PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

Professional responsibility encompasses the conduct and ethics of lawyers and judges. During the *Survey* period, several noteworthy decisions concerning the law of professional responsibility and attorney and judicial discipline were issued.

II. THE LAW OF PROFESSIONAL RESPONSIBILITY

A. Legal Malpractice

"The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury;

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and (4) the fact and extent of the injury alleged."[1] During this *Survey* period, decisions discussing the causation and damages elements of a legal malpractice claim and numerous defenses were issued.

1. Proximate Cause

Proximate cause is often the most difficult element to establish in a legal malpractice action.[2]

As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury... a plaintiff "must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit."[3]

In *Bear v. Prather*, the plaintiff had trouble with the proximate cause element of her claim.[4] Bear had been the victim of a real estate investment scheme.[5] She was not paid the full balance owed to her under the contracts she signed as part of the scheme.[6] Bear retained the defendant attorney to sue the perpetrator, Lee Ruhl, his company, and his employer, Golden Mortgage Corporation, which Ruhl used to help Bear obtain funds to invest in his scheme.[7] Bear's claim against Golden was based on vicarious liability.[8]

Golden filed a motion for summary disposition, denying participation in the investment scheme.[9] In response to Golden's motion, Bear's attorney submitted an affidavit from Bear swearing to facts connecting Ruhl's scheme to Golden.[10] But the trial court granted Golden's motion, holding that the facts in the affidavit were insufficient to subject Golden to liability for Ruhl's scheme.[11]

Bear filed a motion for reconsideration, which included an addendum to her affidavit and four new affidavits from witnesses on her witness list.[12] The trial court denied the motion, refusing to consider the

1. Manzo v. Petrella, 261 Mich. App. 705, 712, 683 N.W.2d 699, 703–04 (2004).
2. Charles Reinhart Co. v. Winiemko, 444 Mich. 579, 586, 513 N.W.2d 773, 775–76 (1994).
3. *Id.* at 586, 514 N.W.2d at 775–76.
4. Bear v. Panther, No. 313378, 2014 WL 6852944 (Mich. Ct. App. Dec. 4, 2014).
5. *Id.* at *1.
6. *Id.*
7. *Id.*
8. *Id.* at *2.
9. *Id.*
10. *Id.*
11. *Id* at *3.
12. *Id.*

affidavits because they contained information that "could have been obtained, but was not offered, in the first instance."[13]

Bear then filed a legal malpractice case against her attorney, alleging that he "failed to timely file the affidavits and neglected to conduct adequate discovery."[14] Bear asserted that her claims would have survived summary disposition if the information in the addendum and new affidavits had been given to the circuit court before the summary-disposition ruling.[15]

The attorney filed a motion for summary disposition based on the attorney-judgment rule.[16] The trial court granted the motion based on the attorney-judgment rule, and also held that the failure to file the affidavits earlier did not cause Bear any damages.[17] This was because the new affidavits still did not contain sufficient facts to support Bear's vicarious-liability theory.[18]

The court of appeals affirmed the trial court's causation analysis.[19] The court noted that where the success of the underlying litigation depends solely on legal principles, proximate cause in the legal malpractice case is a question of law for the trial court to decide.[20] After reviewing the new affidavits, the court concluded that they did not contain any factual allegations sufficiently connecting Golden or its owner to the investment scheme to avoid summary disposition on the vicarious liability claim.[21] Because the affidavits would not have saved Bear's claim from summary disposition, Bear could not establish that the attorney's failure to submit them before the motion was heard caused her damages. Thus, the court affirmed summary disposition of the legal malpractice claim.[22]

The Michigan Court of Appeals also analyzed proximate cause in *Nolan v Chapman* and held that an issue of fact existed, precluding summary disposition.[23] Plaintiffs Lorri and Aaron Nolan operated a trucking company.[24] Lorri worked for the company as a driver.[25] In May

