PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

The law of professional responsibility is dynamic and ever-changing. As ethical norms and societal views of lawyers evolve, so, too, does the field of professional responsibility. The law of professional responsibility is also expansive. On the most basic level, this field concerns the practice of law itself, attempting to set meaningful standards to govern the conduct and ethics of lawyers and judges in our legal system. At the same time, the law of professional responsibility encompasses the myriad complexities of the attorney-client relationship, including matters such as legal malpractice, ineffective assistance of counsel, attorneys' litigation to recover unpaid legal fees, conflicts of interest, the attorney-client privilege and the work-product doctrine.

It is the authors' intent to familiarize the reader with noteworthy developments in Michigan's law of professional responsibility during the *Survey* period. First, the authors consider relevant revisions and amendments to the foundational rules of professional responsibility: the Michigan Rules of Professional Conduct and the Michigan Court Rules. The authors then consider significant state and federal cases pertaining to the law of professional responsibility decided during the present *Survey* period. Lastly, the authors address major disciplinary actions taken against Michigan lawyers and judges during the *Survey* period.

II. THE FOUNDATIONAL RULES OF PROFESSIONAL RESPONSIBILITY

The foundational rules of professional responsibility in Michigan consist of the Michigan Court Rules ("MCR") and the Michigan Rules of Professional Conduct ("MRPC"). These bodies of foundational rules, both adopted by the Michigan Supreme Court, form the backdrop of Michigan's scheme of attorney self-regulation. These rules also communicate to the public the standards that lawyers and judges are expected to follow in our legal system. The Michigan Supreme Court adopted relatively few amendments to the MRPC and MCR during the present *Survey* period. However, three significant developments merit discussion in this article.

A. The Michigan Rules of Professional Conduct

On December 15, 2009, the Michigan Supreme Court adopted MRPC 1.15A.[1] This new rule requires Michigan attorneys to maintain client trust accounts at approved financial institutions.[2] The rule provides that a financial institution "must be approved by the State Bar of Michigan in order to serve as a depository for lawyer trust accounts,"[3] and that "[n]o trust account shall be maintained in any financial institution that has not been so approved."[4] As noted by the staff comment to MRPC 1.15A, "financial institutions become approved by, among other requirements, agreeing to notify the Grievance Administrator and the lawyer if a lawyer's trust account is overdrawn."[5] The rule provides that any lawyer who receives notification from a

1. Adoption of New Rule 1.15A of the Michigan Rules of Professional Conduct, 485 Mich. ___ (2009) (ADM File No. 2008-13, adopted December 15, 2009, effective September 15, 2010).

2. MICH. RULES OF PROF'L CONDUCT R. 1.15A (2010).

3. MICH. RULES OF PROF'L CONDUCT R. 1.15A(b).

4. MICH. RULES OF PROF'L CONDUCT R. 1.15A(c).

5. MICH. RULES OF PROF'L CONDUCT R. 1.15A cmt.

financial institution that his or her trust account has been overdrawn "shall, upon receipt of a request for investigation from the Grievance Administrator, provide the Grievance Administrator, in writing, within 21 days after issuance of such request, a full and fair explanation of the cause of the overdraft and how it was corrected."[6]

B. The Michigan Court Rules

1. Courtroom Decorum and Cell Phones

On August 25, 2009, the Michigan Supreme Court adopted new MCR 8.115(C).[7] The new rule addresses the use of cellular phones and other portable electronic communication devices in Michigan courtrooms.[8] The rule also prohibits any person from photographing any juror or witness, and states that "no photographs may be taken inside any courtroom without permission of the court."[9] The rule provides in pertinent part that "[t]he chief judge [of any court] may establish a policy regarding the use of cell phones or other portable electronic communication devices within the court," and that "[t]he policy . . . shall be posted in a conspicuous location outside and inside each courtroom."[10] Failure to comply with the rule or the cell phone policy "established by the chief judge [of any court] may result in a fine, including confiscation of the device, incarceration, or both for contempt of court."[11]

Chief Justice Kelly wrote separately, joined by Justices Weaver and Hathaway, to express her opinion that lawyers should not be subject to the requirements of the new rule in the same manner as members of the public at large.[12] More specifically, Chief Justice Kelly wrote:

> I believe that attorneys should be permitted to bring electronic devices into courtrooms. If their use interferes with proceedings, judges certainly retain the discretion to have them removed.

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6. MICH. RULES OF PROF'L CONDUCT R. 1.15A(f).

7. Amendment of Rule 8.115 of the Michigan Court Rules [hereafter Amendment of Rule 8.115], 485 Mich. 1 (2009) (ADM File No. 2008-35, adopted August 25, 2009, effective September, 1, 2009).

8. MICH. CT. R. 8.115(C) (2009).

9. MICH. CT. R. 8.115(C)(2).

10. *Id.*

11. *Id.*

12. Amendment of Rule 8.115, 485 Mich. 2 (2009) (statement of Kelly, C.J.).

> The rule the Court has approved permits a judge to adopt a default policy banning all electronic devices from courtrooms. I am concerned that it will seriously impede some attorneys' ability to practice law. The role of technology in the practice of law has matured. Today, Blackberrys, cell phones, and PDAs have become commonplace for most attorneys who rely heavily on them in their busy and fast-paced legal practices. These devices allow attorneys waiting in court for their cases to be called to stay current with, and quietly respond to, their clients' needs. Solo practitioners who do not have staff are especially dependent on these devices. Hence, for many, what was once merely a convenience has become a necessity.
>
> For those reasons, I would allow attorneys to bring electronic devices into courtrooms with the proviso that their use must not interfere with court proceedings.[13]

As Chief Justice Kelly's statement makes clear, MCR 8.115(C) appears to be applicable to lawyers and non-lawyers alike. Certainly, the text of the new rule does not carve out any exceptions for attorneys in general; nor does its flush language allow a lawyer to use his or her cell phone in a courtroom setting even when necessary as part of the practice of law.[14] Because the rule is so new, the chief judges of many courts have not yet adopted policies concerning the use of cell phones and other portable electronic communication devices. It must therefore remain to be seen whether a widespread implementation of the rule by Michigan's trial courts will "seriously impede some attorneys' ability to practice law"[15] as predicted by Chief Justice Kelly. What is clear, however, is that for the time being, attorneys should check the applicable local policies before taking their cell phones or other portable electronic communication devices into Michigan courtrooms.

2. Judicial Disqualification

On November 25, 2009, in the wake of the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*,[16] the Michigan Supreme Court took another step in the raging judicial-disqualification debate by

13. *Id.*
14. *See* MICH. CT. R. 8.115(C).
15. Amendment of Rule 8.115, 485 Mich. 2 (2009) (statement of Kelly, C.J.).
16. 129 S. Ct. 2252 (2009).

adopting certain amendments to MCR 2.003.[17] First, in light of substantial ongoing disagreement concerning the disqualification of Michigan Supreme Court justices,[18] the Court clarified that the provisions of MCR 2.003 apply to "*all* judges, including justices of the Michigan Supreme Court," and that "[t]he word 'judge' includes a justice of the Michigan Supreme Court" for purposes of MCR 2.003.[19] The court's majority also expanded the list of reasons justifying judicial disqualification, providing that the disqualification of a justice or judge would be warranted if:

> The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton* . . . or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.[20]

The most controversial of the amendments to MCR 2.003 were those concerning the procedure for deciding motions to disqualify justices of the Michigan Supreme Court. The Michigan Supreme Court added a new subsection (D)(3)(b), which provides:

> In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.
>
> If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its

17. Amendment of Rule 2.003 of the Michigan Court Rules [hereinafter Amendment of Rule 2.003], 485 Mich. 1 (2009) (ADM File No. 2009-04, adopted and effective November 25, 2009).

18. *See, e.g.*, Henry v. Dow Chemical Co., 484 Mich. 483, 538-41 (2009) (Weaver, J., concurring separately); *id.* at 541-48 (Young, J., responding to concurrence of Weaver, J.) (detailing the continuing disagreements among the members of the Michigan Supreme Court concerning the potential disqualification of Supreme Court justices).

19. MICH. CT. R. 2.003(A) (2010) (emphasis added).

20. MICH. CT. R. 2.003(C)(1)(b).

> grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.[21]

Historically, when a motion was brought to disqualify a justice of the Michigan Supreme Court, the particular challenged justice decided the motion alone. Apart from any potential appeal to the United States Supreme Court, there was no process for reviewing a challenged justice's decision on a motion for disqualification. The new MCR 2.003(D)(3)(b) continues to provide that, when a particular justice's participation is challenged, the challenged justice must individually make the initial determination whether to disqualify himself.[22] However, for the first time in Michigan history, MCR 2.003(D)(3)(b) now allows the entire bench of the Michigan Supreme Court to review *de novo* a challenged justice's decision whether to disqualify himself.[23] Under the new rule, if a challenged justice individually denies a motion calling for his disqualification, the entire bench of the Michigan Supreme Court may vote to override that decision, thereby forcing the challenged justice to step aside in a particular case.[24] Subsection (D)(4)(b) was added to clarify that "[i]n the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court."[25]

These amendments to MCR 2.003 were particularly divisive, engendering pages of concurring and dissenting statements and leading to what appears to be an ever-increasing acrimony among the justices of the Michigan Supreme Court. At the time of the adoption of these amendments, only a year had passed since the election of Justice Diane Hathaway in November 2008. Notably, the amendments to MCR 2.003 were enacted by a four-to-three vote, supported by Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway, but strongly opposed by Justices Corrigan, Young and Markman.[26] In her dissenting statement, Justice Corrigan, joined by Justice Young, made dire predictions, announcing that "[f]or the first time in our state's history, duly elected justices may be deprived by their co-equal peers of their constitutionally protected interest in hearing cases."[27] Justice Corrigan opined that the seven justices of the Michigan Supreme Court are constitutionally

21. MICH. CT. R. 2.003(D)(3)(b).
22. *Id.*
23. *Id.*
24. *Id.*
25. MICH. CT. R. 2.003(D)(4)(b).
26. Amendment of Rule 2.003, 485 Mich. 12.
27. *Id.* at 12 (dissenting statement of Corrigan, J.).

entitled and obligated to decide the cases coming before them, and that the amendments to MCR 2.003 therefore violate the United States and Michigan Constitutions.[28] She wrote that "[s]tarting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court," and that "[t]he majority's action here will precipitate a constitutional crisis."[29]

Justice Young expressed similar views. Joined by Justice Corrigan, he opined that the amendments to MCR 2.003 were "facially unconstitutional."[30] Justice Young set forth the four ways in which a Michigan Supreme Court justice may be removed from office under the Michigan Constitution:[31] (1) defeat by the voters, (2) impeachment,[32] (3) removal by way of a concurrent resolution of the Michigan House of Representatives and Michigan Senate,[33] and (4) removal by the Supreme Court upon recommendation of the Judicial Tenure Commission.[34] He noted that "our Constitution acknowledges the primacy of judicial office" by "expressly preclud[ing] the recall of judges by Michigan voters while allowing the recall of all other elective officers."[35] In sum, Justice Young believed that the amendments to MCR 2.003 were unconstitutional because they would permit a majority of the supreme court justices to disqualify a particular challenged justice in any given case, thereby "allow[ing] four justices to disenfranchise the millions of Michigan voters who elected [the challenged] justice."[36] He wrote that "[i]n eliminating all due process protections, compromising and chilling protected First Amendment rights, and conducting secret appeals that might lead to the removal of an elected justice from a case against his will, the majority has created a 21st Century Star Chamber with its new disqualification rule," and that "[t]he citizens of Michigan should be concerned when a majority of their Supreme Court is indifferent to the state and federal constitutions they have been entrusted and have sworn to uphold."[37]

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28. *Id.*

29. *Id.* at 12. Justice Corrigan also attempted to tie certain "interconnected advocacy groups" funded by George Soros to the Supreme Court majority's adoption of the new MCR 2.003 amendments. *Id.* at 18. She intimated that such groups wish to end the popular election of state court judges in the United States. *See id.*

30. Amendment of Rule 2.003, 485 Mich. 20 (dissenting statement of Young, J.).

31. *Id.* at 25.

32. *See* MICH. CONST. art. XI § 7 (1963).

33. *See* MICH. CONST. art. VI, § 25 (1963).

34. *See* MICH. CONST. art. VI, § 30(2).

35. Amendment to Rule 2.003, 485 Mich. at 26 (dissenting statement of Young, J.) (citing MICH. CONST. art. II, § 8 (1963)).

36. *Id.* at 27 (dissenting statement of Young, J.).

37. *Id.* at 20-21.

Likewise, albeit in slightly less dire language, Justice Markman opined that the amendments to MCR 2.003 were ill-advised, predicting that the new rules pertaining to the disqualification of supreme court justices:

> (a) will incentivize disqualification motions and thereby produce a considerable increase in the number of such motions and in the amount of time and effort devoted by this Court to addressing such motions; (b) will introduce an unprecedented degree of gamesmanship and politicization into the judicial process by enabling attorneys to influence which duly-elected justices will be allowed to participate in deciding their own cases and controversies; and (c) will seriously undermine the collegiality of this Court.[38]

Justice Markman was concerned that the new "appearance of impropriety" standard for the disqualification of supreme court justices was too vague, and that the amendments to MCR 2.003 provided no meaningful guidance for applying the "appearance of impropriety" standard in any given case.[39] "As time goes by," he wrote, "it will become increasingly clear that the majority has replaced a time-tested disqualification procedure with one that will lead inevitably to politicization, gamesmanship, and acrimony."[40]

On March 16, 2010, the Michigan Supreme Court again amended MCR 2.003 by revising subsection (D)(1) and providing specific time limitations for the filing of motions seeking judicial disqualification.[41] In general, all motions seeking the disqualification of a trial court judge or a court of appeals judge must now be filed within fourteen days of the moving party's discovery of the grounds for disqualification.[42] Motions seeking to disqualify a supreme court justice must be filed with the appellant's application for leave to appeal unless the appellant is not aware of the grounds for disqualification at the time the application is filed.[43] If the appellant is not aware of the grounds for disqualification when the application for leave to appeal is filed, the appellant's motion seeking the disqualification of a supreme court justice "must be filed

38. *Id.* at 34 (dissenting statement of Markman, J.).

39. *Id.* at 36.

40. *Id.* at 38.

41. Amendment of Rule 2.003 of the Michigan Court Rules [hereinafter Amendment of Rule 2.003 (II)], 485 Mich. 1 (2010) (ADM File No. 2009-04, adopted and effective March 16, 2010).

42. MICH. CT. R. 2.003(D)(1)(a), (b).

43. MICH. CT. R. 2.003(D)(1)(c).

within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification."[44] "All requests for review by the entire Court . . . must be made within 14 days of the entry of the decision by the individual justice."[45]

It is not entirely clear whether the Michigan Supreme Court majority exceeded its constitutional powers by enacting the new amendments to MCR 2.003. As Justice Young has pointed out, the Michigan Constitution contains no language authorizing a majority of the justices to disqualify or remove one of their colleagues from a given case.[46] At the same time, it is arguable that the recent amendments to MCR 2.003 fall squarely within the scope of the Michigan Supreme Court's constitutional authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state."[47]

Nor is it clear whether the majority's "appearance of impropriety" standard will better protect the fairness and integrity of our judicial process than would a standard that focuses on the *actual bias* of a particular judge. However, in light of the U.S. Supreme Court's decision in *Caperton*, it cannot be gainsaid that the influence of money has become an increasingly relevant consideration in determining whether an individual justice or judge should hear and decide a particular case. Only time will reveal whether the recent amendments to MCR 2.003 will lead to a fairer and more impartial administration of justice in Michigan, or result in the devastating consequences to the Michigan judiciary foreseen by Justices Corrigan, Young and Markman.

III. SIGNIFICANT STATE AND FEDERAL CASES INVOLVING THE LAW OF PROFESSIONAL RESPONSIBILITY

Several noteworthy state and federal cases pertaining to the law of professional responsibility were decided during the instant *Survey* period. The authors first consider significant decisions of the Michigan state courts. The authors then move on to consider several decisions of the federal courts.

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44. *Id.*
45. *Id.*
46. Amendment to Rule 2.003, 485 Mich. 20-22.
47. MICH. CONST. art. VI, § 5.

A. State Cases

1. Legal Malpractice

a. Failure to Preserve Evidence

In *Webber v. Hilborn*,[48] the Michigan Court of Appeals considered whether a plaintiff could successfully assert a legal malpractice claim against her former attorneys for failing to preserve a critical piece of evidence that was needed in her pending products liability action.[49] The decedent was killed in an automobile accident when the truck in which she was riding "began swerving erratically from lane to lane and . . . the accelerator pedal broke off and fell under the brake pedal."[50] At that point, "[t]he truck . . . dangerously sped up out of control and crashed into an oncoming vehicle."[51] The plaintiff hired the defendant attorneys "to represent her in a wrongful death product liability lawsuit against the manufacturer of the vehicle involved in the accident."[52]

Following the accident, the truck was taken to a storage yard for safekeeping.[53] However, the defendant attorneys subsequently "allowed the vehicle to be crushed by the storage yard," thereby causing critical evidence to be destroyed.[54] As explained by the Michigan Court of Appeals in a previous appeal involving these same parties, the defendant attorneys "then recommended to plaintiff that they dismiss the case, and requested that plaintiff sign a stipulation to allow defendants to withdraw as counsel."[55] When the plaintiff "refused to sign the stipulation," the defendant attorneys "filed a motion to withdraw as counsel, which was granted."[56] The plaintiff subsequently sued the defendants for legal malpractice, alleging that she had "lost her ability to pursue the product liability action because defendants failed to preserve the vehicle involved in the accident."[57] The circuit court granted summary disposition in favor

48. No. 286861, 2009 WL 5150082 (Mich. Ct. App. Dec. 29, 2009).

49. *Id.* at *2.

50. *Id.* at *1.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Webber*, 2009 WL 5150082, at *1.

55. Webber v. Hilborn, No. 267582, 2006 WL 2382531, at *1 (Mich. Ct. App. Aug. 17, 2006), *rev'd in part, appeal denied in part*, Webber v. Hilborn, 477 Mich. 1109 (2007).

56. *Webber*, 2006 WL 2382531, at *1. Prior to their withdrawal as counsel, the defendant attorneys apparently "acknowledged in . . . correspondence with plaintiff that the loss of the truck as evidence created a problem[.]" *Id.* at n.1.