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13. *Id.*
14. *Id.* at *4.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* Because the court affirmed on the issue of causation, the court did not review the trial court's attorney-judgment rule holding. *Id.* at *1.
20. *Id.* at *4.
21. *Id.* at *5.
22. *Id.* at *1.
23. Nolan v. Champman, No. 319830, 2015 WL 1893279, at *1 (Mich. Ct. App. Apr. 23, 2015).
24. *Id.*

2009, a vehicle pulled out of a driveway and struck the truck Lorri was driving on the driver's side door.[26] Due to her injuries, Lorri began receiving worker's compensation and personal protection insurance (PIP) benefits.[27]

Lorri and Aaron later retained the defendant attorney to represent them in a tort claim against the driver who hit her.[28] The case proceeded to case evaluation.[29] The defendant requested $2.7 million in damages, including damages for pain and suffering, loss of consortium, and excess economic damages.[30] The evaluation panel issued an award of $425,000.[31]

The defendant met with Lorri and Aaron to discuss the award.[32] The defendant opined that the award was "adequate" and that they should accept it.[33] Lorri and Aaron asserted that the defendant told them that a settlement would have no effect on Lorri's worker's compensation benefits.[34] The defendant asserted that he advised them that the worker's compensation carrier would not be entitled to reimbursement of benefits it paid during the first three years after the accident, but he did not say that he advised them that the carrier would be entitled to a statutory reimbursement credit after the first three years in the form of reduced benefits.[35]

Lorri and Aaron agreed to accept the case evaluation award, but instead of entry of a judgment in that amount, the case was settled for that amount.[36] About a year and a half later, Lorri's worker's compensation benefits were reduced to reimburse the carrier up to the amount she recovered from the settlement.[37] A few months later, Lorri and Aaron filed a legal malpractice claim against the defendant, alleging that he negligently failed to advise them of the effect the settlement would have on Lorri's worker's compensation benefits, and that such information was required so they could make an informed decision regarding settlement.[38]

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at *2.
37. *Id.*
38. *Id.*

The trial court initially denied the defendant's motion for summary disposition, and also denied a motion to amend plaintiffs' complaint to include an additional allegation of malpractice.[39] The defendant later renewed his motion for summary disposition, and the trial court granted it, holding that the plaintiffs could not establish that the defendant's negligence proximately caused them damages.[40] Plaintiffs appealed the grant of summary disposition and the denial of their motion to amend, and the defendant cross-appealed the initial denial of his first motion for summary disposition.[41]

The court of appeals reversed the grant of summary disposition in favor of defendant.[42] The court held that Lorri and Aaron had established a question of fact as to whether defendant's failure to advise them of the statutory reimbursement provision caused them injury.[43] The court based its holding on plaintiffs' testimony that they would not have accepted the settlement if they had known how the reimbursement statute worked.[44] They claimed they would have proceeded with the case in hopes of receiving a larger settlement or jury verdict.[45]

The defendant argued that plaintiffs could not establish that they would have received a higher settlement or verdict, thus any damages were speculative.[46] The court agreed that the ultimate outcome of the case if the plaintiffs had not settled could not be known with certainty, but held that a legal malpractice jury may properly hear the evidence and evaluate the 'suit within a suit' under the circumstances.[47] In essence, the jury in the legal malpractice claim would be charged with considering the evidence that would have been admitted in the underlying case and determining what the underlying jury would have concluded. The court opined that to accept the defendant's argument would require summary disposition in favor of the defendant in almost every legal malpractice case.[48]

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39. *Id.*
40. *Id.* at *3.
41. *Id.*
42. *Id.* at *1.
43. *Id.* at *4.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

2. Damages

Chapman also analyzed the damages element of a legal malpractice claim.[49] The defendant argued that because Lorri's worker's compensation benefits would have been reduced no matter how much she settled for or received via jury verdict, the actual amount of the settlement was irrelevant.[50] But the court noted that the defendant was missing the point of plaintiffs' claim by focusing on the fact that there would have been a reduction regardless of the amount plaintiffs accepted or received.[51]

Lorri and Aaron argued that in deciding whether or not to settle, they would consider the settlement's "total effect on their financial future."[52] Because Lorri was permanently disabled and could not work, Lorri and Aaron could only evaluate the settlement if they knew that her worker's compensation benefits, "part of their future income, would be reduced."[53] The court agreed, holding that knowledge that a reduction was unavoidable was necessary to decide whether to accept the offered settlement.[54]

Next, the court held that Lorri and Aaron had presented evidence that, if presented to the underlying jury, may have resulted in a much higher jury verdict than their settlement amount if they had rejected the settlement. [55] Such evidence included evidence that the other driver was at fault, testimony from Lorri's treating physician regarding her injuries, and evidence regarding her wage losses.[56] Thus, the court held Lorri and Aaron had also established a question of fact as to the "fact and extent" of their damages.[57]

3. Statute of Limitations

The statute of limitations can be a tricky issue in a legal malpractice claim. A legal malpractice complaint must be filed within two years of the date the claim accrues.[58] A legal malpractice claim accrues at the

49. *Id.* at *5.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. MICH. COMP. LAWS ANN. § 600.5805(6) (West 2015); *Id.* § 600.5827; Gebhardt v O'Rourke, 444 Mich. 535, 541, 510 N.W.2d 900, 902–03 (1994).

time the lawyer "discontinues serving" the plaintiff "as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."[59]

"Special rules have been developed in an effort to determine exactly when an attorney 'discontinues serving the plaintiff in a professional ... capacity' for purposes of the accrual statute."[60] In general, an attorney's representation continues "until the attorney is relieved of that obligation by the client or the court."[61] Retention of replacement counsel is sufficient to prove that a client intended to terminate an attorney's representation.[62]

The court of appeals considered a malpractice claim's accrual date in *Beckett Family Rentals, L.L.C. v David & Wierenga, P.C.*[63] Two companies, Beckett Family Rentals and Beckett Investments, filed a malpractice action against the defendant attorneys on October 5, 2012.[64] The attorneys filed a motion for summary disposition based on the statute of limitations.[65] They argued that the plaintiffs' claim accrued on June 17, 2009, when the firm sent Beckett Investments a letter conditionally ending the attorney-client relationship.[66] The letter advised that the firm required Beckett Investments to retain a securities attorney for advice before the firm would continue representing the company.[67] If the claim accrued on June 17, 2009, the two-year statute of limitations expired on June 17, 2011, more than a year before the claim was filed.

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59. MICH. COMP. LAWS ANN. § 600.5838(1) (West 2015). Section 5838(1) provides: "Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff ... as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." *Id.* Section 5838a applies to licensed health care professionals. *Id.* § 600.5838a. Section 5838b is a recently-enacted statute of repose for legal malpractice claims. *Id.* § 600.5838b. Under Section 5838b, a legal malpractice claim cannot be filed after the statute of limitations has lapsed or more than six years after the date of the act or omission, whichever is earlier. *Id.*

60. Kloian v. Schwartz, 272 Mich. App 232, 237, 725 N.W.2d 671, 676 (2006) (internal citation omitted).

61. *Id.*

62. Mitchell v. Dougherty, 249 Mich. App. 668, 683, 644 N.W.2d 391, 399 (2002) (internal citation omitted).

63. Beckett Family Rentals v. David & Wierenga, No. 316658, 2014 WL 6954144, at *1 (Mich. Ct. App. Dec. 9, 2014).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

The trial court agreed with that accrual date and granted the defendants' motion.[68]

But the court of appeals reversed.[69] First, the court recognized that the June 17 letter was only sent to Beckett Investments, not Beckett Family Rentals.[70] Thus, the letter could not have served as notice of termination of the attorney-client relationship with Beckett Family Rentals.[71] Aside from the letter, there was conflicting evidence regarding if and when the attorney-client relationship ended with Beckett Family Rentals.[72]

The attorneys argued that Beckett Family Rentals retained them for one specific task in December 2008, and that the attorney-client relationship ended and its claim accrued when that task was completed.[73] But the company argued that it had a long-term, continuous attorney-client relationship with the firm beginning in 1986.[74] And, unlike Beckett Investments, Beckett Family Rentals had not retained replacement or supplemental counsel, so there was no evidence that the attorney-client relationship with Beckett Family Rentals had been terminated by replacement.[75] Thus, the court reversed summary disposition as to Beckett Family Rentals.[76]