57. *Webber*, 2009 WL 5150082, at *1.

of the defendant attorneys, ruling that the plaintiff's amended complaint failed to state a legally cognizable claim of legal malpractice.[58]

On appeal, the Michigan Court of Appeals first noted that the plaintiff was not entitled "to pursue an independent claim for spoliation of evidence."[59] The court observed that "'Michigan does not yet recognize as a valid cause of action spoliation of evidence that interferes with a prospective civil action against a third party[.]'"[60] Nonetheless, the court of appeals held that the plaintiff was entitled to "pursue a spoliation of evidence theory in the context of a legally recognized legal malpractice action."[61] The court of appeals concluded:

> Indeed, plaintiff's spoliation claim is identified as a legal malpractice claim in her . . . amended complaint. Viewed in this manner, plaintiff is not attempting to pursue a new or novel cause of action, but rather one based on legal malpractice.
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> * * *
>
> [A]lthough plaintiff may not pursue an independent claim for spoliation of evidence, she may pursue a spoliation theory to the extent that she can show that defendants' failure to preserve the . . . truck amounted to negligence in their legal representation of plaintiff, and that such negligence was the proximate cause of an injury, as well as both the fact and extent of the injury alleged.[62]

b. The Attorney Judgment Rule and the Preclusive Effect of Previous Ineffective Assistance of Counsel Litigation

In *Trakhtenberg v. McKelvy*,[63] the Michigan Court of Appeals considered whether the defendant attorney committed legal malpractice during her representation of the plaintiff in an underlying criminal matter.[64] The defendant attorney had been appointed to defend the plaintiff against charges that he sexually assaulted his 9-year-old daughter.[65] The plaintiff was ultimately convicted of three counts of

58. *Id.*
59. *Id.* at *2.
60. *Id.* (quoting Teel v. Meredith, 284 Mich. App. 660 (2009)).
61. *Webber*, 2009 WL 5150082, at *3.
62. *Id.* at *3.
63. No. 285247, 2009 WL 3465436 (Mich. Ct. App. Oct. 27, 2009).
64. *Id.* at *4.
65. *Id.* at *1.

second-degree criminal sexual conduct[66] and "sentenced to concurrent prison terms of 4 to 15 years."[67] On direct appeal in the criminal case, the plaintiff asserted that he had received ineffective assistance of counsel at trial.[68] The Michigan Court of Appeals "found that plaintiff failed to establish that defendant's representation was ineffective and affirmed defendant's convictions."[69]

In December 2007, the plaintiff sued the defendant for legal malpractice, claiming that the "defendant breached her duty to exercise the knowledge, skill, ability and care ordinarily possessed by attorneys" in her handling of the underlying criminal matter.[70] The plaintiff alleged that the defendant had performed deficiently in numerous different ways, including: by (1) failing to call critical witnesses, including the plaintiff's son, to testify in the plaintiff's favor;[71] (2) failing to "meaningfully cross-examine the prosecutor's witnesses;"[72] (3) improperly advising him to waive his right to a jury trial;[73] (4) failing to introduce exhibits into evidence;[74] (5) "fail[ing] to cross examine the . . . victim's mother, even though there was ample evidence that she harbored extreme contempt, bias, and motive to lie against the plaintiff;"[75] (6) "fail[ing] to ask intelligent or meaningful questions of the various witnesses on cross examination and fail[ing] to adequately conduct direct examination of her own client;"[76] and (7) failing to move for a directed verdict of acquittal at trial.[77] The defendant moved for summary disposition of the legal malpractice action, arguing "that a criminal defendant who unsuccessfully asserts an ineffective assistance of counsel claim in a criminal case is barred from relitigating the same claim in a legal malpractice claim and that plaintiff's legal malpractice claim was therefore barred by the doctrine of collateral estoppel."[78] The defendant "also argued that summary disposition was proper based on the attorney judgment rule because plaintiff's allegations regarding defendant's

66. MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West 2008).
67. *Trakhtenberg*, 2009 WL 3465436, at *1.
68. *Id.*
69. *Id.* (citing People v. Trakhtenberg, No. 268416, 2007 WL 914625 (Mich. Ct. App. Mar. 27, 2007)).
70. *Trakhtenberg*, 2009 WL 3465436, at *1.
71. *Id.* at *2.
72. *Id.* at *1.
73. *Id.* at *2.
74. *Id.*
75. *Id.*
76. *Trakhtenberg*, 2009 WL 3465436, at *2.
77. *Id.* at *1-2, *6.
78. *Id.* at *2.

ineffectiveness concerned matters of trial strategy . . . ."[79] The circuit court granted the defendant's motion for summary disposition, ruling "that the doctrine of collateral estoppel barred plaintiff's legal malpractice action because [the court of appeals] had determined that plaintiff did not receive ineffective assistance of counsel during his criminal trial."[80] The circuit court "also ruled that the attorney judgment rule applied" to insulate the defendant from malpractice liability with respect to her tactical and strategic decisions at trial.[81]

The Michigan Court of Appeals affirmed the circuit court's grant of summary disposition in favor of the defendant on the basis of the attorney judgment rule.[82] The court of appeals noted that "[a]n attorney has an implied duty to exercise reasonable skill, care, discretion and judgment in representing a client,"[83] and that "an attorney has a duty to act as an attorney of ordinary learning, judgment or skill would act under the same or similar circumstances."[84] But the court of appeals also noted that, under the so-called attorney judgment rule, a lawyer is not

> a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. Further, 'where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment.'[85]

The court of appeals concluded that each of the purported acts of legal malpractice alleged in the plaintiff's complaint involved tactical decision-making by the defendant and that each challenged action involved the use of the defendant's professional judgment.[86] The court of appeals observed that "the primary issue at trial was whether plaintiff engaged in contact with the victim 'for the purpose of sexual arousal or

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79. *Id.*

80. *Id.* at *3.

81. *Id.*

82. *Trakhtenberg*, 2009 WL 3465436, at *4.

83. *Id.* (citing Mitchell v. Dougherty, 249 Mich. App. 668 (2002)).

84. *Trakhtenberg*, 2009 WL 3465436, at *4 (citing Simko v. Blake, 448 Mich. 648, 656 (1995)).

85. *Trakhtenberg*, 2009 WL 3465436, at *4 (quoting *Mitchell*, 249 Mich. App. at 677).

86. *Trakhtenberg*, 2009 WL 3465436, at *4.

gratification[.]'"[87] The court determined that the defendant had not committed malpractice by failing to call additional witnesses or further cross-examine the prosecution's witnesses because none of these witnesses would have been able to explain "whether plaintiff touched the victim 'for the purpose of sexual arousal or gratification[.]'"[88] The court concluded that the defendant's actions in this regard fell within the protection of the attorney judgment rule, reiterating that "'it is a tactical decision whether to call particular witnesses,'"[89] and finding that "there is no evidence that defendant did not act with full knowledge of the law or in good faith[.]"[90]

Likewise, the court of appeals determined that the defendant's decisions not to call the plaintiff's son to testify, not to impeach the victim's mother, and not to introduce exhibits into evidence were not actionable because they were all strategic decisions falling within the safe harbor of the attorney judgment rule.[91] With regard to the plaintiff's contention that the defendant improperly convinced him to waive his right to a jury trial, the court of appeals ruled:

> Defendant's advice to plaintiff regarding his right to a jury trial is also a matter of trial strategy. Plaintiff alleges that defendant persuaded him to waive his right to a jury trial. The transcript of plaintiff's criminal trial indicates that defendant and plaintiff discussed at length plaintiff's waiver of his right to a jury trial. Thus, even if defendant made an error in judgment in advising plaintiff to waive his right to a jury trial and another attorney would not have so advised plaintiff, this is a tactical decision and is not a ground for a legal malpractice action.[92]

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87. *Id.* at *5 (quoting MICH. COMP. LAWS ANN. § 750.520a(q)) (defining "[s]exual contact" as "intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner").

88. *Trakhtenberg*, 2009 WL 3465436, at *5.

89. *Id.* (quoting *Simko*, 448 Mich. at 660).

90. *Id.*

91. *Id.* at *5-6; *see also* People v. Rockey, 237 Mich. App. 74, 76 (1999) (holding that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy" and that the court of appeals "will not substitute its judgment for that of counsel regarding matters of trial strategy" (citation omitted)).

92. *Trakhtenberg*, 2009 WL 3465436, at *5.

Lastly, with respect to the plaintiff's argument that the defendant committed legal malpractice by failing to move for a directed verdict at trial, the court of appeals held:

> It was a reasonable trial strategy for defense counsel not to move for a directed verdict of acquittal at the close of the prosecution's proofs for two reasons. First, the prosecution presented sufficient evidence to establish the elements of [second-degree criminal sexual conduct], at least with respect to three of the charges. Second, the case hinged on the trial court's assessment of the witnesses' credibility, and plaintiff had not yet testified on his own behalf. It was a reasonable trial strategy for defense counsel to wait and let the trial court, as the trier of fact, determine the credibility of witnesses and make a decision regarding plaintiff's guilt after the presentation of all the evidence.[93]

In sum, the court of appeals determined that the circuit court had properly granted the defendant attorney's motion for summary disposition on the basis of the attorney judgment rule.[94] Accordingly, the court of appeals found it unnecessary to address whether the plaintiff's legal malpractice action—in which he sought to relitigate many of the same issues that he had raised on direct appeal in the underlying criminal case—was also barred by the doctrine of collateral estoppel.[95]

But the Michigan Court of Appeals did consider the applicability of collateral estoppel on very similar facts approximately three months later in *Harris v. Farmer*.[96] In *Harris*, just as in *Trakhtenberg*, the defendant served as the plaintiff's court-appointed attorney in an underlying criminal case.[97] Like the plaintiff in *Trakhtenberg*, the *Harris* plaintiff was convicted in the underlying criminal case and then argued on appeal that he had received ineffective assistance of counsel at trial.[98] The Michigan Court of Appeals rejected the *Harris* plaintiff's ineffective assistance of counsel claims.[99] The plaintiff subsequently filed a legal malpractice action, claiming that the defendant attorney had committed professional malpractice during the criminal trial by "fail[ing] to properly cross-examine a witness, fail[ing] to object to evidence

93. *Id.* at *6.
94. *Id.* at *7.
95. *Id.*
96. No. 288968, 2010 WL 395764 (Mich. Ct. App. Feb. 4, 2010).
97. *Id.* at *1.
98. *Id.*
99. *Id.*

proffered by the prosecution, and fail[ing] to present evidence regarding plaintiff's employment."[100] The defendant moved for summary disposition and the circuit court granted his motion.[101]

The Michigan Court of Appeals affirmed the circuit court's grant of summary disposition for the defendant, concluding generally that the defendant's actions at trial were not actionable because they were strategic and therefore fell within the protection of the attorney judgment rule.[102] However, the court of appeals went on to observe that "summary disposition would have been appropriately granted on the basis of collateral estoppel" as well.[103] The court noted that "[p]laintiff in the instant civil action seeks to relitigate the same assertions of attorney error that were raised and rejected in his criminal appeal[,]"[104] and held that "[a] party who has unsuccessfully litigated a claim of ineffective assistance in criminal proceedings is precluded from challenging the same representation in a civil malpractice action."[105] Accordingly, it now appears settled that a criminal defendant who unsuccessfully raises ineffective assistance of counsel claims on direct appeal in his or her criminal case is precluded from later raising the same alleged legal deficiencies by way of a legal malpractice action.

c. Expert Testimony

In *Reesor v. Norman Yatooma & Associates, P.C.*,[106] the Michigan Court of Appeals addressed the necessity of expert testimony in the context of a legal malpractice action.[107] In *Reesor*, a pipeline company commenced proceedings to condemn a portion of the plaintiff's property.[108] While the condemnation proceedings eventually were settled, the pipeline company took subsequent legal action against the plaintiff, and the plaintiff retained the defendant attorneys to represent her.[109] "Although [the plaintiff] wanted to challenge jurisdiction and move the case to federal court, [the defendant attorneys] advised that the best option would be to continue the state action because not all of the

100. *Id.*
101. *Id.*
102. *Harris*, 2010 WL 395764, at *1-2.
103. *Id.* at *2, n.2.
104. *Id.*
105. *Id.* (citing Keywell & Rosenfeld v. Bithell, 254 Mich. App. 300, 347 (2002), and Barrow v. Pritchard, 235 Mich. App. 478, 484-85 (1999)).
106. Nos. 289400; 289427, 2010 WL 1924838 (Mich Ct. App. May 13, 2010).
107. *Id.* at *4.
108. *Id.* at *1.
109. *Id.*

claims could proceed in federal court."[110] Apparently dissatisfied with the defendant's advice on this matter, the plaintiff stopped paying the defendants and the defendants formally withdrew from the case.[111] Nevertheless, the plaintiff continued the litigation with the pipeline company, proceeding *in propria persona*.[112] The pipeline company eventually prevailed on its claims and judgment was entered against the plaintiff.[113]

The plaintiff thereafter sued the defendants for legal malpractice,[114] alleging that the defendants had been professionally negligent in their representation because they had "failed to challenge the jurisdiction of the circuit court, failed to conduct proper discovery, failed to remove the action from case evaluation, failed to file an appropriate case evaluation summary, and failed to communicate regarding the status of the case and decision-making."[115] The circuit court granted summary disposition in favor of the defendants on the ground that the plaintiff had not provided any expert testimony to support her claims.[116]

On appeal, the Michigan Court of Appeals noted that "[t]he general rule in legal malpractice actions is that expert testimony is required to establish the applicable standard of conduct, the breach of that standard, and causation,"[117] and that plaintiffs in legal malpractice actions are typically permitted to proceed without expert testimony only "'[w]here the absence of professional care is so manifest that [it is] within the common knowledge and experience of an ordinary layman[.]'"[118] The *Reesor* Court concluded that the alleged instances of malpractice set forth in the plaintiff's complaint did "not fall within the common knowledge and experience of an ordinary layman[,]" that "[t]he legal deficiencies alleged by [the plaintiff] involved questions of law," and therefore, that "an expert would have been required to provide a background regarding the standard of conduct."[119] The court of appeals determined that, because the plaintiff had not retained an expert witness to support her claims, the circuit court had properly granted summary

110. *Id.*
111. *Id.*
112. *Reesor*, 2010 WL 1924838, at *1.
113. *Id.*
114. *Id.* at *1.
115. *Id.* at *4.
116. *Id.* at *1.
117. *Id.* at *4 (citing Law Offices of Lawrence J. Stockler, P.C. v. Rose, 174 Mich. App. 14, 48 (1989)).
118. *Reesor*, 2010 WL 1924838, at *4 (quoting *Law Offices of Lawrence J. Stockler*, 174 Mich. App. at 48)).
119. *Reesor*, 2010 WL 1924838, at *4.

disposition of the legal malpractice action in favor of the defendant attorneys.[120]

2. Recovery of Unpaid Legal Fees

In *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C. v. Bakshi*,[121] the Michigan Supreme Court considered the timing of the accrual of a law firm's breach of contract action to recover unpaid legal fees from a former client.[122] There, the defendant retained the plaintiff law firm to represent him and his two companies in an underlying legal action sometime in 1989.[123] The defendant stopped paying the plaintiff law firm's bills in 1992, while the underlying litigation was on appeal to the Michigan Court of Appeals.[124] The plaintiff law firm continued to represent the defendant with respect to certain matters, but ultimately filed a motion with the Michigan Court of Appeals in July 1993 to withdraw as the plaintiff's counsel.[125] The court of appeals granted the plaintiff's motion to withdraw in late September 1993.[126] Following the plaintiff's withdrawal, the defendant requested his file; the plaintiff law firm reviewed the defendant's file, photocopied relevant portions of it, and provided those copies to the defendant.[127] The plaintiff charged the defendant an additional $442 for its file-review services and photocopying expenses, bringing the defendant's total amount due to $55,723.[128] The defendant continued to refuse to pay any part of this amount.[129]

The plaintiff law firm sued the defendant for the unpaid legal fees on October 8, 1999.[130] The circuit court dismissed the plaintiff's action on statute of limitations grounds, ruling that the plaintiff's action had accrued in 1992 when the defendant had stopped paying the plaintiff's bills.[131] But the court of appeals reversed, holding in a two-to-one decision that the plaintiff's claim had not accrued until late September 1993, when the court of appeals granted the plaintiff's motion to

120. *Id.*
121. 483 Mich. 345 (2009).
122. *Id.* at 348.
123. *Id.* at 349.
124. *Id.*
125. *Id.* at 350.
126. *Id.*
127. *Seyburn*, 483 Mich. at 350-51.
128. *Id.*
129. *Id.*
130. *Id.* at 351.
131. *Id.* at 352.

withdraw.[132] A partially dissenting court of appeals judge agreed that the circuit court had prematurely dismissed the plaintiff's claim, but would have remanded to the circuit court for a determination whether the plaintiff's file-review activities and photocopying of the defendant's file were sufficient activities to extend the accrual of the plaintiff's claim.[133] "In lieu of granting leave to appeal, the [Michigan] Supreme Court vacated [the court of appeals] judgment and remanded" the matter to the circuit court for the reasons stated by the partially dissenting court of appeals judge.[134]

On remand, the circuit court determined that the plaintiff law firm had

> performed the additional [file-review and photocopying] work in October 1993, at [the defendant's] request and for his benefit, and that [the plaintiff] could ethically charge [the defendant] for those services. From this, the court reasoned that the limitations period did not begin to run until October 12, 1993, and thus held that [the plaintiff's] action, filed on October 9 [sic: 8], 1999, was timely filed within the six-year period of limitations.[135]

The circuit court ruled that the defendant "'was liable [to the plaintiff] for legal fees of $62,763, and that [the plaintiff] was entitled to interest of $510,405.07, as of August 16, 2006.'"[136] The circuit court entered judgment in favor of the plaintiff law firm in the amount of $573,168.07.[137]

The defendant appealed the circuit court's decision to the Michigan Court of Appeals.[138] The court of appeals reversed and remanded to the circuit court for entry of judgment in favor of the defendant.[139] Specifically, the court of appeals "held that plaintiff's claim accrued on September 30, 1993, which is the date that the court of appeals terminated the underlying attorney-client relationship[,]" and that "plaintiff's October 1993 acts of copying and returning defendant's file did not extend the accrual date [of the plaintiff's claim.]"[140] The court of

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132. *Id.*
133. *Seyburn*, 483 Mich. at 352.
134. *Id.* at 352-53.
135. *Id.* at 353 (quoting Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C. v. Bakshi, 278 Mich. App. 486, 493 (2008)).
136. *Id.* (quoting *Seyburn*, 278 Mich. App. at 493).
137. *Id.*
138. *Id.*
139. *Seyburn*, 483 Mich. at 353.
140. *Id.*

appeals "articulated that in the context of litigation, where the attorney is no longer providing services to the client but a dispute exists over legal fees, a claim for unpaid legal fees accrues on the date that the attorney-client relationship is terminated."[141]

The Michigan Supreme Court affirmed in part and reversed in part the judgment of the court of appeals.[142] The supreme court pointed out that the plaintiff law firm's claim to recover the unpaid fees was based in contract, and that the applicable period of limitations was therefore six years.[143] The court further noted that "in a breach of contract action, the statutory period generally begins to run on the date that the breach occurs,"[144] and that "under general contract principles, an attorney's cause of action to recover attorney fees would accrue on the date the client breached the parties' agreement by failing to pay in accordance with its terms."[145] However, the court concluded that "in the context of litigation, the special features of the attorney-client relationship necessitate an exception to the general rule . . . ."[146] This is because "[a]lthough the client may have ceased making payments to the attorney, the attorney's representation of the client continues until the court has permitted the termination."[147] In other words, the court held that in the course of an ongoing attorney-client relationship, a law firm's breach of contract claim to recover unpaid legal fees generally does not accrue until the attorney-client relationship is finally terminated.

Turning to the specific facts of the case under consideration, the supreme court observed that the defendant "had stopped making payments to plaintiff in late 1992, but defendant never terminated the attorney-client relationship."[148] Instead, "[i]t was plaintiff that filed a motion in the court of appeals seeking to withdraw from the case," which was "finally granted on September 30, 1993, and the attorney-client relationship was then terminated."[149] The supreme court determined that the plaintiff's claim to recover the earlier unpaid legal fees had accrued on the date of termination of the attorney-client relationship—September 30, 1993.[150] The supreme court held that the plaintiff law firm's breach

141. *Id.* at 353-54.
142. *Id.* at 349.
143. *Id.* at 355, 358 (citing MICH. COMP. LAWS ANN. § 600.5807(8)).
144. *Id.* at 358.
145. *Seyburn*, 483 Mich. at 359.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 359-60.
150. *Id.* at 360. In *Seyburn*, the plaintiff law firm contended "that the accrual date can be extended beyond the termination of the attorney-client relationship if the attorney

of contract claim on the earlier unpaid legal fees was barred by the applicable statute of limitations because it had been filed in the circuit court "on October 8, 1999, which is more than six years from the date that the claim accrued on the earlier fees."[151]

However, this was not the end of the case. The supreme court observed that although the plaintiff's follow-up services to the defendant, including the file-review and photocopying services, did not extend the accrual date of the underlying breach of contract claim, "the file-review services effectively constituted a separate contract" and "the minimal costs associated with the file-review services" were therefore collectible.[152] Even though "there were no specific contractual terms governing the costs and fees to review the file," the court noted that "[u]nder MRPC 1.5(a), an attorney must charge a reasonable fee for services rendered to a client."[153] Because the plaintiff law firm charged the defendant "$442 to review and copy the . . . file," and because "[t]he reasonableness of the costs assessed for the file-review services were not contested," the Supreme Court ruled "the fees charged for the file-review services are a reasonable charge, and defendant must pay $442 to plaintiff."[154] The Supreme Court therefore remanded the matter to the circuit court for entry of judgment in favor of the plaintiff in the amount of $442.[155]

3. Attorney Disqualification and Conflicts of Interest

In *Lamont Community Church v. Lamont Christian Reformed Church*,[156] the Michigan Court of Appeals considered the plaintiff's claim that the circuit court erred by failing to disqualify the law firm of Clark Hill from representing the defendant.[157] In 1998, the members of defendant Lamont Christian Reformed Church formed an independent corporation to hold the church's property separate from the church itself, so that if the defendant ever decided to leave the Christian Reformed Church in North America, "it could do so and retain the church

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performs follow-up or ministerial services for the client, such as copying and returning the client's file." *Id.* The supreme court rejected this argument, holding that "the tasks of reviewing, copying, and returning a client's file do not extend the date of accrual beyond the termination date of the attorney-client relationship." *Id.*

151. *Seyburn*, 483 Mich. at 362.