Next, the court considered Beckett Investments' claim. The parties agreed that if the condition in the June 17 letter was met, the attorney-client relationship continued beyond the date of the letter.[77] Beckett Investments provided evidence that it had met the condition and that the firm had acknowledged notice that the condition had been met.[78] Thus, the court held that there was a question of fact whether the letter terminated the attorney-client relationship with Beckett Investments.[79]

The defendants also argued that they were retained by Beckett Investments to perform discrete services, and that the attorney-client relationship ended when those services were complete.[80] But the court held that Beckett Investments presented evidence that it had an ongoing,

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68. *Id.*
69. *Id.*
70. *Id.* at *2.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at *3.

continuous relationship with the defendants.[81] Beckett Investments claimed that it hired the defendants to provide it with ongoing services, and that it continued to seek legal advice from the defendants after the services described by the defendants were complete.[82]

The court also held that there was a question of fact regarding whether the retention of the securities attorney ended Beckett Investments' attorney-client relationship with the defendants.[83] There was evidence that Beckett Investments continued to seek legal services from the defendants even after retaining the securities attorneys.[84] Based on these findings, the court held that summary disposition in favor of the defendants was inappropriate.[85]

Plaintiffs also argued that the trial court should have considered actions taken by a non-party attorney in the statute of limitations analysis.[86] But the court of appeals held that the trial court correctly disregarded that attorney's actions.[87] The court noted that a court may impose vicarious liability on the principal (the law firm) for an agent's torts, but since the principal hadn't committed a tortious act itself, it was not a tortfeasor.[88] Thus, the law firm was only liable to the extent there was liability on behalf of the attorneys identified in the complaint.[89] Because the actions of the non-party would not have the tendency to make the existence of the liability of a named defendant more or less probable, his actions were irrelevant and could not support a finding of an ongoing attorney-client relationship between Beckett Investments and the defendants.[90] Thus, the trial court properly concluded that the non-party's actions were irrelevant to the statute of limitations analysis.[91]

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81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at *4.
87. *Id.*
88. *Id.* (internal citation omitted)
89. *Id.*
90. *Id.*
91. *Id.* (noting that while the trial court reached the correct result, it was incorrectly based on factual findings that the trial court was not permitted to make in the context of a motion for summary disposition based on the statute of limitations. But the court of appeals will not disturb a trial court's ruling if it is the correct result, even if it is based on improper reasoning).

4. Wrongful Conduct Defense

In *Thomas v. Miller Canfield Paddock & Stone*, the court of appeals considered the application of the wrongful conduct defense in a legal malpractice case.[92] The underlying case involved the plaintiffs' sale of business assets to a third-party.[93] The purchaser later obtained a $2.8 million arbitration award against the plaintiffs.[94] The arbitrator found that the plaintiffs had committed fraud by failing to disclose to the purchaser their practice of fabricating advertisements and invoices and that they were purchasing parts from suppliers at discounted prices and selling them through improper channels, and inaccurately reported advertising reimbursements on its financial statements.[95]

The individual plaintiffs then filed chapter 11 bankruptcy and the purchaser filed an adversary proceeding against them, arguing that the arbitration award was nondischargeable due to fraud.[96] The bankruptcy court relied on the arbitrator's findings and, applying collateral estoppel, concluded that the debt was nondischargeable.[97]

The plaintiffs then filed their legal malpractice case against the defendant law firm.[98] Plaintiffs alleged that they told the firm about the disputed practices and other matters, but that the firm failed to disclose the information to the purchaser.[99] Plaintiffs alleged thirty-nine separate breaches of the standard of care and claimed that, but for such breaches, the arbitration award would not have been entered against them.[100]

The firm attempted to use non-mutual defensive collateral estoppel to preclude the plaintiffs from relitigating certain factual issues decided in the arbitration regarding their fraudulent conduct.[101] The trial court ultimately denied the firm's request to have those facts deemed admitted.[102]

The firm then filed a motion in limine requesting that it be allowed to assert the wrongful conduct rule as a defense at trial.[103] Under the

92. Thomas v. Miller Canfield Paddock & Stone, No. 314374, 2014 WL 5358392, at *1 (Mich. Ct. App. Oct. 21, 2014).

93. *Id.* at *1.