152. *Id.* at 361-62.

153. *Id.* at 361.

154. *Id.* at 361-62.

155. *Id.* at 364.

156. 285 Mich. App. 602 (2009).

157. *Id.* at 613.

property."[158] Following a dispute in 2004 and early 2005 concerning the suspension and ultimate termination of a pastor, several members of defendant Lamont Christian Reformed Church broke away and formed their own congregation, plaintiff Lamont Community Church.[159] Thereafter, the members of the new plaintiff Lamont Community Church asserted ownership of the church property that was held by the independent corporation.[160] Plaintiff Lamont Community Church "filed a complaint requesting . . . a declaratory judgment that [it] was the owner of the church property," claiming that its membership consisted of a majority of the former members of defendant Lamont Christian Reformed Church.[161] The remaining members of Lamont Christian Reformed Church disputed the plaintiff's claim that it was made up of a majority of the defendant's former members, and filed a counterclaim asserting that defendant Lamont Christian Reformed Church remained the rightful owner of the church property.[162]

Plaintiff Lamont Community Church then moved to disqualify attorneys Roger Swets and Stephen Turner, as well as their law firm, Clark Hill, as the defendant's counsel.[163] The plaintiff asserted that it was either a present or former client of Swets and Clark Hill, and that the attorneys were therefore ethically precluded from representing defendant Lamont Christian Reformed Church in the pending matter under MRPC 1.7 or MRPC 1.9.[164]

However, the Michigan Court of Appeals disagreed with the plaintiff's position that it was a present or former client of Swets, Turner, or Clark Hill.[165] The court observed that, "[u]nder MRPC 1.13, lawyers 'employed or retained to represent an organization represent[] the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.'"[166] It was undisputed that defendant Lamont Christian Reformed Church and the independent corporation formed to hold the church property were clients of Swets and Clark Hill.[167] But the plaintiff's claim to be a client of these same attorneys was much less convincing. The court of appeals noted that the plaintiff essentially was attempting "to bootstrap itself into the position of client

158. *Id.* at 605.
159. *Id.* at 606-07.
160. *Id.* at 607.
161. *Id.* at 608.
162. *Lamont Cmty. Church*, 285 Mich. App. at 608.
163. *Id.* at 608-09.
164. *Id.* at 613-14.
165. *Id.* at 614.
166. *Id.* at 614 (quoting MICH. RULES OF PROF'L CONDUCT R. 1.13).
167. *Id.* at 605.

by arguing that because the stated purpose of the [independent corporation] is to carry out the purposes of [the defendant] or 'any church formed by a majority of the members' of [the defendant], [plaintiff Lamont Community Church] as that entity is also a client of Swets [and Clark Hill]."[168] The court of appeals continued:

> What this argument fails to register is that [the plaintiff] is a separate organization, distinct from either [defendant Lamont Christian Reformed Church] or the [independent corporation], and neither Swets nor Clark Hill has ever represented the entity [Lamont Community Church]. It makes no difference whether [the plaintiff] is a church formed by a majority of the members of [defendant Lamont Christian Reformed Church] . . . . Corporations exist for the benefit of many groups of people, including other companies or their own shareholders. However, that does not make those groups or shareholders clients of the attorneys who represent the corporations themselves. This is the crux of MRPC 1.13. Because [the plaintiff] is neither a current nor former client of either Swets or Clark Hill, MRPC 1.7 and 1.9 are not implicated[.][169]

The court of appeals accordingly affirmed the circuit court's order declining to disqualify Swets, Turner, and Clark Hill from representing the defendant in the matter.[170]

In *People v. Waterstone*,[171] the Michigan Court of Appeals again considered the issues of attorney disqualification and conflicts of interest, this time in the specific context of the attorney general's prosecution of a circuit court judge.[172] Alexander Aceval and Ricardo Pena were charged with narcotics offenses in 2005, and their case proceeded to jury trial before the defendant, Wayne County Circuit Judge Mary Waterstone.[173] Two Inkster police officers and a confidential informant allegedly lied during the trial.[174] The assistant prosecuting attorney assigned to the case was aware of this perjury, and discussed the matter with the defendant in two ex parte meetings.[175] The defendant ordered the transcripts of the

168. *Lamont Cmty. Church*, 285 Mich. App. at 614.
169. *Id.*
170. *Id.* at 615.
171. 287 Mich. App. 368 (2010), *rev'd*, 486 Mich. 942 (2010).
172. *Id.* at 371-72.
173. *Id.* at 371.
174. *Id.* at 371-72.
175. *Id.* at 372.

two ex parte discussions sealed.[176] While Pena was ultimately convicted, the jury could not reach a verdict with respect to Aceval; however, Aceval later pled guilty.[177]

In 2006, Aceval filed a lawsuit against the defendant and thirteen others in federal court under 42 U.S.C. section 1983.[178] Aceval alleged, *inter alia*, that the defendant had conspired with the others to deny him of his civil rights by withholding from him and the jury the fact that the officers and informant had committed perjury at trial.[179] The Michigan Department of Attorney General, which is statutorily required to defend judges against civil lawsuits, assigned Assistant Attorney General Steven Cabadas of the Public Employment, Elections, and Tort ("PEET") Division to represent the defendant in the section 1983 action.[180] Cabadas spoke to the defendant concerning the lawsuit and filed an answer on her behalf.[181] Ultimately, however, the federal court dismissed the Section 1983 action in March 2008.[182]

Due to a conflict of interest, the office of the Wayne County prosecuting attorney determined that it could not bring criminal charges against the defendant.[183] Prosecuting attorneys from other Michigan counties therefore were asked to pursue the matter, but all declined to do so.[184] Eventually, the Michigan Attorney General's Office agreed to act as special prosecutor and assigned the criminal matter to its Criminal Division.[185]

An investigator from the Attorney General's Criminal Division met with the defendant and interviewed her during late 2008.[186] In early 2009, the attorney general's office filed a criminal complaint against the defendant, charging her with "four felony counts of misconduct in office"; "two counts related to the two ex parte communications, one count involving the allowance of perjured testimony[,] and the final count concerning the concealment of perjured testimony."[187] After unsuccessfully moving to dismiss the charges on the grounds of judicial

176. *Id.*
177. *Waterstone*, 287 Mich. App. at 372.
178. *Id.*
179. *Id.*
180. *Id.* at 372-73, 381.
181. *Id.* at 373.
182. *Id.*
183. *Waterstone*, 287 Mich. App. at 373.
184. *Id.*
185. *Id.*
186. *Id.* at 373-75.
187. *Id.* at 375.

immunity and insufficient allegations of criminal intent, the defendant moved to disqualify the attorney general's office from the criminal case

> because of [its] representation of her in the federal civil lawsuit. Defendant contended that the Attorney General had a conflict of interest and could not bring the charges against her. In an attached affidavit, defendant indicated that she had a series of confidential communications with Cabadas about the events that had occurred at the Aceval/Pena trial.[188]

The attorney general's office responded to the defendant's motion for disqualification, maintaining that Cabadas had never spoken to or communicated with any personnel from the Criminal Division and that Cabadas had not participated in the investigation of the criminal case.[189] The attorney general's office also "detailed certain screening procedures and provided an affidavit from Cabadas regarding his limited contacts with defendant."[190]

After examining the evidence, including affidavits from many of the critical actors, the district court observed that "it was satisfied that no sharing of information occurred" and ruled that the MRPC had not been violated.[191] The district court also noted that the Section 1983 action had concluded before the Criminal Division had ever begun its investigation of the defendant.[192] The district court thus denied the defendant's motion for disqualification of the attorney general's office.[193]

The circuit court affirmed the district court's decision, ruling "that the attorney general's office operated as a firm, but it had sufficiently screened Cabadas pursuant to MRPC 1.10 and also the divisions acted independently."[194] "The [circuit] court also decided that defendant had not been prejudiced as a result of Cabadas' prior representation of her in the federal civil case."[195]

The Michigan Court of Appeals began by examining MRPC 1.9, which "governs conflicts of interest regarding former clients and provides that an attorney may not represent a new client whose interests are adverse to a former client, unless the former client consents[.]"[196]

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188. *Id.* at 375-76.
189. *Waterstone*, 287 Mich. App. at 376.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 377.
195. *Waterstone*, 287 Mich. App. at 377.
196. *Id.* at 383.

The court of appeals noted that "MRPC 1.9 prohibits a client's representation where that representation is directly or materially adverse to the interest of . . . [a] former client," and clarified that "[t]he matters must be the same or substantially related."[197] The court of appeals determined that the section 1983 action and the pending criminal matter were "the same or substantially related" because "both cases arose from the same alleged perjury at the Aceval/Pena trial."[198] The court went on to state the general rule that "a lawyer who prosecuted a defendant cannot properly represent that defendant in a later civil action against the government regarding the same transaction,"[199] and determined that "the Attorney General's instant criminal prosecution is materially adverse to the defense offered by the Attorney General on defendant's behalf in the federal civil case."[200]

In light of these principles, the court of appeals stated that it was "clear that Cabadas could not 'change sides' and participate in the criminal investigation of defendant given his confidential knowledge gained from the federal civil case."[201] However, this was not the end of the inquiry. After all, Cabadas had not participated in the criminal case at all, which had been assigned to two completely different staff attorneys in the Attorney General's Criminal Division.[202] Rather, the relevant question was "whether the *entire* Attorney General's Office must be disqualified in light of Cabadas' former representation."[203]

After a great deal of analysis, the court of appeals answered this question in the affirmative. The court first held that because the attorney general's office routinely represents judges in civil cases, as it is statutorily required to do, the Attorney General's office must conduct "conflict check[s]" to ensure against any possible conflicts of interest before criminally prosecuting a judge that it may have represented in the past.[204] After observing that "attorneys have a responsibility to recognize and avoid conflicts of interest" and that "[t]he Attorney General shares that responsibility,"[205] the court of appeals ruled:

> The Attorney General has a particular obligation given that the PEET Division habitually defends judges. As a result, the

197. *Id.* at 384 (citation omitted).
198. *Id.* at 384-85.
199. *Id.* at 385-86 (citing MICH. RULES OF PROF'L CONDUCT R. 1.9 cmt.).
200. *Id.* at 385.
201. *Waterstone*, 287 Mich. App. at 386.
202. *Id.* at 373.
203. *Id.* at 386 (emphasis added).
204. *Id.* at 389-91.
205. *Id.* at 391.

> Attorney General has an obligation to make early inquiry into situations where, as here, the Criminal Division has agreed to prosecute a case involving a judge. We hold that the Attorney General has an affirmative duty to perform a conflict check before undertaking the prosecution of a judge or other person whom the office is statutorily required to defend.[206]

The court of appeals also mentioned that the Criminal Division investigator who had visited the defendant had not informed her that she was a target of the investigation.[207] The court found this problematic because the defendant "could reasonably [have] assume[d] that the Attorney General was not investigating her, but instead remained her counsel."[208] Moreover, the Criminal Division investigator who visited the defendant said nothing to dispel such a belief.[209] In short, the court concluded that the Attorney General's Office had not communicated to the defendant "information 'reasonably sufficient to permit [her] to appreciate the significance of the matter in question.'"[210] The court explained:

> [The] defendant was not aware that she was a target of the investigation. The critical issue is not whether Cabadas shared defendant's confidential information with [the Criminal Division attorneys], but whether defendant herself shared such information on the basis of her reasonable belief that she was a former client of the Attorney General's "firm" whose investigator questioned her under the guise of investigating others.
>
> Accordingly, it is largely immaterial to this analysis that the Attorney General instituted screening procedures to shield Cabadas after the investigation began. Although Cabadas has been precluded from any participation in the criminal matter and staff members were informed of the conflict . . . , defendant herself was not adequately consulted about the conflict before the Attorney General's investigation of her conduct[.][211]

206. *Id.* at 391-92.
207. *Waterstone*, 287 Mich. App. at 393-94.
208. *Id.* at 394.
209. *Id.* at 394-95.
210. *Id.* (quoting MICH. RULES OF PROF'L CONDUCT R. 1.0 cmt.).
211. *Id.* at 396.

The court of appeals held that the Attorney General's Office violated the MRPC by "undertaking the prosecution of defendant regarding misconduct in office in conjunction with the Aceval trial, where the Attorney General formerly defended her against Aceval's federal claims, without first obtaining her consent."[212] In order to remedy the violation, the court ordered the Attorney General's Office to withdraw from the criminal prosecution.[213]

On June 4, 2010, just four days after the close of the present *Survey* period, the Michigan Supreme Court summarily reversed the judgment of the court of appeals in *Waterstone*, holding in relevant part:

> Given that appeals have already delayed a preliminary examination by 14 months since issuance of the criminal charges, and given that a full opinion could not proceed until the next term of this Court if leave to appeal were to be granted, we are satisfied that prompt resolution of this matter by issuance of an order is warranted. The court of appeals erred in holding that the Attorney General's office is disqualified from acting as special prosecutor. While recognizing that the Attorney General is subject to the rules of professional conduct, we hold that disqualification is not required in this case because accommodation of his unique constitutional and statutory status will not infringe on the defendant's right to a fair prosecution. The Attorney General's unique status "requires accommodation," and such accommodation is particularly apt where no evidence has been presented of any prejudice that would be suffered by the defendant.[214]

Accordingly, although the Michigan Supreme Court recognized that the attorney general's office "is subject to the rules of professional conduct,"[215] it appears that those rules may now apply differently to the attorney general's office than they do to other attorneys and law firms in Michigan. It remains unclear, following the Supreme Court's remand order, whether there are truly different ethical standards for the attorney general than there are for the remainder of Michigan attorneys, or why the "unique . . . status"[216] of the attorney general's office should militate

212. *Id.* at 398.

213. *Waterstone*, 287 Mich. App. at 398-99.

214. People v. Waterstone, 486 Mich. 942, 942-43 (2010) (citing Att'y Gen. v. Pub. Serv. Comm'n, 243 Mich. App. 487 (2000)).

215. *Id.* at 942.

216. *Id.* at 943.

against a rigid application of the MRPC to the attorney general's activities. Only time and additional litigation will be able to reveal the answers to these complex questions.

4. Fiduciary Duty to Former Clients

In *Alpha Capital Management, Inc. v. Rentenbach*,[217] the Michigan Court of Appeals considered the claim of plaintiff Alpha Capital Management, Inc. ("ACM") that defendants, attorney Robert Rentenbach and Dykema Gossett, P.L.L.C., had breached their fiduciary duties to the plaintiff by representing a former ACM shareholder.[218] Ralph Burrell formed ACM in 1991; Burrell and Robert Warfield were the company's only initial shareholders.[219] Burrell had a prior relationship with Dykema Gossett and therefore hired Dykema to incorporate ACM in 1991.[220] Following ACM's incorporation, attorney Rentenbach provided ongoing legal services to the company.[221] ACM hired employees Dawna Edwards and Napolean Rodgers and began providing financial consulting services to businesses, pension funds, and nonprofit organizations.[222]

However, all was not rosy at ACM. Burrell and Warfield began to disagree, specifically with respect to "Warfield's compensation," "Edwards's equity share in the firm," and certain fees payable to Munder Capital, an independent investment advising firm with which ACM had a "subadvisory agreement."[223] ACM began accruing long-term debt which was due to Munder Capital and "Warfield's compensation also created a debt."[224] Burrell remained committed to ACM's relationship with Munder Capital, and began negotiating with Munder Capital concerning the ACM-Munder cost structure.[225] Burrell eventually achieved a lower cost structure and had it incorporated into the ACM-Munder subadvisory agreement.[226] In contrast, "Warfield and Edwards wanted ACM 'to move away from Munder[.]'"[227]

By 1999, Burrell and Warfield "began negotiating a buyout agreement contemplating that Burrell would buy Warfield's shares or

217. 287 Mich. App. 589 (2010).
218. *Id.* at 592.
219. *Id.*
220. *Id.*
221. *Id.* at 593-94.
222. *Id.* at 592.
223. *Alpha Capital*, 287 Mich. App. at 593.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

vice versa" with Rentenbach serving as a facilitator during these negotiations.[228] Although Burrell initially believed that Rentenbach remained "the corporate attorney representing [ACM]," it soon became apparent that Rentenbach was representing Warfield's interests during the negotiating sessions.[229] Indeed, following an April 1999 meeting, "Rentenbach informed Burrell that Warfield and Edwards had asked him to represent them."[230] Rentenbach then wrote a letter to Burrell's personal attorney "advising that Rentenbach and Dykema sought to represent Warfield and Edwards 'with respect to the negotiations that will take place regarding [Burrell's] proposed disengagement [from ACM].'"[231] "Rentenbach requested that Burrell waive any conflict of interest that might arise," but Burrell declined to do so.[232] Rentenbach and Dykema nonetheless proceeded with their plan to represent Warfield and Edwards.[233]

After additional negotiations, "[i]n May 2001, Warfield elected to sell his shares to Burrell, and in June 2001 Burrell assigned to ACM his right to purchase Warfield's shares."[234] After the deal closed in October 2001, "Warfield, Edwards and Rodgers continued to work for ACM."[235] The stock buyout agreement required Burrell to make an initial payment of $75,000, as well as a subsequent payment "of $1,425,000 to be paid in 20 equal quarterly installments."[236]

"In July 2003, Burrell notified Warfield that he could not make the quarterly payment required under the buyout agreement" unless Warfield would approve a secured loan to ACM from one of Burrell's other companies.[237] Warfield did not respond to Burrell, and Burrell did not make the required July quarterly payment.[238] Burrell again wrote to Warfield in August 2003 seeking approval for the loan.[239] This time Warfield wrote back to Burrell, declining to approve the loan and declaring ACM to be in default under the buyout agreement.[240] Attorney Rentenbach informed Warfield that Burrell's missed quarterly payment

228. *Id.*
229. *Alpha Capital*, Mich. App. 593.
230. *Id.*
231. *Id.* at 593-94.
232. *Id.* at 594.
233. *Id.*
234. *Id.*
235. *Alpha Capital*, 287 Mich. App. at 595.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 596.
240. *Id.*

rendered unenforceable a noncompetition clause contained in the stock buyout agreement, by which Warfield had agreed not to compete with ACM.[241]

In late August 2003, "Rentenbach drafted an operating agreement for Alpha Partners," a new company to be formed by Warfield, Edwards, and Rodgers.[242] "On October 15, 2003, Edwards and Rodgers resigned from ACM."[243] By the end of October 2003, most of ACM's clients had withdrawn their funds from ACM and invested them with Alpha Partners.[244]

In April 2006, ACM sued Rentenbach and Dykema, alleging, *inter alia*, breach of fiduciary duty.[245] Rentenbach and Dykema moved for summary disposition, asserting that ACM's claim actually sounded in legal malpractice and was therefore barred by the two-year statute of limitations applicable to malpractice actions.[246] "ACM answered that the breach of fiduciary duty claim did not sound in legal malpractice, but was properly pleaded as a separate cause of action subject to a three-year period of limitations."[247] ACM also moved for summary disposition in its favor with respect to the breach of fiduciary duty claim.[248] After the circuit court denied the defendants' and plaintiff's motions for summary disposition, the matter proceeded to a jury trial.[249] "[T]he jury returned a special verdict finding that . . . defendants had not breached a fiduciary duty to ACM[.]"[250]

On appeal, ACM argued that Rentenbach and Dykema had breached their fiduciary duties to the plaintiff as a matter of law, and that the circuit court had therefore erred by failing to grant summary disposition, direct a verdict, or grant judgement notwithstanding the verdict in favor of ACM with respect to the breach of fiduciary duty claim.[251] Rentenbach and Dykema did "not dispute that they owed ACM a fiduciary duty premised on ACM's status as their former client."[252]

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241. *Alpha Capital*, 287 Mich. App. at 596-97.
242. *Id.* at 597.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 598.
247. *Alpha Capital*, 287 Mich. App. at 598.
248. *Id.*
249. *Id.* at 598-99.
250. *Id.*
251. *Id.* at 599.
252. *Id.* at 599-600.