94. *Id.* at *2.

95. *Id.*

96. *Id.* at *3.

97. *Id.*

98. *Id.* Individual attorneys were also named as defendants, but were dismissed by the trial court. *Id.* n.2.

99. *Id.* at *3.

100. *Id.*

101. *Id.* at *4–6.

102. *Id.* at *5.

103. *Id.*

wrongful conduct rule, a plaintiff's claim is barred when his claim is based in part or entirely on his own illegal conduct.[104] The firm was prepared to present the same evidence presented at the arbitration hearing regarding plaintiffs' fraudulent conduct towards its vendors and towards the purchaser.[105] But the court denied the firm's motion.[106] The court concluded that the legal malpractice claim was based on the firm's failure to disclose information to the purchaser and the resulting damages, if any, and that there was not a sufficient causal nexus between the plaintiffs' alleged fraudulent conduct and the damages in the legal malpractice case.[107]

But the court of appeals disagreed. The court held that collateral estoppel applied and that the wrongful conduct rule precluded plaintiffs' malpractice action to the extent their claims were related to their own misconduct.[108]

The court explained that, to implicate the wrongful conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited by a penal or criminal statute.[109] A sufficient causal nexus must also exist between the plaintiff's illegal conduct and the plaintiff's asserted damages.[110] But a plaintiff's conduct must only be "a" proximate cause, not "the" proximate cause, of the asserted damages.[111]

The firm alleged that the plaintiffs' alleged fraud constituted the crime of false pretenses under MCL 750.218(1)(c).[112] The court of appeals agreed, holding that the plaintiffs were collaterally estopped from arguing that their conduct was not fraudulent, and that their fraudulent conduct satisfied the elements of the crime of false pretenses.[113]

Three elements must be established to apply collateral estoppel: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.[114] The third element, mutuality,

104. *Id.* at *6 (citing Orzel v. Scott Drug Co., 449 Mich. 550, 537 N.W.2d 208 (1995)).
105. *Id.* at *5.
106. *Id.* at *6 (quoting the trial court addressing defendant firm's motion in limine).
107. *Id.*
108. *Id.*
109. *Id.* at *7 (quoting *Orzel*, 449 Mich. 560–61, 537 N.W.2d at 214 (Mich. 1995)).
110. *Id.* (quoting *Orzel*, 449 Mich. at 564, 537 N.W.2d at 215).
111. *Id.* (quoting *Orzel*, 449 Mich. at 566–67, 537 N.W.2d at 217–16).
112. *Id.*
113. *Id.*
114. *Id.* at *8 (internal quotes and citation omitted).

is not required where collateral estoppel is being used defensively against a party who already had a chance to fully and fairly litigate the issue.[115]

The court held that the arbitrator's findings of fact regarding plaintiffs' fraud must be considered established in the legal malpractice case because the issue of plaintiffs' fraud was actually litigated and determined by a valid, final judgment, and was essential to that judgment.[116] Those facts were also relevant to determining whether the firm's alleged malpractice was the proximate cause of plaintiffs' injury, the $2.8 million arbitration award.[117] To the extent plaintiffs' conduct was an issue that must be resolved in the legal malpractice case, relitigation of that issue was barred.[118]

In arguing against the application of collateral estoppel, plaintiffs relied on an opinion issued by the court of appeals in a legal malpractice case filed by the purchaser against its own counsel.[119] In the purchaser's case, the court of appeals rejected the application of collateral estoppel, holding that the issue decided in the arbitration proceeding was the fraudulent conduct of the sellers, not the conduct of the purchaser's attorney.[120]

The court of appeals distinguished the plaintiffs' case from the purchaser's case, because the arbitrator did address the key issue of plaintiffs' fraud.[121] The court held that the plaintiffs' fraud and misrepresentation were issues that had to be decided in their malpractice case because under the wrongful conduct rule, they were precluded from asserting a claim against the firm based on their own misconduct.[122] Thus, the court held that the trial court erred when it denied the firm's request that it deem the facts determined by the arbitrator as established in the legal malpractice action.[123]

Plaintiffs then argued that, even if the arbitrator's factual findings were deemed established, the wrongful conduct rule did not apply because there was no causal nexus between their conduct and their damage claim.[124] The court disagreed.