However, Rentenbach and Dykema asserted that they had not breached this duty.[253]

The Michigan Court of Appeals noted that "[t]he common law has long recognized that an attorney's fiduciary duties extend to both current and former clients."[254] According to the court, a lawyer's continuing fiduciary duties to his or her former clients

> derive from the principle that the attorney's duties of loyalty and confidentiality continue even after an attorney-client relationship concludes. But under the common law and pursuant to the rules of professional responsibility, the continuing duties of loyalty and confidentiality apply only to matters in which the new client's interests qualify as both adverse to those of the former client *and* substantially related to the subjects of the attorney's former representation. Michigan Rule of Professional Conduct 1.9(a) embodies these concepts as follows: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." An attorney does not necessarily breach his or her duty of loyalty and confidentiality to a former client by representing a new client whose interests are merely adverse to those of the former client. *The attorney breaches his or her fiduciary duty to a former client only by undertaking representation of a client who has interests both adverse and substantially related to work the attorney performed for the former client.*[255]

Despite ACM's arguments that Rentenbach and Dykema had breached their fiduciary duty as a matter of law, the court of appeals ruled that there had remained a genuine issue of material fact with respect to whether the defendants had breached their duty.[256] The court of appeals observed that both the plaintiff and the defendants had presented expert witnesses at trial.[257] While all of these experts agreed concerning the scope of a lawyer's fiduciary duties to a former client in general, the witnesses did not agree with regard to whether the

253. *Cf. Alpha Capital*, 287 Mich. App. at 600.
254. *Id.* at 603.
255. *Id.* at 604 (emphasis added).
256. *Id.* at 610.
257. *Id.* at 606-10.

defendants' legal work for Warfield, Edwards, Rodgers, and Alpha Partners had been in direct conflict with their legal work for ACM.[258] In short, the plaintiff's witnesses both testified that Rentenbach and Dykema had breached their fiduciary duties to ACM by representing Warfield in his effort to negotiate the stock buyout deal at the same time as they continued to represent Burrell and ACM.[259] The plaintiff's witnesses further testified that Rentenbach and Dykema breached their fiduciary duties to ACM when they assisted in the creation and incorporation of Alpha Partners, a business in direct competition with ACM.[260] In contrast, the defendants' witness testified that the defendants' "legal work for Alpha Partners did not substantially relate to the work [the defendants] had done for ACM."[261] With respect to the new entity, Alpha Partners, the defendants' witness testified that Rentenbach and Dykema had only "do[ne] the paperwork to help get another business started."[262] The witness opined that "[t]his is the kind of bureaucratic stuff that lawyers help investment management firms do all the time," and [t]here is nothing improper about that."[263]

In light of the divergent testimony, the court of appeals concluded that a genuine issue of material fact had remained concerning whether Rentenbach and Dykema breached their fiduciary duties to ACM.[264] The court of appeals therefore ruled that the circuit court had "properly denied ACM's motions for . . . summary disposition, a directed verdict, and JNOV."[265] The court of appeals found further support for its conclusion in *INA Underwriters Insurance Co. v. Nalibotsky*.[266] In *INA Underwriters*, the federal district court adopted a three-part test for determining whether a lawyer's subsequent representation bears a "substantial relationship" to legal services performed by that lawyer for a former client:

> 1. What is the nature and scope of the prior representation at issue?

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258. *Id.*
259. *See generally Alpha Capital*, 287 Mich. App. at 606-10.
260. *See id.* at 608-10.
261. *Id.*
262. *Id.*
263. *Id.* at 610.
264. *Id.*
265. *Alpha Capital*, 287 Mich. App. at 610.
266. *See id.* at 603, 610 (citing INA Underwriters Ins. Co. v. Nalibotsky, 594 F. Supp. 1199 (E.D. Pa. 1984)).

> 2. What is the nature of the present lawsuit against the former client?
>
> 3. In the course of the prior representation, might the client have disclosed to his attorney *confidences* which could be relevant to the present action? In particular, could any such *confidences* be detrimental to the former client in the current litigation?[267]

The *Alpha Capital Management* court stated that, "applying the *INA Underwriters* factors to the evidence introduced at trial, substantial evidence supports the jury's conclusion that ACM failed to prove a breach of defendants' fiduciary duties."[268] The court noted that neither the testimony of the defendants' expert witness nor ACM's brief on appeal had "identifie[d] *any* confidential information in defendants' possession that somehow advantaged Alpha Partners."[269] The court concluded:

> Even assuming that Rentenbach possessed confidential information concerning the Munder Capital debt, ACM neglected to explain how this confidential information advantaged Warfield. Without question, ACM and Alpha Partners had adverse interests. But [the defendants' expert witness] correctly noted that defendants apparently performed only the most routine, "bureaucratic" work on behalf of ACM, and that aside from sharing the same general nature, these legal services lack any substantial relationship to Rentenbach's activities on behalf of Alpha Partners. Accordingly, we reject ACM's position that as a matter of law defendants breached their fiduciary duties.[270]

In the wake of the Michigan Court of Appeals decision in *Alpha Capital Management*, it appears that, at least under certain circumstances, a Michigan lawyer may be held liable for breaching his or her fiduciary duties to a former client when the lawyer's representation of a new client is "materially adverse" to the former client's interests. It also appears that such an action may continue to sound in breach of

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267. *INA Underwriters*, 594 F. Supp. at 1206 (emphasis added).
268. *Alpha Capital*, 287 Mich. App. at 610.
269. *Id.*
270. *Id.*

fiduciary duty rather than in legal malpractice.[271] This continuing distinction between legal malpractice and breach of fiduciary duty claims may prove important because while the period of limitations for legal malpractice actions is two years,[272] the period of limitations for breach of fiduciary duty actions is three years.[273]

5. Ineffective Assistance of Counsel

In *People v. Nouri*,[274] the Michigan Court of Appeals was faced with the question whether the circuit court had erred by granting the defendant a new trial on the ground that his attorney had rendered ineffective assistance of counsel.[275] In *Nouri*, a jury convicted the physician defendant of sexually assaulting "an employee at his medical office."[276] The defendant did not testify at trial.[277] Thereafter, the defendant moved for a new trial on the ground that his trial attorney, David Griem, had rendered ineffective assistance of counsel by failing to inform him that he had an absolute constitutional right to testify in his own defense.[278] The circuit court held an evidentiary hearing[279] on the matter, after which it ruled that Griem "had been ineffective for failing to inform defendant of his absolute right to testify and for preventing defendant from testifying in his own defense."[280] The circuit court accordingly entered an order setting aside the defendant's conviction and granting him a new trial.[281]

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271. *See id.* at 598-602. *See also* Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 107 Mich. App. 509, 515-17 (1981) (discussing breach of fiduciary claims against attorneys generally); Prentis Family Found. v. Barbara Ann Karmanos Cancer Inst., 266 Mich. App. 39, 47 (2005) ("The conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice.").

272. MICH. COMP. LAWS ANN. § 600.5805(6) (West 2000). *See also* Kloian v. Schwartz, 272 Mich. App. 232, 237 (2006).

273. MICH. COMP. LAWS ANN. § 600.5805(10); *see also Prentis*, 266 Mich. App. at 47.

274. No. 290178, 2009 WL 3199532 (Mich. Ct. App. October 6, 2009).

275. *Id.* at *1.

276. *Id.*

277. *Id.*

278. *Id.*

279. "A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim . . . ." People v. Ginther, 390 Mich. 436, 443 (1973) (quoting People v. Jelks, 33 Mich. App. 425, 431 (1971)).

280. *Nouri*, 2009 WL 3199532, at *1.

281. *Id.*

The prosecution appealed the circuit court's decision, arguing that the court had erroneously concluded that the defendant was denied the effective assistance of counsel at trial.[282] The Michigan Court of Appeals "fully acknowledge[d] that a criminal defense attorney may be ineffective in the constitutional sense when he prevents his client from testifying against his client's wishes."[283] Nevertheless, the court of appeals determined that the circuit court had erred by ruling that attorney Griem had rendered ineffective assistance of counsel to the defendant in that case.[284]

The court of appeals first reiterated the general rules that a criminal defendant has an absolute constitutional right to testify in his or her own defense,[285] that "a criminal defense attorney must 'abide by the client's decision, after consultation with the lawyer, with respect to . . . whether the client will testify,'"[286] and that "'[i]f the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection.'"[287] The court also noted that "a criminal defense attorney is presumed to follow the rules of professional conduct when advising his client concerning the decision whether to testify at trial[.]"[288]

The court then went on to review the testimony adduced at the circuit court's evidentiary hearing.[289] The court of appeals stated that while it was "beyond dispute" that the defendant had informed Griem "that he wanted to testify in his own defense," it was "also beyond dispute that Griem urged defendant not to testify in the strongest possible language."[290] The court continued:

> Griem testified at the [evidentiary] hearing that he "made it crystal clear that [defendant] should not take the stand," that he informed defendant that it would be "a horrible mistake in judgment to take the witness stand," that he told defendant that "it would be a huge mistake for you to testify," and that he told defendant either "[y]ou can't [testify]" or "you shouldn't [testify]." But Griem explained that "if I used the word can't, it would have been in a figurative sense . . . ." Griem could not

282. *Id.*
283. *Id.*
284. *Id.* at *2.
285. *Id.* at *1.
286. *Nouri*, 2009 WL 3199532, at *1 (quoting MICH. RULES OF PROF'L CONDUCT R. 1.2(a)).
287. *Id.* (quoting People v. Simmons, 140 Mich. App. 681, 685 (1985)).
288. *Id.* at *2 (citing United States v. Weber, 208 F.3d 545, 551 (6th Cir. 2000)).
289. *Id.* at *2-3.
290. *Id.* at *2.

> specifically recall whether he had informed defendant that he had an absolute right to testify, but acknowledged that it is his general practice to tell all his clients that the matter of testifying at trial "is the client's decision." Griem testified that after discussing the matter with defendant, and twice advising defendant not to testify, "we looked at each other, we looked each other in the eye and I don't believe that [the defendant] said anything more after the second time that we discussed it."[291]

Based on the testimony offered at the evidentiary hearing, the court of appeals acknowledged that "Griem strongly urged defendant not to testify," partially because "Griem was concerned that defendant might be a less-than-ideal witness[.]"[292] However, the court was not persuaded Griem had actually prevented the defendant from testifying or in any way conveyed to the defendant that he was not permitted to testify.[293] "Instead," the court of appeals observed, "Griem merely stated that defendant 'should not,' 'could not,' or 'can't' testify," and told the defendant that "testifying would be 'a horrible mistake in *judgment*[.]'"[294] According to the court of appeals, the defendant should have understood these words to mean that the ultimate decision to testify was a matter of his own personal judgment or choice: "It was implicit in Griem's very words that the decision whether to testify was ultimately defendant's own."[295]

On review *de novo*,[296] the court of appeals determined that Griem had not performed in a constitutionally deficient manner, noting that the "defendant acquiesced in Griem's strategic recommendation that he not testify at trial," and, therefore, that he "was not denied the effective assistance of counsel."[297] As a consequence, the court of appeals reversed the circuit court's order granting the defendant's motion for a new trial and remanded to the circuit court for reinstatement of the defendant's convictions.[298]

In *People v. Parker*,[299] the Michigan Court of Appeals again weighed a defendant's claim of ineffective assistance of counsel.[300] The

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291. *Id.*
292. *Id.* at *3.
293. *Nouri*, 2009 WL 3199532, at *3.
294. *Id.*
295. *Id.* at *3.
296. *Id.* (citing People v. Kevorkian, 248 Mich. App. 373, 410-11 (2001)).
297. *Id.* at *3.
298. *Id.*
299. No. 287202, 2009 WL 4981184 (Mich. Ct. App. Dec. 22, 2009).
300. *Id.* at *1.

defendant, who was involved in a nonfatal shooting in the City of Detroit,[301] was ultimately convicted of being a felon in possession of a firearm,[302] and possessing a firearm during the commission of a felony ("felony-firearm").[303] The defendant argued on appeal that his convictions should be reversed because his trial attorney had rendered ineffective assistance in several different ways.[304] First, the defendant argued that he was denied the effective assistance of counsel when his trial attorney did not know the charges he was facing at the time of the preliminary examination.[305] At the preliminary examination, the defendant's attorney was apparently "confused about whether defendant had been charged with felonious assault because the board outside the courtroom indicated that defendant had been charged with felonious assault."[306] In actuality, however, the defendant "had only been charged with felon in possession of a firearm and felony-firearm at that time."[307] Relying on *United States v. Cronic*,[308] the defendant argued that his attorney's confusion concerning the criminal charges had been tantamount to a complete denial of counsel during a critical stage of the criminal proceedings, and that prejudice should therefore be presumed.[309] But the Michigan Court of Appeals disagreed, observing that the defendant had been vigorously represented by counsel during the preliminary examination and that the situation was therefore wholly unlike the complete denial of representation to which the defendant likened it in *Cronic*.[310] Accordingly, the court determined that no prejudice should be presumed under *Cronic*.[311] The court also went on to conclude that the defendant could not prevail on his claim of ineffective assistance of counsel because he could not show that he was prejudiced by counsel's performance at the preliminary examination.[312] The court determined that the defendant had not established "any prejudice regarding the confusion on the charges" because he had failed to show

301. *Id.*
302. *Id.* (citing MICH. COMP. LAWS ANN. § 750.224f (West 2004)).
303. *Id.* (citing MICH. COMP. LAWS ANN. § 750.227b (West 2004)).
304. *Id.*
305. *Parker*, 2009 WL 4981184, at *2.
306. *Id.*
307. *Id.*
308. 466 U.S. 648 (1984).
309. *Parker*, 2009 WL 4981184, at *2.
310. *Id.*
311. *Id.*
312. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)).

"how his counsel could have prevented him from being bound over on the . . . charges of felon in possession of a firearm and felony-firearm."[313]

The defendant next argued that he had been denied the effective assistance of counsel when his trial attorney failed to request an adjournment of trial in order to allow the processing of fingerprint evidence.[314] The defendant asserted that the fingerprint "evidence would have been exculpatory."[315] The record demonstrated that the fingerprinting of certain evidence collected at the scene of the shooting had been requested, but that it had never been carried out.[316] Defense counsel apparently did not learn of this until the middle of trial, and chose to refrain from requesting an adjournment to allow the fingerprint analysis to go forward.[317] The court of appeals assumed, *arguendo*, that "[i]t may have been unreasonable for defense counsel not to request an adjournment and pursue the testing of this evidence."[318] Nevertheless, the *Parker* court determined that the defendant had "failed to prove that he had suffered any prejudice" resulting from defense counsel's actions because he had "made no showing that the fingerprint evidence would have been exculpatory[.]"[319] Moreover, the court of appeals noted that because the defendant's gun had not been recovered, and was therefore unavailable for fingerprint testing, the fingerprint analysis would have been of limited value in establishing the defendant's guilt or innocence on the firearm-related charges.[320]

The defendant further argued that his trial attorney "was 'per se' ineffective because [he had] argued at the sentencing hearing that defendant should be placed on probation, when, in fact, defendant was convicted of a crime that had a mandatory five-year sentence."[321] However, as noted by the court of appeals, defense counsel had actually "made a good faith argument that the plain language of [the probation statute] permitted the trial court to sentence a defendant convicted of an offense with mandatory prison time to probation."[322] Consequently, the court of appeals determined that the defendant's attorney had not rendered ineffective assistance of counsel in this regard.[323]

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313. *Parker*, 2009 WL 4981184, at *2.
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Parker*, 2009 WL 4981184, at *2.
320. *Id.*
321. *Id.* at *3.
322. *Id.*
323. *See id.*

The *Parker* defendant lastly argued that his trial attorney had rendered ineffective assistance of counsel by failing to present a claim of self-defense at trial.[324] But as the court of appeals observed, the defendant's sole defense throughout the proceedings had been that he never possessed a gun at all.[325] In other words, any claim of self-defense presented by counsel would have contradicted the defendant's insistence that he never had a firearm in the first instance.[326] The *Parker* court acknowledged that the "defendant could have presented inconsistent defenses," but held that the defendant had not "overcome the strong presumption" that defense counsel acted strategically by pursuing only one, consistent theory at trial—namely, that the defendant had never possessed a firearm at all.[327] In the end, the court of appeals was convinced that the attorney's decision not to present "a claim of self-defense that was entirely inconsistent with [the defendant's] testimony and effectively impeached his testimony and the other defense witnesses" constituted sound trial strategy.[328] The court of appeals found no ineffective assistance of counsel entitling the defendant to relief.[329]

6. Attorney Withdrawal Through Mass Media

The conduct of attorney David Griem was again at issue in *People v. Grant*,[330] a high-profile case in which the defendant killed his wife, dismembered her body, and scattered her body parts in a park near the couple's Macomb County home.[331] After the victim had been missing for several weeks, the police executed a search warrant at the defendant's Macomb County residence.[332] The defendant thereupon fled Macomb County and drove to northern Michigan, where he attempted to hide from the police in a remote area.[333] He was eventually located and arrested.[334] A Macomb County jury thereafter convicted him of second-degree murder.[335]

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324. *Id.*
325. *Parker*, 2009 WL 4981184, at *3.
326. *Id.*
327. *See id.*
328. *Id.*
329. *Id.*
330. No. 284100, 2009 WL 3199493 (Mich. Ct. App. Oct. 6, 2009).
331. *See id.* at *1.
332. *Id.* at *1.
333. *Id.*
334. *Id.*
335. *Id.*

Shortly after the victim's disappearance in February 2007, well before the defendant fled to northern Michigan, the defendant had retained attorney Griem.[336] Griem had made several appearances during the pendency of the ongoing police investigation, publicly defending his client from speculation that he may have killed his wife.[337] Griem had also been in contact with the Macomb County Sheriff's Department, and had reached an agreement with the department "that all contact with defendant would be directed through [the defendant's] counsel" and that the department would "advise counsel if defendant was apprehended[.]"[338]

The defendant was arrested in northern Michigan at approximately 6:30 a.m. on March 4, 2007, and received medical attention for frostbite and hypothermia.[339] Despite Griem's agreement with the Macomb County Sheriff's Department, the authorities did not immediately inform Griem that the defendant had been apprehended.[340] At approximately 9:00 a.m. on that same day, Griem appeared on television in the Detroit area and publicly announced that he was no longer representing the defendant.[341] Still unaware of the defendant's whereabouts or that the defendant had been taken into custody, Griem stated that his relationship with the defendant had broken down and that he would be immediately withdrawing as the defendant's counsel.[342] That afternoon, the defendant asked the police if he could speak to Griem.[343] When the defendant announced his desire to speak with Griem, "the Macomb County Sheriff's Department advised defendant that Mr. Griem had terminated their attorney-client relationship on television that morning."[344] The authorities asked the defendant whether he wanted to retain a different attorney, but the defendant declined; he later waived his right to remain silent and made a full "written and verbal confession."[345]

On appeal, the defendant argued, *inter alia*, that his confession to the police should have been suppressed "due to Mr. Griem's alleged

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336. *Grant*, 2009 WL 3199493, at *6.

337. *See, e.g.*, Joe Swickard and Christy Arboscello, *Grant's Defender Says Resignation is Not a Snap Decision*, DETROIT FREE PRESS (Mar. 5, 2007), http://www.freep.com/article/2007035/NEWS06/703050346/Grant%5C-s-defender-says-resignation-not-snap-decision.

338. *Grant*, 2009 WL 3199493, at *6.

339. *Id.* at *1, *6.

340. *Id.* at *6

341. *Id.* at *6-7.

342. *Id.* at *6.

343. *Id.* at *6-7.

344. *Grant*, 2009 WL 3199493, at *6.