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115. *Id.* (internal quote and citation omitted).
116. *Id.* at *11–12.
117. *Id.*
118. *Id.*
119. *Id.* at *11 (citing Computer Bus. World, LLC v. Simen, No. 301082, 2012 WL 832847 (Mich. Ct. App. Mar. 13, 2012)).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at *13.

The court noted that the plaintiffs alleged that the firm failed to disclose the plaintiffs' misconduct to the purchaser and as a result, plaintiffs were liable to the purchaser for the $2.8 million judgment.[125] As such, the plaintiffs could only establish their malpractice claim by relying on their own misconduct.[126] The arbitration award was based on plaintiffs' fraud, and the legal malpractice claim was based on the fact that they were held liable for such fraud.[127] Thus, the court held a sufficient causal nexus existed between plaintiffs' misconduct and their alleged damages in the legal malpractice case.[128] The court remanded for further proceedings to determine which, if any, of plaintiffs' claims remained after application of collateral estoppel and the wrongful conduct rule.[129]

B. Attorney Fees

In *Payne Broder & Fossee, P.C. v. Shefman*, the defendant, a licensed attorney, appealed a judgment entered for the plaintiff law firm for unpaid fees from an underlying representation and fees and costs incurred in the collection action.[130] The plaintiff firm successfully represented the defendant in a probate matter in which he was accused of undue influence.[131] Defendant signed a retention agreement that described the firm's hourly billing rates.[132] But defendant did not pay all of plaintiff's invoices, prompting plaintiff to sue him for breach of contract and account stated.[133]

Plaintiff filed a motion for summary disposition, and defendant opposed it by alleging that there were issues of fact regarding the reasonableness of plaintiff's services and fees.[134] The trial court granted the motion, and the court of appeals affirmed.[135]

First, the defendant argued that the charged services exceeded the scope of plaintiff's representation because plaintiff performed additional research and writing.[136] But the court stated that the retention agreement

125. *Id.* at *14.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. Payne Broder & Fossee, P.C. v. Shefman, No. 312659, 2014 WL 3612699, at *2, 4 (Mich. Ct. App. July 22, 2014)
131. *Id.* at *1.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at *5.

did not have any language limiting the representation in that manner.[137] Not only that, but such a limitation would conflict with the rules of professional conduct regarding preparation and the exercise of professional judgment.[138] Furthermore, the defendant also failed to present any evidence that the billed time was not actually time worked.[139] The court held that the defendant's subjective expectations failed to create an issue of fact when he could have identified and limited the services by tailoring the retention agreement.[140]

The defendant also argued that plaintiff was not entitled to recover fees for the collection action.[141] Again, the court of appeals disagreed because the retention agreement expressly entitled the plaintiff to attorney fees and expenses in an action to enforce the agreement.[142]

Defendant also argued that plaintiff could not recover fees for the collection action because it did not incur attorney fees for the firm's own attorneys to appear in court.[143] The court acknowledged that a prior case had held that attorney-litigants were not entitled to recover fees, but held that such case was not applicable.[144] The other case involved mediation sanctions, not a contractual provision for attorney fees.[145] A fee award under a contractual provision for attorney fees represents damages.[146] The court also noted that the rule described in that case was intended to avoid disparate treatment between lawyers and non-lawyers, but that both parties to this retention agreement were lawyers, so that concern was not relevant.[147]

In *In re Clinkscale*, the Western District of Michigan Bankruptcy Court considered the reasonableness of fees charged by a Chapter 13 debtor's attorney.[148] A Chapter 13 trustee filed petitions in multiple cases being handled by the same attorney, objecting to fees charged monthly to review the status and then to have the primary attorney review the status report.[149]

The court began its analysis by pointing out that unlike in a Chapter 7 bankruptcy, the attorney for a debtor in a Chapter 13 case can recover

137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at *5–6.
145. *Id.* at *6.
146. *Id.*
147. *Id.*
148. *In re* Clinkscale, 525 B.R. 399 (Bankr. W.D. Mich. Jan. 14, 2015).
149. *Id.* at 403.

fees from the bankruptcy estate as an administrative claim.[150] Under 11 U.S.C. 330(a), the court may award reasonable compensation to the debtor's attorney after considering numerous factors, including the time spent, the rates charged, and the necessity of the services in the administration of a bankruptcy case.[151]

The court noted that the Sixth Circuit has adopted the "lodestar" method of calculating fees, which involves determining a reasonable hourly rate for the particular attorney and multiplying that rate by the reasonable number of hours spent on the case.[152] But the court observed that a fee request under § 330 is "more nuanced" than the "lodestar" method.[153]

After reviewing the fee petitions, the court calculated that the attorney was requesting about $47 per month for the status reports, which, over a sixty-month Chapter 13 plan, would total $2,820.[154] The trustee objected to the fees as unreasonably expensive, unnecessary, and unlikely to benefit the debtors.[155] The court agreed that the trustee was understandably troubled by the attorney reviewing another attorney's status report.[156]

The court was also troubled by the propriety of charging attorney time to prepare the status report in the first place and to electronically file certificates of service or certificates of no objection.[157] The court would not allow fees at attorney rates for services that should be performed by clerical staff or paralegals.[158]

Regarding the necessity of the monthly monitoring, the attorney argued that it was always necessary, and the trustee argued that it was never necessary.[159] But the court declined to make any sweeping generalizations, holding that the benefit to any particular debtor will depend upon the debtor's circumstances.[160] The trustee also argued that debtors' attorneys should rely on the trustee to monitor the files.[161] But the court rejected the trustee's categorical disapproval of regular

150. *Id.* at 402.
151. *Id.*
152. *Id.* at 402 (internal quotes and citation omitted).
153. *Id.* at 402–03.
154. *Id.* at 403.
155. *Id.*
156. *Id.* at 404. The court noted, "At a minimum, this practice raised concerns regarding duplication of services." *Id.*
157. *Id.* at 404.
158. *Id.*
159. *Id.* at 405.
160. *Id.* at 406.
161. *Id.*

monitoring practices by attorneys.[162] The court concluded that while monitoring activities may be reasonable in some cases, the attorney had provided no case-specific information to support the requests for fees for such activities and, therefore, would not allow compensation for monitoring and reviewing status reports.[163]

C. Ineffective Assistance of Counsel

In *People v. Kammeraad*, the court of appeals considered a claim of ineffective assistance of counsel, among many other claims.[164] The defendant was convicted of several crimes by a jury.[165] He appealed his convictions on multiple bases, including ineffective assistance of counsel.[166] But the court held that he had forfeited his right to counsel, thus even if appointed counsel had failed to subject the prosecution's case to a "meaningful adversarial [test]," reversal was not warranted.[167]

The defendant refused to participate in the trial court proceedings and refused court-appointed counsel.[168] He repeatedly advised the court that he took "exception" to the proceedings and judicial process, and refused to respond appropriately to the court's questions during numerous court appearances.[169] While acknowledging that he was not qualified to represent himself, the defendant steadfastly refused court-appointed counsel.[170] Because the defendant would not acknowledge appointed counsel or cooperate in his own defense, the appointed attorney filed a motion to withdraw, but the trial court denied it.[171]

At trial, the defendant again refused to participate in the proceedings.[172] He was removed from the courtroom and permitted to watch the proceedings via video.[173] Defense counsel again tried to withdraw, but this request was denied.[174] During the proceedings, defense counsel repeatedly tried to confer with the defendant, but was rebuffed every time.[175] As a result, defense counsel declined to question