345. *Id.*

improper action of withdrawing from representation through the media."[346] The defendant recognized "that the remedy for the commission of ethical violations is generally disciplinary actions against the attorneys rather than suppression of a statement," but urged the Michigan Court of Appeals to hold that "where the ethical violation is egregious, suppression is a possible remedy."[347] The court of appeals declined the defendant's request, stating that:

> The provisions of the code [of professional responsibility] are not constitutional or statutory rights guaranteed to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar. Although it is true that the principal purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary action against the offending attorney.
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> * * *
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> The admissibility of evidence in a court of law, on the other hand, is normally determined by reference to relevant constitutional and statutory provisions, applicable court rules and pertinent common-law doctrines. Codes of professional conduct play no part in such decisions.[348]

The court of appeals ruled that, even assuming *arguendo* that Griem's public withdrawal as the defendant's attorney via live television had constituted a violation of the Michigan Rules of Professional Conduct, "the remedy would be an attorney disciplinary action[,] not suppression of defendant's confession."[349]

7. Duty of Candor Toward the Tribunal

In *People v. Cargill*,[350] the Michigan Court of Appeals considered whether a criminal defense attorney had rendered constitutionally ineffective assistance to his client when he argued at the defendant's sentencing hearing, "in contrast to [the] recommendation of the probation

346. *Id.* at *8.
347. *Id.*
348. *Id.* (quoting People v. Green, 405 Mich. 273, 293-94 (1979)).
349. *Grant*, 2009 WL 3199493, at *8.
350. No. 284893, 2009 WL 5194983 (Mich. Ct. App. Dec. 15, 2009).

department, that the [circuit] court" should assess 15 points for Offense Variable 8.[351] In *Cargill*, the defendant was convicted of, *inter alia*, "two counts of armed robbery"[352] and was sentenced to concurrent prison terms of fifteen to forty years.[353] The record evidence established that "the defendant was one of . . . three men who broke into [a] home and robbed" several victims, including the homeowner.[354] Upon entering the home, defendant and one of his accomplices pulled the homeowner "away from the front door" of the house and forced him to the floor in order to prevent his escape.[355] The record showed that "[t]his movement of the homeowner allowed defendant and the others to commit the offense of armed robbery."[356] Thereafter, as police arrived on the scene and began knocking on the front door, the defendant and his accomplices forcibly moved the homeowner and the other victims upstairs.[357]

Under offense variable 8, which pertains to the issue of "victim asportation or captivity,"[358] a circuit court may assess fifteen points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense[.]"[359] In preparing the presentence information report for use at the defendant's sentencing, the probation department did not recommend that the circuit court assess any points for offense variable 8.[360] However, despite the probation department's recommendation, defense counsel acknowledged at the sentencing hearing that the defendant had asported or participated in asporting the victims to a place of greater danger during the commission of the crimes.[361] Accordingly, defense counsel noted that the circuit court would be justified in assessing 15 points for offense variable 8.[362] The circuit court agreed with defense counsel, and assessed fifteen points for offense variable 8.[363]

On appeal, the defendant argued, among other things, that his attorney had "rendered deficient performance during sentencing when he

351. *Id.* at *3-4.
352. *See* MICH. COMP. LAWS ANN. § 750.529 (West 2004).
353. *Cargill*, 2009 WL 5194983, at *1.
354. *Id.* at *2.
355. *Id.* at *6.
356. *Id.*
357. *Id.*
358. *Id.* at *5.
359. MICH. COMP. LAWS ANN. § 777.38(1)(a) (West 2010).
360. *Cargill*, 2009 WL 5194983, at *3.
361. *Id.*
362. *Id.*
363. *Id.* at *4.

argued, in contrast to recommendation of the probation department, that the trial court assess points" for offense variable 8.[364] But the Michigan Court of Appeals disagreed, concluding that "defense counsel's performance did not fall below an objective standard of reasonableness."[365] The court of appeals remarked that there was ample "evidence on the record to support scoring [Offense Variable 8] at 15 points."[366] The court further noted that defense counsel had "a 'duty of candor' toward the tribunal" at the time of sentencing, requiring him to disclose critical facts in his possession even if they were adverse to his client's interests.[367] Specifically, the court of appeals stated, "an attorney must not 'knowingly . . . fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]'"[368] Nor may a lawyer "make a false statement of material fact or law to a tribunal"[369] or "offer evidence that the lawyer knows to be false."[370] In light of the duties imposed by MRPC 3.3, the Michigan Court of Appeals concluded that defense counsel had not acted in a constitutionally deficient manner by pointing out that the facts of the case would support a score of 15 points for offense variable 8.[371]

The matter of an attorney's candor toward the tribunal was again at issue in *Ryan v. Lamphere Public School System*,[372] wherein the Michigan Court of Appeals issued a rare rebuke to an attorney who misrepresented critical facts during oral argument before the court.[373] There, the plaintiff sued the defendant for negligence after the plaintiff's decedent drowned in a swimming pool located on the defendant school district's property during a Special Olympics practice session.[374] The circuit court granted summary disposition of the plaintiff's negligence claim on the ground that the defendant school district was entitled to governmental immunity.[375] A critical issue on appeal was whether the defendant school district had been "engaged in the exercise or discharge

364. *Id.* at *3.
365. *Id.* at *4 (citing People v. Toma, 462 Mich. 281 (2000)).
366. *Cargill*, 2009 WL 5194983, at *4.
367. *Id.* (citing MICH. RULES OF PROF'L CONDUCT R. 3.3).
368. *Id.* (quoting MICH. RULES OF PROF'L CONDUCT R. 3.3(a)(3)).
369. MICH. RULES OF PROF'L CONDUCT R. 3.3(a)(1).
370. MICH. RULES OF PROF'L CONDUCT R. 3.3(a)(4).
371. *Cargill*, 2009 WL 5194983, at *4.
372. No. 286741, 2010 WL 934243 (Mich. Ct. App. Mar. 16, 2010).
373. *See id.* at *6.
374. *Id.* at *1-2.
375. *Id.* at *4.

of a governmental function"[376] within the meaning of Michigan's governmental tort liability act at the time of the decedent's drowning.[377] There was some uncertainty concerning whether the Special Olympics practice sessions qualified as a "governmental function" under Michigan law.[378] Specifically, it was unclear whether the Special Olympics practice sessions were actually part of the defendant school district's regular curriculum for disabled students, or whether they merely constituted extracurricular activities for which the defendant district had gratuitously loaned its swimming pool facilities.[379]

The defendant's attorney maintained at oral argument before the Michigan Court of Appeals that the Special Olympics practice sessions in which the decedent had participated "*were* part of the regular curriculum" of the defendant school district and that the defendant was therefore entitled to complete immunity.[380] The attorney asserted that the Special Olympics "practice sessions were held in conjunction with regular physical education classes" at the school and fell within the school's statutory requirement to provide physical education programs for its students.[381] The attorney referred to the Special Olympics practice sessions as "a swim class which is part of [the] sports or physical education requirements of the special education program," and stated that the Special Olympics practice sessions were "one of 'the special services that [the defendant was] paid for by the state to provide[.]'"[382]

After examining the record evidence presented in the case, however, the Michigan Court of Appeals disagreed with the attorney's representations at oral argument, stating:

> Contrary to defense counsel's misleading representations at oral argument before this Court, it is beyond factual dispute that the Special Olympics swimming practice sessions in which the decedent participated were not part of the regular curriculum of the [defendant school district], and were not akin to a regular physical education program required by state statute. Indeed, [a school official] specifically testified that the practice sessions were not a component of the school's curriculum. Defense counsel's assertion that the swimming practice sessions were

376. MICH. COMP. LAWS ANN. § 691.1407(1) (West 2010).
377. *Ryan*, 2010 WL 934243, at *5-6.
378. *Id.* at *6.
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*

> held in conjunction with regular physical education classes is entirely disproved by the record evidence in this case. The uncontroverted evidence establishes that although the Special Olympics practice sessions were held on school premises and during school hours, they did not constitute a regular class offering for students . . . .
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> * * *
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> Nor were the Special Olympics practice sessions one of "the special services that [the defendant was] paid for by the state to provide to [the decedent]" as defense counsel argued. There is simply no evidence in the record to substantiate any of these representations by defense counsel.[383]

Although the court of appeals ultimately declined to refer the defendant's attorney to the Attorney Grievance Commission or take other disciplinary action against him, the court "remind[ed] defense counsel that attorneys have a duty of candor toward the tribunal,"[384] and specifically noted that it was authorized to "sanction a party or take other disciplinary action upon a determination that an 'argument . . . was grossly lacking in the requirements of propriety . . . or grossly disregarded the requirements of a fair presentation of the issues to the court[.]'"[385]

B. Federal Cases

1. Legal Malpractice

a. Motion for Relief from Judgment versus Legal Malpractice Action

In *Moore v. United States Postal Service*,[386] the plaintiff brought claims of race and gender discrimination under various federal statutes against her employer.[387] After cross-motions for summary judgment were granted in part and denied in part, the parties entered into settlement negotiations.[388] Upon informing the court that the parties had

383. *Ryan*, 2010 WL 934243, at *6.
384. *Id.* (citing MICH. RULES OF PROF'L CONDUCT R. 3.3).
385. *Id.* (quoting MICH. CT. R. 7.216(C)(1)(b)).
386. 369 F. App'x 712 (6th Cir. 2010).
387. *Id.* at 712.
388. *Id.* at 713.

reached an agreement to settle the case, the court entered an order of dismissal with prejudice providing a period of sixty days to reopen if necessary.[389] However, during the sixty day period, the parties were unable to agree upon a final settlement.[390] Shortly after the expiration of the re-opening period, the plaintiff's "relationship with her lawyers deteriorated," and she subsequently retained new counsel.[391] Several months later, the plaintiff's new counsel proposed additional revisions to the settlement agreement, to which the defendant refused to agree.[392] Several additional months later, the plaintiff then "made a motion to revive the case" under Federal Rule of Civil Procedure 60(b), asserting that no agreement had been reached and that her original attorneys misrepresented her assent to settlement.[393] The district court subsequently granted the defendant's motion to enforce the original settlement agreement and denied the plaintiff's Rule 60(b) motion.[394] On appeal, the U.S. Court of Appeals for the Sixth Circuit concluded that the district court correctly concluded that a settlement agreement had been reached and that the plaintiff had failed to move to re-open the case within the sixty days.[395] The Sixth Circuit further held that if the plaintiff alleged that "if there were indeed no meeting of the minds and no agreement, or if [the plaintiff's original attorney] withheld crucial information regarding the agreement from his client, [the plaintiff's] recourse is not through the filing of a Rule 60(b) motion to set aside the court's order of enforcement, but rather through an action . . . for legal malpractice."[396]

b. Federal Subject Matter Jurisdiction over Patent Cases

In *Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C.*,[397] the district court held that attorney malpractice claims arising from federal patent law cases do not necessarily implicate federal subject matter jurisdiction.[398] The plaintiff filed suit in state court asserting that its former attorneys had committed malpractice by, *inter alia*, failing to

389. *Id.* at 713-14.
390. *Id.* at 715.
391. *Id.* at 714.
392. *Moore*, 369 F. App'x at 714-15.
393. *Id.* at 715.
394. *Id.*
395. *Id.* at 716-17.
396. *Id.* at 718.
397. 632 F. Supp.2d 694 (E.D. Mich. 2009), *reconsideration denied*, 666 F. Supp.2d 749 (E.D. Mich. 2009).
398. *Id.* at 697-99.

renew a patent, settling previous litigation on unfavorable terms, failing to reinstate the patent, and other breaches of professional duties.[399] Upon the defendants' motion for summary disposition in the state court, the plaintiff voluntarily refiled the case in federal court.[400] The district court issued a show-cause order for why the case should not be remanded to state court for lack of federal question.[401] Both parties contended that the district court had subject matter jurisdiction because the malpractice claims involved "substantial federal patent law questions," citing several decisions from the U.S. Court of Appeals for the Federal Circuit.[402]

The district court initially questioned, but did not decide, whether prior Federal Circuit precedent on the issue was binding "where a district court finds that it has no *section 1338* jurisdiction altogether."[403] The district court distinguished prior Federal Circuit precedent by recognizing that the plaintiff's malpractice claims involving an unfavorable settlement and lost profits and royalties based upon a lapsed patent do "not necessarily require a court to engage in claim construction, evaluate the viability of underlying patent litigation, or determine if others are infringing the patent in question" and "seem readily addressed without reference to actual substantive and disputed questions of patent law."[404] The district court later denied reconsideration noting that "[t]he only federal aspects of Plaintiff's claim—patent disputes embedded within the proximate cause element of an otherwise straightforward legal malpractice claim—are only incidental to the overall complaint."[405]

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399. *Id.* at 696.

400. *Id.*

401. *Id.* at 695.

402. *Id.* at 697. The parties relied upon Air Measurement Tech., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262 (Fed. Cir. 2007), and Immunoconcept, L.L.C. v. Fulbright & Jaworski, L.L.P., 504 F.3d 1281 (Fed. Cir. 2007).

403. *Warrior Sports*, 632 F. Supp.2d at 698 n.4 (citing Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 829-30 (2002)).

404. *Warrior Sports*, 632 F. Supp.2d at 699. The district court further noted that a previous decision from the Eastern District of Michigan reached a similar result. *Id.* at 699 (citing Adamasu v. Gifford, Krass, Groh, Sprinkle, Anderson & Citowski, 409. F. Supp.2d 788 (E.D. Mich. 2005)).

405. Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C., 666 F. Supp.2d 749, 753 (E.D. Mich. 2009). Noting the decision in *Warrior Sports*, two subsequent federal district courts have held that they lacked subject matter jurisdiction over legal malpractice claims involving underlying patent issues. *See* Roof Tech. Servs. v. Hill, 679 F. Supp.2d 749, 751-55 (N.D. Tex. 2010); Genelink Biosciences, Inc. v. Colby, 722 F. Supp.2d 592, 602 (D.N.J. 2010). However, in Wortring v. Price Heneveld Cooper Dewitt & Litton, L.L.P., No. 1:08-CV-00477, 2009 WL 2242699, at *1 (W.D. Mich. July 24, 2009) the defendants removed the case involving legal malpractice claims arising out of an underlying patent

c. Standing to Assert Claims against Counsel for an ERISA Plan

In *Iron Workers Local 25 Pension Fund v. Watson Wyatt & Co.*,[406] the district court refused in part to permit an ERISA plan trustee and several beneficiaries to assert various breach of contract, breach of fiduciary duty, and legal malpractice claims against the plan's counsel arising out of a contingency fee agreement. In 2004, the ERISA plan filed a lawsuit against an actuarial service provider for negligence.[407] The law firm negotiated a fee arrangement where the plan would pay hourly up to $250,000 and then "a one-third contingency fee" of the ultimate recovery.[408] The plaintiffs alleged that not only did the law firm's negotiation of the fee arrangement create a conflict of interest, but also misrepresented the amount of recovery to the ERISA plan as $2,000,000 when the actual amount of damages exceeded $100,000,000.[409] The plaintiffs further alleged that the law firm failed to communicate a settlement offer to the plan trustees, and ultimately settled the case without informing the trustees.[410] A majority of the trustees later ratified the settlement.[411] After discovering that the settlement entitled the law firm to $36,000,000 in contingency fees, the plaintiffs intervened in the original lawsuit asserting breach of contract, legal malpractice and breach of fiduciary duty claims to prevent or recover the disbursement of the contingency funds to the law firm.[412] The law firm moved to dismiss.[413]

In relevant part, the district court rejected the plaintiffs' breach of contract claim on the basis that: (1) the ERISA plan participants and/or beneficiaries "are not parties to the legal services agreement" between the plan and the law firm;[414] (2) the plaintiffs were not "derivative clients";[415] and (3) the plaintiffs were not "third party beneficiaries" of

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case on the basis of the Federal Circuit precedent rejected by *Warrior Sports*. Neither the plaintiff nor the court questioned subject matter jurisdiction. *See id.*

406. No. 04-CV-40243 & 07-CV12368, 2009 WL 3698562, at *1 (E.D. Mich. Nov. 4, 2009).

407. *Id.* at *2, *7.

408. *Id.* at *2

409. *Id.*

410. *Id.* at *3.

411. *Id.*

412. *Iron Workers*, 2009 WL 3698562, at *3.

413. *Id.*

414. *Id.* at *5.

415. *Id.* at *5-6 ("The Court agrees that the adoption of this 'derivative client' theory would undermine settled law in Michigan regarding attorney-client conduct. . . . Imposing on [the law firm] a duty to represent the beneficiaries and/or participants as

the legal services agreement.[416] The district court further refused to permit the plaintiffs to assert a legal malpractice claim because: (1) the attorney-client relationship between the ERISA plan and the law firm did not extend to the individual plan participants;[417] and (2) the facts did not qualify for the "rare exception to the attorney-client privilege."[418]

At the same time, the district court found that the plaintiffs stated a claim under ERISA for violation of fiduciary duties.[419] The district court initially noted that the central inquiry for determining whether an entity is an ERISA fiduciary involves "whether the person assumes a *de facto* control over fiduciary functions," or assumes merely "professional functions."[420] The district court found that "litigating, and finally settling, the [original lawsuit] without the consent of the trustees exceeded the bounds of the functions [that the law firm] was hired to perform, *i.e.*, the provision of legal advice, and those acts thereby crossed the line from usual professional functions to discretionary control."[421]

d. Choice of Law

In *CenTra, Inc. v. Estrin*,[422] the district court analyzed whether Michigan or Canadian law applied to an alleged conflict of interest lodged against an attorney licensed in Canada and his Canadian law firm.[423] The plaintiffs brought suit against an attorney and his Canadian law firm alleging "breach of contract, breach of fiduciary duties, and legal malpractice[.]"[424] The plaintiffs alleged that the defendants had an impermissible conflict of interest when it represented both the plaintiffs and the City of Windsor in a dispute about the building of a second bridge span across the Detroit River.[425] In deciding whether to apply the Michigan Rules of Professional Conduct or the Law of Upper Canada's Rules of Professional Conduct as probative of the standard of care,[426] the

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'derivative clients' . . . . would constitute a per se violation of Rule 1.13(a) and potentially create conflicts of interest for [the law firm].").

416. *Id.* at *6-7 (citing MICH. COMP. LAWS ANN. § 600.1405 (West 2010)).

417. *Id.* at *7.

418. *Iron Workers*, 2009 WL 3698562, at *10 (discussing Mieras v. DeBona, 452 Mich. 278 (1996)).

419. *Iron Workers*, 2009 WL 3698562, at *10.

420. *Id.*

421. *Id.* at *11.

422. 639 F. Supp.2d 790 (E.D. Mich. 2009).

423. *See generally id.*

424. *Id.* at 808. For general background of the dispute, see CenTra, Inc. v. Estrin, 538 F.3d 402 (6th Cir. 2008).

425. *CenTra*, 639 F. Supp.2d at 794.

426. *Id.* at 806 (citing *CenTra*, 538 F.3d at 410-11).

district court applied Michigan's choice-of-law "significant interest" analysis.[427] In determining to apply the Canadian Rules, the district court found significant that: (1) the Canadian attorney was not licensed in Michigan; (2) the attorney's law firm had no offices in the United States and no attorneys licensed in Michigan; and (3) the attorney's engagement letter was limited to Canadian tax issues.[428] At the same time, the district court found that Michigan's connections to the lawsuit—the plaintiffs' residency and the fact that the attorney sent a letter to a Michigan state agency on behalf of a Canadian client—did not create a "significant interest."[429] Therefore, the district court determined that the Canadian Rules "provide[d] evidence of the standard of care."[430]

2. Cases Pertaining to the Michigan Rules of Professional Conduct

a. Attorney-Client Privilege and Work-Product Doctrine

In *Serrano v. Cintas Corp.*,[431] an employment case, the magistrate judge determined that the Equal Employment Opportunity Commission ("EEOC") had to turn over the identities of the women on whose behalf it was pursuing claims, "the identities of the women" to whom it sent questionnaires and the completed questionnaires themselves.[432] The magistrate judge first found no reason that the EEOC could withhold the names of the women, which it planned to represent in the litigation.[433] He further concluded that the identities of the women sent questionnaires neither implicated the attorney client privilege,[434] nor the work product doctrines.[435] The magistrate judge further rejected the EEOC's position that the attorney-client privilege[436] or the work product doctrine[437] barred the production of the completed questionnaires.

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427. *Id.* at 806-07.

428. *Id.* at 807.

429. *Id.*

430. *Id.* at 807-08 (footnote omitted). Despite this holding, the district court acknowledged that the outcome would be the same under either rule. *Id.* at 808 n.7.

431. No. 04-40132, 2010 WL 746430 (E.D. Mich. Mar. 2, 2010).

432. *Id.* at *9.

433. *Id.* at *2-3.

434. *Id.* at *3 ("[T]he existence of the attorney/client relationship and the identity of the 'client' are not encompassed within the privilege.") (citing Humphries, Hutcheson & Moseley v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985)).

435. *Serrano*, 2010 WL 746430, at *3 ("The EEOC has not made a showing that the mere identity of persons contacted for possible inclusion in a class action lawsuit betrays the mental impressions or legal analysis of its attorneys.").

436. *Id.* at *7 ("The EEOC has not produced evidence that the recipients took affirmative steps to enter into an attorney-client relationship in this action. The completed

b. Conflicts of Interest and Disqualification

In *CenTra, Inc. v. Estrin*,[438] the district court denied the plaintiffs' preliminary injunction request seeking removal of the Canadian counsel for the City of Windsor, Ontario, based upon a conflict of interest, in a brewing dispute about the building of a second bridge span across the Detroit River.[439] In relevant part, the plaintiffs contended that while one of the attorneys in the Canadian law firm represented Windsor against the building of the second span, other attorneys in the same firm were assisting the plaintiffs in obtaining financing for the construction of the second span.[440] The defendants responded that the plaintiffs impliedly consented to the Canadian law firm's representation of Windsor when it hired the firm knowing that it already represented Windsor.[441]

After analyzing the issues under primarily Canadian law, the district court concluded that the plaintiffs did not demonstrate a "likelihood of success on the merits."[442] Although the attorney for Windsor failed to run the required conflict checks at the law firm, other evidence suggested the existence of implied consent, and the Windsor firm took exceptional measures to "screen" the attorneys from obtaining confidential information from the other party.[443] The district court further found no "irreparable harm" because the plaintiffs could not show that there was a risk that the confidential information would be exchanged given the "comprehensive screening" employed by the law firm, that plaintiffs could seek protective orders from the court, and that the plaintiffs delayed filing for disqualification for months after filing suit.[444] The district court found that the "harm to others" tilted in favor of the attorney because of his unique expertise and longstanding client

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questionnaires contain only unprivileged identification information, and there is no indication that the responses were intended to remain confidential.").

437. *Id.* at *8 (recognizing that the EEOC waived the work-product doctrine by producing the text of the letter sent to prospective class members and three completed questionnaires from those declining to participate, and in the alternative that the questionnaires only revealed information as to name, age, and location).

438. 639 F. Supp.2d 790 (E.D. Mich. 2009).

439. For a general background of the dispute, *see* CenTra, Inc. v. Estrin, 538 F.3d 402 (6th Cir. 2008).

440. *CenTra*, 639 F. Supp.2d at 794.

441. *Id.* The district court rejected the plaintiff's further contention that work performed by the law firm in the 1980s and 1990s was related to the second span controversy. *Id.* at 795-97 n. 3.

442. *Id.* at 808-15.

443. *Id.*

444. *Id.* at 815-16.

relationship with Windsor.[445] Finally, it found that a preliminary injunction would best serve the public interest by not depriving Windsor of the counsel of its choice.[446]

In *MJK Family L.L.C. v. Corporate Eagle Management Services, Inc.*,[447] the district court refused to disqualify defense counsel on the basis of alleged past representation and the possibility that one of the defendant's attorneys would be a necessary witness at trial.[448] The plaintiffs were members of an L.L.C.,[449] and the defense counsel had represented the L.L.C. itself during the events leading up to the lawsuit.[450] The plaintiffs contended that: (1) even if a "specifically identifiable impropriety" did not exist, representation would create the "appearance of impropriety"; and (2) the members of the company reasonably believed they were being represented by counsel.[451] First, the district court noted that the ABA had abandoned the "appearance of impropriety" doctrine,[452] and the Michigan Supreme Court refused to adopt it.[453] Second, the district court found that defense counsel only represented the entity, and the individual members could not reasonably believe that defense counsel represented them individually.[454] Third, the district court found that the defense firm was not acting as an "intermediary" under Rule 2.2 as a participant at board meetings because it clearly acted as the entity's attorney.[455] Finally, the district court noted that although one of defendant's attorneys may be called as a "necessary witness" at trial, Rule 3.7(a)[456] only required disqualification of the attorney at trial, and not the entire firm.[457]

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445. *Id.* at 817-18.

446. *CenTra*, 639 F. Supp.2d at 818.

447. 676 F. Supp.2d 584 (E.D. Mich. 2009).

448. *Id.* at 586, 601-02.

449. *Id.* at 586.

450. *Id.* at 586-90.

451. *Id.* at 593.

452. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. 5 (pre-2002)).

453. *MJK Family*, 676 F. Supp.2d at 593-94 (citing Smith v. Arc-Mation, Inc., 402 Mich. 115, 117-19 (1976)).

454. *MJK Family*, 676 F. Supp.2d at 594-97. The district court quoted the five-factor test for determining whether the attorney-client relationship attached between corporate counsel and an individual. *Id.* at 594 (citing In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986)). The district court further relied upon MRPC 1.13 in finding that the attorney's representation for the entity remains distinct from representation of individual directors or employees, and that there was no indication that there was any "consent" to dual representation under Rule 1.17. *MJK Family*, 676 F. Supp.2d at 595. The district court further found no factual support for any reasonable belief that defense counsel also represented individual members. *See id.* at 595-99.

455. *MJK Family*, 676 F. Supp.2d at 599-600.

456. Rule 3.7 states:

In *Shaw v. London Carrier, Inc.*,[458] the magistrate judge disqualified the plaintiff's counsel and law firm under Michigan Rules of Professional Conduct 1.9(a)[459] and 1.10(b).[460] As a result of an accident with a driver of a tractor-trailer, one of the plaintiffs had died, and two others were injured.[461] The plaintiff sued the owner of the tractor, the driver, and the owner of the trailer.[462] During the course of the suit, one of the attorneys for the trailer company left his firm for the plaintiff's firm.[463] Although the plaintiff's firm notified its attorneys of potential conflicts, the firm did not inform the court in the pending lawsuit of the attorney's change of firms.[464] The trailer company moved to disqualify the plaintiff's firm on the basis of Rules 1.9(a) and 1.10(b).[465] The magistrate judge held that Rule 1.9(a) mandated the disqualification of the attorney.[466] The district court found that the plaintiff's firm had complied with Rule 1.10(b)(1) by screening the attorney from the matter and not sharing with him any portion of the fee potentially earned.[467]

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

MICH. RULES OF PROF'L CONDUCT R. 3.7(a).

457. *MJK Family*, 676 F. Supp.2d at 600 (citing Dalrymple v. Nat'l Bank & Trust Co. of Traverse City, 615 F. Supp. 979, 990 (W.D. Mich. 1985)).

458. No. 1:08-CV-401, 2009 WL 4261168 (E.D. Mich. Nov. 24, 2009) *objections overruled* by, 2010 WL 748217 (E.D. Mich. Mar. 1, 2010).

459. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." MICH. RULES OF PROF'L CONDUCT R. 1.9(a).

460. Rule 1.10(b) states:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, is disqualified under Rule 1.9(b), unless: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

MICH. RULES OF PROF'L CONDUCT R. 1.10(b).

461. *Shaw*, 2009 WL 4261168, at *1.

462. *Id.*

463. *Id.* at *2.

464. *Id.*

465. First Choice Carrier's Motion to Disqualify the Law Firm of Fieger Fieger Kenny Johnson & Giroux PC, Shaw v. London Carrier, Inc. (W.D. Mich. 2009) (No. 108CV00401), 2009 WL 5002897.

466. *Shaw*, 2009 WL 4261168, at *4.

467. *Id.* at *5.

However, the magistrate judge disqualified the plaintiff's firm for not promptly informing the tribunal of the switch under Rule 1.10(b)(2).[468]

In *Factory Mutual Insurance Co. v. APComPower, Inc.*,[469] the district court refused to disqualify the defendant's counsel and his firm under Rule 1.9 due to contact with a prospective client.[470] The district court first noted that Michigan did not have an equivalent of ABA Model Rule 1.18,[471] addressing an attorney's duties to prospective clients.[472] The district court deemed that a motion to disqualify based upon prospective client contact "should be analyzed the same as a motion to disqualify pursuant to a former client relationship, with the additional requirement that the lawyer receive information that could be 'significantly harmful,' rather than merely confidential as required by the

468. *Id.* at *5-9. The magistrate judge relied upon several previous federal decisions strictly applying Rule 1.10(b)(2). *See* Nat'l Union Fire Ins. Co. of Pittsburgh v. Alticor, 472 F.3d 436 (6th Cir. 2007); Cobb Publ'g, Inc. v. Hearst Corp., 891 F. Supp. 388 (E.D. Mich. 1995); Faith Baptist Church v. Waterford Twp., No. 08-11028, 2009 WL 3756891 (E.D. Mich. Nov. 6, 2009) (disqualifying the defendant's law firm based on the failure of the transferring associate to comply with MRPC 1.10(b)(2)).

469. 662 F. Supp.2d 898 (W.D. Mich. 2009).

470. *Id.* at 896.

471. ABA Model Rule 1.18 provides:

> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (ii) written notice is promptly given to the prospective client.

472. *APComPower*, 662 F. Supp.2d at 899.

Sixth Circuit's three-prong *Dana Corp.* test."[473] Although the district court found that the plaintiffs' attorney received "significantly harmful" information from the defendant's insurer,[474] it ultimately held that the defendant's insurer had waived that conflict through its actions and that the insurer's waiver was binding on the defendant.[475]

In *Innovation Ventures, Inc. v. N2G Distributing, Inc.*,[476] the district court disqualified the defendant's law firm under Rules 1.9 and 1.10 on the basis that the same law firm had recently helped the plaintiff to file several patent applications involving the same product at issue in the litigation.[477] The defendant's law firm had terminated the relationship with the plaintiff only a year beforehand.[478] Although the case involved a trade dress claim, and not the patent claim, the district court nevertheless disqualified the law firm because the case "involve[d] the very same product" and there was no screening of the previously-involved attorneys from the case.[479]

c. Withdrawal of Representation

In *Davis v. State Farm Fire & Casualty Co.*,[480] the U.S. Court of Appeals for the Sixth Circuit reversed a district court decision denying the plaintiff's attorney's motion to withdraw pursuant to Michigan Rules of Professional Conduct 1.16(b)[481] and 3.3(b).[482] The underlying dispute

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473. *Id.* at 900 (citing Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 889 (6th Cir. 1990)).

474. *Id.* at 901.

475. *Id.* at 901-03

476. No. 08-10983, 2009 WL 2381836 (E.D. Mich. July 31, 2009).

477. *See id.*

478. *See id.* at *1.

479. *Id.* at *2; *see also* Gen. Elec. Co. v. Valeron Corp., 608 F.2d 265, 266-67 (6th Cir. 1979).

480. 351 F. App'x 990 (6th Cir. 2009) (unpublished).

481. Rule 1.16(b) states:

> [E]xcept as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud; (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (6) other good cause for withdrawal exists.

MICH. RULES OF PROF'L CONDUCT R. 1.16(b).

involved a house fire where the insurance company accused the plaintiff of committing arson.[483] After several depositions, the plaintiff's attorney moved to withdraw for refusal to offer evidence that she knew to be false.[484] The Sixth Circuit found that the attorney had acted "promptly" in moving to withdraw and that trial was six months away at the time of filing.[485]

d. Communication with Former Employees of an Adversary

In *Clemons v. City of Detroit*,[486] the district court refused to disqualify the plaintiff's counsel for conducting an ex parte interview with the defendant's managerial employee in the context of an employment discrimination suit.[487] Under Michigan Rule of Professional Conduct 4.2, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party with whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[488] Although the text of Rule 4.2 does not address attorney communications with former employees, the district court noted that both the comment to Model Rule of Professional Conduct 7, the ABA formal opinions, and a majority of other courts had taken the position that Rule 4.2 does not extend to communications with former employees.[489] At the same time, the district court acknowledged that a minority of courts have applied Rule 4.2 to situations where "the former employee was a member of an organization's management or control group, or where the former employee had privileged or confidential information, or where the conduct of the former employee could have been imputed to the employer."[490] The district court refused to disqualify the plaintiff's

482. *Davis*, 351 F. App'x at 991. "The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." MICH. RULES OF PROF'L CONDUCT R. 3.3(b).

483. *Davis*, 351 F. App'x at 990.

484. *Id.* at 990-91.

485. *Id.* at 991.

486. No. 09-13480, 2010 WL 2089361 (E.D. Mich. May 24, 2010).

487. *See id.*

488. *Id.* at *1.

489. *Id.* at *2 (citing Vallasis v. Samelson, 143 F.R.D. 118, 122 (E.D. Mich. 1992)).

490. *Clemons*, 2010 WL 2089361, at *2 (citing Serrano v. Cintas Corp., No. 04-40132, 2009 WL 5171802, at *2-3 (E.D. Mich. Dec. 23, 2009)). In *Serrano*, the magistrate judge conditionally granted in part the Equal Opportunity Employment Commission's ("EEOC") request to conduct ex parte interviews with the defendant's employees. *Serrano*, 2009 WL 5171802, at *1. The EEOC, as intervenors in a lawsuit, requested

counsel because neither party had alleged that the employee possessed any confidential information or otherwise had any personal involvement in the decision to hire or to terminate the plaintiff.[491]

In *Fuhr v. School District of the City of Hazel Park*,[492] the magistrate judge found that the plaintiff's attorney had improperly circumvented Rule 4.2 by contacting the defendant's employees via an intermediary.[493] The underlying case involved a discrimination claim brought by a sports coach against a school district.[494] The plaintiff's attorney referred the plaintiff to contact a company that checked employment references.[495] The company then conducted telephone interviews with employees of the school district about the plaintiff's performance.[496] The company then forwarded written reports of these interviews to the plaintiff's counsel, who then used these reports in connection with the litigation.[497] Although the magistrate judge ultimately did not disqualify the plaintiff's counsel or refer her to the Attorney Grievance Commission, he concluded that the plaintiff's counsel "proposed her client's utilization of [the company] to contact Defendant's high level administrators for the purpose of developing evidence to buttress and expand the claims in this action"[498] and found "the indirect method of contact recommended . . . is equally violative of MRPR 4.2."[499]

3. Ineffective Assistance of Counsel

In *United States v. Herrera-Zuniga*,[500] the U.S. Court of Appeals for the Sixth Circuit addressed a highly unusual situation wherein an

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permission from the magistrate judge to interview certain of the defendant's former employees "who made, or may have made, hiring decisions on behalf of" the defendant. *Id.* The defendant objected to this request on the basis of Rule 4.2. *Id.* After surveying relevant case law, the magistrate judge decided to permit the EEOC to initiate ex parte communications with the defendant's former decision makers, upon the conditions that counsel: (1) identify him/herself as such; (2) determine whether the former employee is still affiliated with the defendant; (3) advise the potential witness that the interview is not mandatory; (4) did not attempt to solicit confidential and/or privileged information, and advise the former employee not to disclose such; and (5) create a list of the interviewees and notes of the interviews to be provided to the defendant's counsel. *See generally id.*

491. *Clemons*, 2010 WL 2089361, at *2.

492. No. 08-11652, 2009 WL 3834017 (E.D. Mich. Nov. 16, 2009).

493. *Id.* at *1.

494. *Id.*

495. *Id.*

496. *Id.* at *2.

497. *Id.* at *2.

498. *Fuhr*, 2009 WL 3834017, at *4.

499. *Id.*

500. 571 F.3d 568 (6th Cir. 2009).

assistant federal public defender attached what appeared to be a lengthy invective against his own client to a sentencing memorandum to the district court.[501] The defendant pleaded guilty to illegally reentering the United States after a previous deportation.[502] The defendant had an extensive criminal history both in the United States and in Mexico involving alcohol-related offenses.[503] The assistant federal public defender submitted a sentencing memorandum that both failed to address any of the 18 U.S.C. section 3553(a) factors, mitigating factors such as the defendant's return to the country to support his family and his sick daughter, and the suggestion that the defendant's criminal history score underrepresented the serious of his previous offenses.[504] Instead, the defendant's attorney purposefully attached a copy of a letter he sent the defendant, that read "more like an argument by the prosecutor in favor of a harsher sentence than it does an argument by the defense[.]"[505] The court recounted the letter as follows:

> My duty now is to try to write a sentencing memorandum on your behalf. I knew this day was coming and I knew it would be a difficult task, but for the first time in my two and a half years of service to the Defenders Office, I must admit that I am completely stymied (i.e., without a place to go). *There is not one thing about your situation that lends itself to a positive thought,* save that you have a good work history.
>
> You are clearly an alcoholic with either no ability or desire to quit drinking, for, surely if you wanted to or could, you would at least do so as a means of staying in this country. . . . At some point either you will stop consuming alcohol on your own, or you will develop cirrhosis of the liver and *you will die a slow, painful, horrible death.* And then you will be done drinking for sure.
>
> The problem is that for the rest of society, in the meantime, before you stop drinking, one way or another, you will continue to drink alcohol to excess and then drive motor vehicles. You have five convictions for drunk driving. By the grace of God, you have not been involved in a serious accident. Unfortunately,

501. *Id.* at 575.
502. *Id.* at 572-73.
503. *Id.* at 573.
504. *Id.* at 574.
505. *Id.* at 575.

it is only by that divine intervention that that is the case. And every time you take the wheel either impaired or completely inebriated, you defy the odds. *It is only a matter of time before you kill or seriously injure yourself (perhaps that is your goal). The concern for the court, I, and the rest of society is that you are more likely to kill, maim, or injure some innocent driver or passenger in another vehicle or a bystander.* There would be no recovery for that victim or family. *There would be no mercy for you.*

And then there is the overriding problem to all of this. You are not supposed to be in this country in any event. I am not talking about just coming here without documentation to earn a living that you could not earn in Mexico. I am talking about the ordered deportation of you on at least two occasions.

I am truly at a loss to figure out how to explain to Chief Judge Bell that somehow or in some manner, he should not treat you most severely. Perhaps before the 11th of April you will have formulated some statement or some explanation (that has completely escaped me) in the face of these facts. *Your action returning to the U.S. in 2007 was wrong. Your drinking and driving upon that return (and to return to this district as well) is just plain stupid.*

I am sorry to be so blunt, but I have to honest with you, your case has left me without an expressible empathy. For this I am sorry because *it leaves me almost unable to advocate on your behalf.* (I say "almost" because as you are one of God's creatures, any person can advocate for mercy or lenience premised upon your basic humanity. But that job is a tough one, made ever more so by your conduct.

* * *

[Y]ou are certainly at the bottom of society's hierarchy, [and] you have done very little on your own behalf to be anywhere but there.

* * *

> There simply is not a great deal of hope and optimism to be found here. My verbal statement to the Court will be equally limited.[506]

Although the U.S. Court of Appeals for the Sixth Circuit ultimately affirmed that the district court's sentence, it found, on its own initiative, that the "strategy" of including the letter was "highly questionable [and] ... highly unprofessional."[507] Not only did the defendant's counsel "fail[] to raise any § 3553(a) factors," his statements "raise[d] serious concerns that [counsel] failed to fulfill his duty to advocate on his client's behalf."[508] The Sixth Circuit noted that defense counsel's actions "may have rendered constitutionally ineffective assistance [of counsel] ...because [his] letter essentially argued *against* his client's interests[.]"[509] The court then indicated that the defendant should consult the opinion so that the defendant could evaluate his options in seeking habeas relief.[510]

In *Williams v. Birkett*,[511] the district court granted the petitioner an unconditional writ of habeas corpus arising from imprisonment after a revocation of parole based on "the egregious nature and number of the constitutional violations ranging from: no notice of charges, no notice of right to hearing, no hearing, no allowance of Petitioner's right to speak, absence of meaningful counsel and ineffective assistance of counsel."[512] The petitioner originally pleaded guilty to armed robbery in Wayne County Circuit Court, and was sentenced to probation under the Holmes Youthful Trainee Act conditioned on the completion of a "boot camp" program.[513] After being accused of violating the terms of boot camp, the petitioner was assigned an attorney the morning of his hearing who met with him in the "bullpen," and only spoke with him for about "fifteen seconds to about five minutes."[514] The attorney testified that he was unaware that the petitioner had a right to a full revocation hearing and was unaware that he had "special education needs."[515] After a spirited

506. *Herrera-Zuniga*, 571 F.3d at 575-76.
507. *Id.* at 591.
508. *Id.* 591-92 (citing Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974)).
509. *Id.* at 592.
510. *Id.* at 592-93.
511. 697 F. Supp.2d 716 (E.D. Mich. 2010).
512. *Id.* at 718.
513. *Id.*
514. *Id.* at 720-21.
515. *Id.* at 721.

colloquy with the petitioner on the record, the state court sentenced the petitioner to one to fifteen years.[516]

The district court agreed with the magistrate judge that the petitioner was denied effective assistance of counsel when his attorney failed to request a written notice of the charges, failed to inform the petitioner that he had a right to a hearing and likewise failed to obtain voluntary waiver of such right and furthermore to investigate the allegations.[517] The district court emphasized that the brief meeting the morning of the hearing amounted to a "constructive denial of counsel."[518] The district court further criticized the Wayne County Circuit Court's practice of assigning defense counsel shortly before a probation hearing as constituting "a state impediment to effective assistance of counsel."[519] Furthermore, the

> structure, whereby counsel must represent a client in front of the very judge to whom he is beholden for his court appointed assignments, 'clearly provides counsel an incentive to encourage the defendant' to plead guilty to the probation violation immediately, 'and a disincentive to seek more time to investigate and seriously weigh the merits of a defendant's case.'[520]

Finally, the district court found that the state court had "predetermined the outcome of the proceedings" and failed to inform the petitioner of his right to hearing or weighed any relevant considerations of safety of the community and rehabilitation.[521]

4. Sanctions

In *Huntsman v. Perry Local Schools Board of Education*,[522] the U.S. Court of Appeals for the Sixth Circuit upheld the district court's decision to award sanctions under Federal Rule of Civil Procedure 11 where the "complaint . . . was . . . clearly barred by the statute of limitations and by res judicata."[523] The plaintiff had previously brought two state-court suits

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516. *Id.* at 719.

517. *Williams*, 697 F. Supp.2d at 723-25.

518. *Id.* at 725 (citing Moss v. Hofbauer, 286 F.3d 851, 860 (6th Cir. 2002) (quoting United States v. Cronic, 466 U.S. 648, 659 (1984))).

519. *Williams*, 697 F. Supp.2d at 726 (quoting United States v. Morris, 470 F.3d 596, 601-02 (6th Cir. 2006)).

520. *Williams*, 697 F. Supp.2d at 727 (quoting *Morris*, 470 F.3d at 601 n.4).

521. *Williams*, 697 F. Supp.2d at 727 (internal quotations and citation omitted).

522. 379 F. App'x 456 (6th Cir. 2010).

523. *Id.* at 458.

arising from his termination as a public school teacher, with the first being voluntarily dismissed without prejudice and the second litigated through the Ohio appellate courts.[524] The plaintiff then refiled the case in federal court in Ohio, where the district court dismissed it on res judicata, statute of limitations, and failure to state a claim grounds, and sanctioned plaintiff's attorney under Rule 11.[525] On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision to dismiss the case and sanction the plaintiff's attorney,[526] and it further imposed appellate sanctions against the attorney under Federal Rule of Appellate Procedure 38 for pursuing the frivolous appeal until he withdrew after the conclusion of mediation efforts.[527] The Sixth Circuit refused to sanction the plaintiff himself because of "the relative lack of sophistication of a *pro se* litigant like [the appellant]."[528]

In *Hall v. Liberty Life Assurance Co. of Boston*,[529] an ERISA case, the U.S. Court of Appeals for the Sixth Circuit remanded the issue of the denial of attorney's fees under 28 U.S.C. section 1927.[530] The underlying case involved an ERISA plan's decision to terminate long-term disability benefits and to seek partial reimbursement from Social Security funds disbursed to the plaintiff.[531] During the course of the case, the plaintiff's attorney filed repeated "meritless" motions in an effort to reestablish the plaintiff's benefits.[532] Although the district court found that the ERISA plan "ha[d] been forced to spend an inordinate amount of time and money defending against repeated meritless motions filed by [the plaintiff] in an attempt to have a second, third, or further bite at the apple in the litigation of her benefits claim," it nevertheless refused to award attorney fees under section 1927 because of the "[p]laintiff's purported financial situation."[533] The U.S. Court of Appeals for the Sixth Circuit found that the plaintiff's financial status was irrelevant to whether the attorney should be sanctioned under § 1927 and remanded that issue.[534]

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524. *Id.* at 459.
525. *See id.*
526. *Id.* at 464.
527. *Id.*
528. *Huntsman*, 379 F. App'x at 464.
529. 595 F.3d 270 (6th Cir. 2010).
530. *Id.* at 272. "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Id.* at 276 (quoting 28 U.S.C. § 1927).
531. *Id.* at 272-73.
532. *Id.* at 273.
533. *Id.* at 276.
534. *Id.*

In *Uszak v. Yellow Transportation, Inc.*,[535] a case involving a Labor Management Relations Act claim for wrongful termination, the Sixth Circuit reversed the district court's decision to impose Rule 11 sanctions because the defendants failed to present the motion to the plaintiff's attorney at least twenty-one days before filing the motion with the district court.[536]

In *Issa v. Provident Funding Group, Inc.*,[537] the district court imposed § 1927 sanctions in the form of attorney fees against a law firm that had filed more than ninety nearly identical cases arising from mortgage foreclosures.[538] The district court further found that the plaintiff's counsel had made no attempt to distinguish multiple prior adverse decisions regarding the same arguments.[539]

In *Dearborn Street Building Associates v. D&T Land Holdings, LLC*,[540] the magistrate judge sanctioned the plaintiff's attorney for failing to perform an adequate investigation whether he could assert a Uniform Fraudulent Transfer Act[541] claim against a financial institution with a prior lien. The magistrate judge imposed sanc"tions under Rule 11 because the plaintiff's contention that the financial institution was a "necessary party" was unsupported by Michigan law,[542] that the plaintiff failed to conduct discovery on whether he had a claim against the financial institution,[543] and then failed to file a response to its motion for summary judgment.[544]

In *Essroc Cement Corp. v. CPRIN, Inc.*,[545] the district court granted Rule 11 and section 1927 sanctions against the plaintiff's claims of promissory estoppel and fraudulent misrepresentation against a defendant law firm "were utterly meritless."[546]

In *King v. IB Property Holdings Acquisition*,[547] the magistrate judge recommended, and the district court subsequently adopted, the dismissal of the *pro se* plaintiff's complaint as a sanction for violating Rule 11

535. 343 F. App'x 102 (6th Cir. 2009).
536. *Id.* at 107-08 (citing FED. R. CIV. P. 11(c)(2)).
537. No. 09-12595, 2010 WL 3245408 (E.D. Mich. Aug. 17, 2010).
538. *Id.* at *5.
539. *Id.* at *1.
540. No. 1:07-CV-1056, 2009 WL 3234133 (W.D. Mich. Sept. 30, 2009), *aff'd in part, rev'd in part*, No. 09-2414, 2011 WL 558392 (6th Cir. 2011).
541. MICH. COMP. LAWS ANN. § 566.31-.43 (West 2010).
542. *Dearborn*, 2009 WL 3234133, at *2.
543. *Id.* at *6.
544. *Id.*
545. No. 1:08-CV-974, 2009 WL 2033052 (W.D. Mich. July 9, 2009).
546. *Id.* at *21.
547. 635 F. Supp. 651 (E.D. Mich. 2009).

because the plaintiff misrepresented to the court the identity of the actual holder of the mortgage which formed the basis for the complaint.[548]

5. Civil Liability for Attorneys

a. Absolute Prosecutorial Immunity

In *Koubriti v. Convertino*,[549] the U.S. Court of Appeals for the Sixth Circuit held that the doctrine of absolute prosecutorial immunity barred *Bivens* claims based upon failure to disclose material evidence against a former assistant U.S. attorney ("AUSA").[550] Shortly after the 9/11 attacks, the FBI searched a house occupied by several men and found false identity documents, audio tapes featuring fundamentalist Islamic teachings, and pictures of American landmarks.[551] The men were eventually indicted for false identification and/or immigration documents and later for conspiracy to provide material support for terrorists.[552] After a jury convicted the men of several of the charges, the defendants filed a motion for a new trial claiming the government had suppressed pertinent material evidence in violation of *Brady v. Maryland*.[553] The government eventually disclosed numerous additional documents not previously turned over to the defendants.[554] The district court then dismissed the terrorism charges without prejudice and ordered a new trial as to a fraud count.[555]

The AUSA in charge of the case was subsequently indicted and tried for obstruction of justice and making various false declarations.[556] A jury acquitted him on all counts.[557] One of the defendants then brought a civil *Bivens* action against the former AUSA predicated upon various *Brady* violations including the failure to disclose the fact that the government could not identify any of the sites in Jordan allegedly represented in several sketches and that the former AUSA purposefully instructed agents not to take notes at a meeting with a crucial prosecution witness to hinder potential cross-examination.[558] The former AUSA brought a

548. *Id.* at 660-62.
549. 593 F.3d 459 (6th Cir. 2010).
550. *Id.* at 461-62.
551. *Id.* at 462.
552. *Id.*
553. *Id.* at 462-63 (citing Brady v. Maryland, 373 U.S. 83 (1963)).
554. *Id.* at 463.
555. *Koubriti*, 593 F.3d at 464.
556. *Id.*
557. *Id.*
558. *Id.* at 465

motion to dismiss, partly on prosecutorial immunity,[559] and the district court permitted those two claims to go forward.[560]

The U.S. Court of Appeals for the Sixth Circuit reversed, finding absolute prosecutorial immunity barred both claims.[561] Regarding the failure to disclose the lack of consensus among government officials as to the photos, it found that *Imbler v. Pachtman*[562] and *Jones v. Shankland*[563] prevent claims based upon the non-disclosure of exculpatory evidence.[564] Addressing the claim regarding the instruction to the agents not to take notes during the interview, the court applied the traditional qualified immunity analysis and concluded that it was not "clearly established" that such actions were unconstitutional.[565]

b. Defamation

In *Park West Galleries, Inc. v. Hochman*,[566] the district court denied the attorney counter-defendants' motion to dismiss a defamation claim because the alleged statements were not covered by the "litigation privilege."[567] The plaintiff art gallery sued the defendants over some allegedly defamatory statements involving the gallery's business practices.[568] The defendants counterclaimed for defamation, including statements allegedly made by the gallery's attorneys.[569] The "litigation privilege" states that "[s]tatements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issues being tried."[570] The district court concluded that the attorneys' statements "ha[d] nothing to do with the present litigation, nor are they related to any other action which had been filed in any court."[571] The district court denied the motion to dismiss as to one of the attorneys because his non-privileged statements "could be interpreted as defamatory."[572]

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559. *Id.*
560. *Id.*
561. *Koubriti*, 593 F.3d at 472.
562. 424 U.S. 409 (1976).
563. 800 F.2d 77 (6th Cir. 1986).
564. *Koubriti*, 593 F.3d at 466-69.
565. *Id.* at 469-72.
566. Nos. 08-12247 & 08-12274, 2009 WL 5151315 (E.D. Mich. Dec. 17, 2009).
567. *Id.* at *4-5.
568. *Id.* at *1.
569. *Id.*
570. *Id.* at *3 (quoting Oesterle v. Wallace, 272 Mich. App. 260, 264 (2006)).
571. *Park West*, 2009 WL 5151315, at *4.
572. *Id.* at *5.

IV. MAJOR DISCIPLINARY ACTIONS AGAINST MICHIGAN LAWYERS AND JUDGES

A. Attorney Discipline

1. Attorney David Gorcyca

In *Grievance Administrator v. Gorcyca*,[573] the Michigan Attorney Discipline Board ("ADB")[574] considered whether now-former Oakland County Prosecuting Attorney David Gorcyca committed professional misconduct by publicly accusing and condemning James Perry, a teacher who had been charged with criminal sexual conduct.[575] The local hearing panel had dismissed the formal complaint, finding that it was beyond genuine factual dispute that Gorcyca had not committed professional misconduct and that "no objective person could conclude that [Gorcyca's] statements had a substantial likelihood of materially prejudicing Perry's retrial."[576] However, the ADB reversed the decision of the local hearing panel and reinstated the complaint. The ADB began by noting that, under MRPC 3.6, "[A] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[577] The ADB disagreed with the local hearing panel's determination that no reasonable person could conclude that Gorcyca's statements would prejudice the outcome of Perry's retrial.[578] The ADB noted that although MRPC 3.6 "requires a showing of substantial likelihood of prejudice,"[579] an attorney "may still be in violation of the rule if events unfold in a manner such that this prejudice does not in fact occur or cannot be proven."[580] Moreover, the ADB observed that "a lawyer's good faith subjective

573. No. 08-000037-GA (Mich. Att'y Discipline Bd. October 30, 2009) *available at* http://www.adbmich.org/coveo/opinions/2009-10-30-08o-37.pdf#search=%22opinion%22.

574. For additional information concerning the procedures of the Attorney Discipline Board, *see generally* Nicholas C. Krieger & Davidde A. Stella, *Professional Responsibility, 2009 Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 497, 544-45 (2009).

575. *Gorcyca*, No. 08-000037-GA, at 1.

576. *Id.* at 1-2.

577. *Id.* at 1 (quoting MICH. RULES OF PROF'L CONDUCT R. 3.6).

578. *Id.* at 2.

579. *Id.* (citing Maldanado v. Ford Motor Co., 476 Mich. 372, 402 (2006)).

580. *Gorcyca*, No. 08-000037-GA, at 2.

belief that prejudice probably will not occur may be unreasonable and thus afford no defense under MRPC 3.6."[581]

In the case under consideration, Perry's first trial had resulted in a deadlocked jury, and a second trial had not yet been ordered. The ADB noted that some of Gorcyca's statements about Perry "refer[ed] to inadmissible evidence" and that another of Gorcyca's remarks "referr[ed] to the accused's refusal to take a polygraph examination[.]"[582] In sum, the ADB concluded that there remained a genuine issue of material fact concerning "whether [Gorcyca] reasonably should have known that the statements had a substantial likelihood of materially prejudicing" Perry's retrial.[583] Because it was possible that the grievance administrator would be able to develop sufficient proofs to establish professional misconduct by Gorcyca, the ADB remanded the matter for further proceedings.[584]

2. Attorney Murdoch Hertzog

In *Grievance Administrator v. Hertzog*,[585] the ADB affirmed the local hearing panel's determination that attorney Murdoch Hertzog had committed sanctionable misconduct, but increased the discipline imposed by the local hearing panel to suspension from the practice of law for 180 days.[586] In 2001, Hertzog appeared before the Macomb County Circuit Court and pleaded guilty to a misdemeanor charge of assault and battery[587] in exchange for the dismissal of a charge that he had sexually assaulted a former female client.[588] The assault and battery conviction "was not reported to the Grievance Administrator or the [ADB] at that time."[589] It was apparently agreed at the time that Hertzog's conviction would be expunged after a five-year period.[590]

In 2004, a former client filed a grievance against Hertzog.[591] "As part of his investigation [of the complaint], the [Grievance] Administrator sent a . . . letter to [Hertzog] which requested a full and fair statement concerning the events upon which the 2001 [misdemeanor] conviction

581. *Id.*
582. *Id.* at 3.
583. *Id.*
584. *Id.*
585. Nos. 06-000076-JC; 06-000077-GA (Mich. Att'y Discipline Bd. November 23, 2009) *available at* http://www.adbmich.org/coveo/opinions/2009-11-23-06o-76.pdf#search=%22opinion%22.
586. *Id.* at 1.
587. MICH. COMP. LAWS ANN. § 750.81
588. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 1-2.
589. *Id.* at 2.
590. *Id.*
591. *Id.*

was based."[592] The grievance administrator also asked Hertzog to explain why he had failed to report his 2001 misdemeanor conviction to the appropriate authorities or on his State Bar of Michigan dues statement.[593]

In his reply to the grievance administrator's letter, Hertzog misrepresented the facts and circumstances surrounding his 2001 conviction, stating that he had merely pleaded guilty to a charge of simple assault and that his plea had been made "under advisement."[594] Hertzog explained that he had not reported the guilty plea because he "assum[ed] that the prosecutor's office had reported the conviction" and because "in view of the expungement agreement and the plea taken under advisement, he believed that no further reporting . . . was necessary."[595]

The grievance administrator thereafter filed a formal complaint against Hertzog, alleging that Hertzog had committed professional misconduct by failing to report his conviction to the Grievance Administrator and the ADB, as well as on his State Bar dues statement.[596] The administrator further alleged that Hertzog had made a false statement when he explained that his plea had been taken "under advisement," and that Hertzog had engaged in misconduct during the representation of the former client who initiated the grievance.[597] Hertzog had apparently told the former client "that she should not worry about his legal fees because the balance could be paid" through sexual favors.[598]

In July 2006, the Macomb County Circuit Court set aside Hertzog's plea-based conviction.[599] Therefore, "[i]n his answer to the formal complaint," Hertzog stated that "he had no criminal conviction because his 2001 conviction had been set aside[.]"[600] In addition, Hertzog explained that "he had mistakenly believed his guilty plea had been taken under advisement."[601] Hertzog pleaded no contest to the grievance administrator's allegations that he had failed to properly report his 2001 misdemeanor conviction.[602] In November 2006, "the Grievance

592. *Id.*
593. *Id.*
594. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 2.
595. *Id.*
596. *Id.*
597. *Id.*
598. *Id.*
599. *Id.* at 3.
600. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 3.
601. *Id.*
602. *Id.*

Administrator filed a notice of intent to offer MRE 404(b)[603] evidence consisting of the testimony of one Sandra B regarding 'an additional act by [Hertzog] of sexual assault of a female law client.'"[604] "The [Grievance] Administrator then filed a second notice of intent to offer MRE 404(b)[605] evidence consisting of [testimony concerning] an additional act by [Hertzog] of remarking to a vulnerable female client in a domestic matter that she could pay his fees on his 'couch of restitution.'"[606]

The local hearing panel determined that Hertzog had committed professional misconduct by failing to provide notice of his 2001 plea-based conviction of assault and battery and by failing to disclose the conviction on his 2003-2004, 2004-2005, and 2005-2006 State Bar of Michigan dues statements.[607] The panel specifically noted that "the setting aside of [Hertzog's] conviction did not preclude subsequent disciplinary proceedings against him."[608] The local hearing panel also found that Hertzog had lied when he informed the Grievance Administrator that his plea had been taken "under advisement"; according to the panel, "there was 'absolutely no basis' upon which [Hertzog] could have formed such a belief, especially in light of his extensive legal experience."[609]

In a subsequent opinion, the local hearing panel also approved the Grievance Administrator's request to present other-acts evidence under MRE 404(b) concerning Hertzog's past sexual improprieties with female clients.[610] Over the course of several months, numerous hearings were held at which the Grievance Administrator presented the testimony of former clients and other witnesses who had knowledge of Hertzog's sexual harassment, inappropriate sexual remarks, and sexual misconduct.[611] This extensive testimony revealed that Herzog had made unwanted advances on female clients, groped and inappropriately touched female clients, spoke profanely with female clients regarding matters of a sexual nature, and promised various female clients that they could pay his legal fees by providing him sexual favors.[612] Herzog's legal secretary then testified that "she had never seen [Hertzog] touch

603. MICH. R. EVID. 404(b) (2001).
604. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 3.
605. MICH. R. EVID. 404(b).
606. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 3.
607. *Id.* at 3-4.
608. *Id.* at 3.
609. *Id.*
610. *Id.* at 4.
611. *See id.* at 4-5.
612. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 4-5.

[one of the former clients] except for the times [Hertzog] patted her on her shoulder[.]"[613] Hertzog, himself, denied all allegations of sexual improprieties.[614] He testified that "he offered a plea of guilty to the assault charge in 2001 even though he was innocent, because he feared that a jury would be unpredictable."[615]

The local hearing panel found "that [Hertzog's] testimony was 'considerably less than credible' and that the testimony of . . . the . . . witnesses presented by the [Grievance] Administrator was 'most worthy of belief.'"[616] The panel determined that the reported sexual improprieties constituted additional instances of professional misconduct under MCR 9.104(A)(2) and (3)[617] and "issued [an] order suspending [Hertzog's] license to practice law for a period of 120 days."[618]

On appeal, the ADB first concluded that it was appropriate for the local hearing panel to consider Hertzog's 2001 conviction as a basis for discipline even though it was set aside in 2006.[619] Hertzog argued that because his 2001 conviction had been expunged, the hearing panel was without authority to consider it as a basis for imposing discipline.[620] In support of his argument, he cited MCLA section 780.622(1), which provides that "[u]pon the entry of an order [setting aside a conviction], the applicant, for purposes of the law, shall be considered not to have been previously convicted, except as provided in this section and section 3."[621] However, the ADB noted that one of the exceptions to this general rule, contained in MCLA section 780.623(2)(a), "allows an agency of the judicial branch of state government to have access to the nonpublic record of the expunged conviction for purposes of '[c]onsideration in a licensing function.'"[622] In light of this exception, the ADB concluded that "consideration of [Hertzog's] criminal conviction by a hearing panel

613. *Id.* at 6.

614. *Id.*

615. *Id.*

616. *Id.*

617. Certain "acts or omissions by an attorney" constitute "misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship," including "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach," MICH. CT. R. 9.104(A)(2), and "conduct that is contrary to justice, ethics, honesty, or good morals," MICH. CT. R. 9.104(A)(3).

618. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 7.

619. *Id.* at 7-10.

620. *Id.* at 7-8.

621. MICH. COMP. LAWS ANN. § 780.622(1).

622. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 8 (quoting MICH. COMP LAWS ANN. § 780.623(2)(a) (West 2010)).

appointed by the [ADB], an agency of the judicial branch of state government, was within the ambit of [MCLA section] 780.623(2)(a)."[623]

Having determined that the local hearing panel was authorized to consider Hertzog's 2001 conviction even though it had been expunged, the ADB concluded that "[Hertzog's] failure to provide notification [of the conviction] was prejudicial to the proper administration of justice and constituted misconduct under [MCR] 9.104(A)(1) and (4)."[624] The ADB also concluded that the hearing panel had properly considered the other-acts evidence offered against Hertzog by the Grievance Administrator pursuant to MRE 404(b).[625] The ADB ruled: (1) that the other-acts evidence concerning Hertzog's past sexual improprieties with other female clients was properly offered under MRE 404(b) as proof of a plan, scheme, system, motive, opportunity, or intent; (2) that the other-acts evidence was relevant; and (3) "that the danger of undue prejudice in admitting the 'prior bad acts' testimony in this case did not substantially outweigh its probative value."[626]

Lastly, the ADB reviewed the level of discipline imposed on Hertzog by the hearing panel.[627] The ADB observed:

> In the absence of specific conditions imposed in the discipline order, an attorney suspended for 179 days or less may generally be reinstated automatically when the suspension period has elapsed by simply filing an affidavit of compliance with the clerk of the Supreme Court, the Grievance Administrator and the [ADB] . . . . By contrast, [MCR] 9.123(B) and [MCR] 9.124 require that an attorney suspended for a period of 180 days or more must undergo further scrutiny by a hearing panel in reinstatement proceedings which include the filing of a petition for reinstatement accompanied by a detailed personal history affidavit covering the period of suspension; publication of a notice in the *Michigan Bar Journal* and on the [ADB]'s website that the individual is seeking reinstatement; an investigation by the Grievance Administrator including a transcribed interview with the reinstatement petitioner and the filing of a written report; and the petitioner's personal appearance before a hearing panel to demonstrate by clear and convincing evidence that he or she can safely be recommended to the public, the courts and the

623. *Id.* at 9.
624. *Id.* at 11.
625. *Id.* at 11-13.
626. *Id.* at 12-13.
627. *Id.* at 13-15.

> legal profession as a person fit to engage in the practice of law.[628]

The ADB determined that "such further scrutiny is required in this case," particularly in light of the nature and extent of Hertzog's past misconduct.[629] After "[t]aking into consideration the range of professional misconduct in this case," the ADB concluded that "protection of the public, the courts and the profession requires that [Hertzog] be suspended for a sufficient period of time to ensure that he is not permitted to resume his standing as a member of the profession unless he is able to establish his fitness by clear and convincing evidence."[630] The ADB consequently increased the discipline imposed on Hertzog to suspension from the practice of law for 180 days.[631]

3. Attorney Victor Douglas

In *Grievance Administrator v. Douglas*,[632] the facts of the case established that Linda Sandberg had retained attorney Victor Douglas in 2003 to assist her incarcerated son in editing a motion for relief from judgment.[633] Sandberg believed that her son's 1996 guilty plea had been involuntary because he was heavily medicated and suffering from a mental illness at the time.[634] Sandberg paid Douglas $5,000 and over the next three years Douglas visited her son in prison several times.[635] Douglas assisted Sandberg's son in gathering additional evidence and developing a strategy for his motion.[636] However, Douglas did not personally draft the motion for relief from judgment; instead, Sandberg's son drafted the motion himself, merely relying on Douglas for ideas and strategies.[637] Douglas never filed any motion on behalf of Sandberg's son, and Sandberg's son "eventually filed [the motion] himself in

628. *Hertzog*, Nos. 06-000076-JC; 06-000077-GA, at 14-15.
629. *Id.* at 15.
630. *Id.*
631. *Id.*
632. No. 08-000161-GA (Mich. Att'y Discipline Bd. Jan. 21, 2010) *available at* http://www.adbmich.org/coveo/opinions/2010-01-21-08o-161.pdf#search=%22opinion%22.
633. *Id.* at 1.
634. *Id.* at 2.
635. *Id.* at 1-3.
636. *Id.* at 3-4.
637. *See id.* at 2-4.

2006[.]"[638] Douglas did not refund any portion of the $5,000 that he had been paid.[639]

The local hearing panel dismissed the formal complaint against Douglas, finding insufficient evidence of professional misconduct.[640] On the basis of the testimony presented, the hearing panel determined that Sandberg had not actually hired Douglas to draft or file a motion for relief from judgment, but instead that she had retained Douglas "to help [her son] edit a motion for relief from judgment that he had already written."[641] The panel found persuasive certain testimony tending to establish that Sandberg "wanted her son to file the motion himself because the work he was doing on his own behalf was essential to his well being during his incarceration."[642] The panel also pointed to the testimony of Sandberg's son, who testified that Douglas "had been retained for the purposes of 'helping him edit the motion . . . that [he] had already written.'"[643] The panel found that although Douglas had not drafted or filed the motion, he had "performed a multitude of services, including, making several trips to the Upper Peninsula for meetings with his client, reviewing the brief drafted by [Sandberg's son] and the legal arguments and cites contained therein, and meeting with [Sandberg's son's psychiatrist] in Pittsburgh."[644]

On appeal, the ADB affirmed the hearing panel's decision to dismiss the formal complaint against Douglas.[645] The ADB began by stating that "[c]harges of professional misconduct in a disciplin[ary] proceeding must be established by a preponderance of the evidence,"[646] and concluded that the hearing panel did not err by determining that the Grievance Administrator failed to satisfy this burden of proof.[647] The ADB revisited the testimony presented before the hearing panel, observing that Sandberg and her son had given conflicting accounts of whether Douglas was actually hired to draft and file a motion for relief from judgment.[648] The ADB acknowledged that the hearing panel had a superior opportunity to view the demeanor of the witnesses and to judge their credibility, and noted that the panel "was free to reject the

638. *Douglas*, No. 08-000161-GA, at 4.
639. *Id.* at 2.
640. *Id.* at 5.
641. *Id.*
642. *Id.*
643. *Id.* at 6.
644. *Douglas*, No. 08-000161-GA, at 5-6.
645. *Id.* at 1, 8.
646. *Id.* at 6 (citing MICH. CT. R. 9.115(J)(3)).
647. *Id.*
648. *Id.*

Sandbergs' testimony, in whole or in part."[649] The ADB noted that its review of a hearing panel's decision is not *de novo*, but is limited to "determin[ing] whether the hearing panel's findings of fact have proper evidentiary support on the whole record."[650] In the end, after reviewing all the evidence presented below, the ADB found that "while incarcerated, [Sandberg's son] spent a great deal of time engaged in th[e] process of drafting and redrafting the motion and that, while [Douglas] was to provide assistance, Ms. Sandberg made it clear to [Douglas] that her son was to remain in control of the process."[651] Because there was "adequate evidentiary support in the record" for the hearing panel's findings of fact, the ADB affirmed the hearing panel's dismissal of the formal complaint against Douglas.[652]

4. Attorney Dianne Baker

In *Grievance Administrator v. Baker*,[653] the ADB considered whether it should impose disciplinary measures on an attorney who pleaded guilty to the offense of driving while visibly impaired but "ha[d] no other criminal convictions or professional discipline."[654] Attorney Dianne Baker appeared before the district court and pleaded guilty to the offense of operating a motor vehicle while visibly impaired.[655] The court ordered her "to pay fines and costs and complete an alcohol highway safety education class and victim's impact panel . . . ."[656] However, the court did not order her "to undergo further treatment or counseling, or to participate in a group such as Alcoholics Anonymous."[657] Baker had never before been disciplined and had no criminal record of any kind.[658]

The Grievance Administrator fully acknowledged "that there [wa]s no evidence that [Baker's] competence as a lawyer has been called into question[.]"[659] Nevertheless, the Grievance Administrator

> took the position that respondent should be placed under supervision for a period of two years. The hearing panel agreed

649. *Id.*
650. *Id.* (citing Grievance Adm'r v. August, 438 Mich. 296, 304 (1990)).
651. *Douglas*, No. 08-000161-GA, at 7.
652. *Id.* at 8.
653. No. 07-000189-JC (Mich. Att'y Discipline Bd. Jan. 27, 2010).
654. *Id.* at 1.
655. *Id.* at 3.
656. *Id.*
657. *Id.*
658. *Id.*
659. *Baker*, No. 07-000189-JC, at 3.

> and ordered a reprimand with conditions requiring her to: (1) abstain from alcohol for two years; (2) participate in monitoring through the State Bar of Michigan's Lawyers and Judges Assistance Program ("LJAP") or individual therapy for two years; (3) sign irrevocable waivers allowing LJAP or her therapist to provide reports as to her progress; and, (4) provide quarterly reports including a diagnosis, prognosis and recommendation.[660]

On appeal, the ADB began by recognizing that "not all criminal conduct shall result in discipline."[661] The ADB made clear that "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[662] The ADB determined that Baker had been honest and forthright in her testimony before the hearing panel.[663] She had testified that although she drinks wine on the weekends, she does not do so during the week and it does not affect her practice of law.[664] The ADB also agreed with Baker's contention that there were "problems with the methodology and reasoning" of an LJAP evaluation conducted in the case.[665] Indeed, the ADB concluded that "there was no evidence that [Baker's] work was affected by her consumption of alcohol."[666] In addition, the ADB found that Baker had voluntarily attended "four or five" therapy sessions, and that she had "kept a journal, obtained a book recommended by her therapist, cut back on drinking, and improved her relationship with her husband."[667]

Given the totality of the evidence presented in the case, the ADB disagreed with the Grievance Administrator's assertion that Baker had "an ongoing alcohol problem."[668] The ADB continued:

> While Michigan . . . classifies all criminal conduct as professional misconduct *per se*, numerous authorities . . . suggest that we should be most circumspect and restrained in the use of

660. *Id.* at 3-4.
661. *Id.* at 2.
662. *Id.* (quoting Grievance Adm'r v. Fink, 462 Mich. 198, 204 (2000) (in turn quoting American Bar Ass'n Standard 5.12 cmt)).
663. *Baker*, No. 07-000189-JC, at 4.
664. *Id.* at 3-4.
665. *Id.* at 5.
666. *Id.*
667. *Id.*
668. *Id.* at 6.

> our authority when the criminal conduct is far removed from harm to the public, the courts, or the legal profession.
>
> * * *
>
> In some cases, the record evidence will clearly establish that [an attorney] has been unable or unwilling to address an alcohol problem that affects his or her ability to practice. In those situations, discipline and appropriate conditions are called for. This case, however, in no way resembles such situations. Even if the record indicates what could be deemed excessive alcohol consumption at certain points in [Baker's] life, we must also consider the evidence of [Baker's] voluntary cessation or reduction of alcohol use during most periods of her life, which include consistent employment in responsible positions, childbirth and child-rearing years, and graduation cum laude from law school while working. We cannot conclude that the discipline imposed below is necessary or appropriate in this case.[669]

The ADB ruled that "after a careful review of the record in this matter," it was "firmly convinced that the panel's order exceeds the appropriate disciplinary response in this particular case."[670] Accordingly, the ADB vacated the hearing panel's order and entered "an order imposing no discipline."[671]

5. Attorney Alexander Benson

In *Grievance Administrator v. Benson*,[672] attorney Alexander Benson telephoned opposing counsel in a civil case on which he was working and "left a recorded message which, while brief, was mocking, profane, and personally insulting."[673] The Grievance Administrator inquired into Benson's conduct and asked Benson whether he had made the profane telephone call in question.[674] Benson responded to the inquiry by filing a false affidavit, swearing under penalty of perjury that he had not made the phone call or left the inappropriate message on opposing counsel's

669. *Baker*, No. 07-000189-JC, at 6-7.
670. *Id.* at 7.
671. *Id.*
672. No. 08-000052-GA (Mich. Att'y Discipline Bd. Feb. 12, 2010).
673. *Id.* at 1.
674. *Id.*

voicemail.[675] The Grievance Administrator charged Benson with having filed a false affidavit and having given false testimony under oath.[676] Benson pleaded no contest to these charges, but explained that he was suffering from a severe psychological condition for which he was undergoing treatment and taking medication.[677] "Finding that [Benson's] conduct was substantially caused by a psychological condition . . . , and that respondent otherwise met the criteria for probation under [MCR] 9.121(C), the hearing panel ordered that [Benson] be subject to probation for two years, with detailed conditions . . . ."[678]

On appeal, the ADB acknowledged Benson's psychological condition and noted that the condition may have led to Benson's inappropriate conduct.[679] However, the ADB also noted that, as a general rule, "deliberately false statements to a tribunal will result in the most serious discipline."[680] The ADB observed that, pursuant to American Bar Association Standards 6.11 and 6.12, the appropriate sanction for filing deceptive documents or false affidavits is typically disbarment or suspension.[681] After reviewing its own precedent and other Michigan law on the subject, the ADB concluded that although Benson had been *eligible* for probation under MCR 9.121(C), an order of suspension was necessary in the case.[682] The ADB found persuasive that both the Michigan Supreme Court and the ADB had previously "ordered the revocation of a respondent's license in cases involving perjury or the submission of false evidence to a tribunal."[683] On the basis of this and other precedent the ADB vacated the hearing panel's decision and entered an order "suspending [Benson's] license to practice law in Michigan for a period of one year."[684]

6. Other Attorney Discipline Matters

During this *Survey* period, the ADB also issued full opinions concerning several suspended attorneys' petitions for reinstatement. By and large, these opinions are not particularly noteworthy and do not

675. *Id.*
676. *Id.*
677. *Id.*
678. *Benson*, No. 08-000052-GA, at 1.
679. *See id.* at 2-6.
680. *Id.* at 6.
681. *Id.* at 6-7.
682. *Id.* at 7-10.
683. *Id.* at 10.
684. *Benson*, No. 08-000052-GA, at 10.

warrant discussion in this article.[685] However, *In re Reinstatement Petition of David S. Feinberg*[686] does merit brief mention—not because its facts are especially significant or important, but because the ADB in that case expressly rejected the petitioner's argument that "there is an implicit assumption that a suspended lawyer will be reinstated[.]"[687] The ADB reaffirmed that each attorney disciplinary matter is *sui generis* with respect to its facts, that there is no set formula for reinstatement, and that it should not be presumed that a lawyer who has been suspended from the practice of law will later be reinstated.[688] Instead, as the ADB implicitly held, a suspended lawyer must affirmatively satisfy the requirements of MCR 9.123(B) before he may be reinstated to the practice of law.[689] Because Feinberg failed to prove by clear and convincing evidence that he had satisfied the requirements of MCR 9.123(B), the ADB affirmed the hearing panel's order denying reinstatement.[690]

B. Judicial Discipline

1. Judge Steven R. Servaas

The Judicial Tenure Commission ("JTC")[691] recommended that the Michigan Supreme Court remove from office Judge Steven R. Servaas of the 63rd District Court for vacating his judicial office, for making a comment and possessing several drawings of a sexual nature, and for lying under oath.[692] The JTC initially alleged that Judge Servaas vacated his office by moving his residence outside of the division of his judicial district in violation of the Michigan Constitution, article VI, section

685. *See, e.g.*, In re Reinstatement Petition of Gregory L. Wilkins, No. 08-000139-RP (Mich. Att'y Discipline Bd. Jan. 15, 2010); In re Reinstatement Petition of Phillip E. Smith, No. 08-000165-RP (Mich. Att'y Discipline Bd. Jan. 21, 2010); In re Reinstatement Petition of Rene A. Cooper, No. 07-000175-RP (Mich. Att'y Discipline Bd. Feb. 23, 2010).

686. No. 08-000070-RP (Mich. Att'y Discipline Bd. Feb. 25, 2010) *available at* http://www.adbmich.org/coveo/opinions/2010-01-21-08o-161.pdf#search=%22opinion%22.

687. *Id.* at 3.

688. *Id.* at 3-5.

689. *See id.* at 5-7.

690. *Id.* at 1-2, 8.

691. For a detailed background on the procedures of the Judicial Tenure Commission, *see generally*, Nicolas C. Krieger & Davidde A. Stella, *Professional Responsibility, 2009 Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 497, 555-60 (2009).

692. *In re Servaas*, 484 Mich. 634, 637 (2009).

20.[693] The Michigan Supreme Court found that the exclusive procedure under Michigan law to complain of a vacation of office was a quo warranto action brought in the Michigan Court of Appeals; and the JTC had no authority to assert such charges.[694] Next, the court criticized the Executive Director of the JTC for several of his actions in prosecuting the action.[695] The executive director, with the aid of an armed Michigan State Police officer, personally served Judge Servaas with the twenty-eight-day notice, threatened him with interim suspension, and presented him with a pre-prepared letter of resignation on the court's letterhead.[696] The details of this incident were also widely disseminated in the media.[697] In addressing this conduct, the court noted that "[w]hile the actions of the JTC director have been called into question, this Court need not address whether he violated any ethical rules because the proper forum for review . . . is the Attorney Grievance Commission[.]"[698] The court noted that Judge Servaas' sexual comment and drawings were "crass and inappropriate,"[699] but concluded that the proper remedy for such conduct was a "public censure."[700] Finally, the court determined that Judge Servaas did not intentionally lie under oath regarding the vacation of office issue.[701]

2. Judge Brenda K. Sanders

The Honorable Brenda K. Sanders of the 36th District Court consented to a JTC Decision of Recommendation where she was charged with "inappropriate political activity while a judge or judicial candidate" and "inappropriate campaign conduct/soliciting contribution[s]."[702]The Michigan Supreme Court found that while in office, Judge Sanders announced her candidacy for mayor of Detroit, and took various actions in furtherance of her campaign in violation of Canon 7 of the Michigan

693. *Id.* at 639-40. "Whenever a justice or judge removes his domicile beyond the limits of the territory from which he was elected or appointed, he shall have vacated his office." MICH. CONST., art. VI, § 20.

694. *Servaas*, 484 Mich. at 642-48. The Michigan Supreme Court relied upon MICH. COMP. LAWS ANN. § 600.4501 and MICH. CT. R. 3.306(A)(1) in determining that the JTC had no authority to level such charges against a judicial officer. *Id.*

695. *Id.* at 648-51.

696. *Id.* at 648-49.

697. *Id.* at 650.

698. *Id.*

699. *Id.* at 651.

700. *Servaas*, 484 Mich. at 651

701. *Id.* at 651-54.

702. *In re Sanders*, 485 Mich. 1045 (2010).

Code of Judicial Conduct.[703] The court further found that Judge Sanders violated Canon 7(B)(2) by improperly soliciting campaign funds for her mayoral campaign.[704] The court imposed a twenty-one-day suspension without pay.[705]

3. Judge Charles C. Nebel

The Honorable Charles C. Nebel of the 11th Circuit Court consented to a JTC Decision and Recommendation wherein he was charged with misconduct arising from consuming alcohol and operating a motor vehicle.[706] A Michigan State Police officer pulled over Judge Nebel for speeding and discovered that his blood-alcohol content exceeded the amount permissible by Michigan law.[707] The Michigan Supreme Court imposed a 91-day suspension without pay.[708]

V. CONCLUSION

Unlike so many other disciplines, the law is a self-regulating enterprise. That is why, as lawyers and judges, we must take special note of recent developments in the law of professional responsibility. As a general matter, there would be no reason for alarm if a criminal law practitioner decided to disregard current developments in workers' compensation law or if a probate court judge decided not to follow recent trends in the law of public utilities. In contrast, we must all pay heed to the current state of the law of professional responsibility, regardless of our particular interests, concentrations, or specialties. Our profession imposes on each of us an obligation to defend the integrity of the practice of law, and the law of professional responsibility is our primary tool in that endeavor. It is the hope of the authors that this article has helped explain and clarify significant developments in Michigan's law of professional responsibility during the *Survey* period. Only by understanding these developments will we continue to grow and improve as a self-regulating profession.

703. *Id.* at 1047.
704. *Id.* at 1047-48.
705. *Id.* at 1048-49.
706. *In re Nebel*, 485 Mich. 1049 (2010).
707. *Id.* at 1049-50.
708. *Id.* at 1050.