162. *Id.*
163. *Id.* at 407.
164. People v. Kammeraad, 307 Mich. App 98, 858 N.W.2d 490 (2014).
165. *Id.* at 100, 858 N.W.2d at 493.
166. *Id.*
167. *Id.*
168. *Id.* at 101–16, 858 N.W.2d. at 493–501.
169. *Id.*
170. *Id.*
171. *Id.*at 110–11, 858 N.W.2d. at 498–99.
172. *Id.* at 112–15, 858 N.W.2d. at 499–501.
173. *Id.* at 115, 858 N.W.2d. at 501.
174. *Id.*
175. *Id.*

or challenge jurors during voir dire, give an opening statement, cross-examine the prosecution's witnesses, present any evidence, give a closing argument, or object to the jury instructions.[176]

The defendant appealed his conviction. Regarding his ineffective assistance claim, the defendant argued that he did not have to establish prejudice because his appointed attorney failed completely to challenge the prosecution's case.[177] The court held that, while prejudice may be presumed in some situations where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," the defendant must have been constitutionally entitled to the assistance of counsel and must not have waived or forfeited the right.[178] The court further held that prejudice was not presumed because the defendant had forfeited his right to counsel.[179]

The court concluded that the defendant had the choice to refuse both appointed counsel and self-representation.[180] A defendant may decide to refuse both, forfeiting those constitutional rights and effectively allowing the prosecution to go unchallenged.[181] The court would not allow the defendant's "reprehensible conduct" to be turned into a claim that he was deprived of his constitutional rights.[182] But, the court noted, a finding of forfeiture of the right to counsel should only be made in the rarest of circumstances and as necessary to address "exceptionally egregious conduct."[183]

D. Conflict of Interest

In *Kohut v Lenaway (In re Lennys Copy Ctr. & More, LLC)*, the Eastern District of Michigan Bankruptcy Court granted a motion for disqualification based on a conflict of interest in an adversary proceeding.[184] The adversary proceeding was filed by the trustee against the debtor LLC's members to recover prepetition transfers as fraudulent

176. *Id.*
177. *Id.* at 122, 858 N.W.2d. at 504–05.
178. *Id.* at 125–126, 858 N.W.2d. at 506–07 (quoting United States v. Cronic, 466 U.S. 648, 650 (1984)).
179. *Id.* at 130–31, 858 N.W.2d. at 509–10.
180. *Id.* at 135, 858 N.W.2d. at 512.
181. *Id.*
182. *Id.* at 136, 858 N.W.2d. at 512.
183. *Id.* at 137, 858 N.W.2d. at 513.
184. Kohut v. Lenaway (*In re* Lennys Copy Ctr. & More, LLC), 515 B.R. 562, 564 (Bankr. E.D. Mich., July 18, 2014).

transfers.[185] The same law firm represented the debtor LLC and its members.[186]

The court concluded that the firm and all of its attorneys were prohibited from representing the debtor's members by MRPC 1.7(a) and 1.10(a) because the firm's representation of the debtor's members was directly adverse to its representation of the debtor.[187] The court held that there were "continuing adverse interests" between the debtor and its members.[188] The members' interest in defending themselves against the fraudulent transfer claims conflicted with the debtor's interests and duties, including the debtor's interest in cooperating with the Chapter 7 trustee and maximizing the recovery for the bankruptcy estate and the debtor's creditors.[189]

The court acknowledged that the debtor was a distinct entity from the bankruptcy estate and the bankruptcy trustee.[190] But the debtor's duties and interests after filing its bankruptcy petition were aligned with the trustee and estate.[191] The debtor and the firm had a fiduciary obligation to act in the best interest of the entire estate, including the debtor's creditors.[192] The debtor had a duty to disclose information that would help the trustee to recover assets in preference and fraudulent conveyance actions.[193] Thus, a debtor's counsel's representation of the debtor and adversary proceeding defendants "compels an adversarial posture at odds with [his or her] statutory duties," thus creating a conflict of interest.[194]

The court also held that the exception provided in Rule 1.7(a) did not apply because the client did not consent.[195] The trustee controlled the

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185. *Id.*

186. *Id.*

187. *Id.*; *see* MODEL RULES OF PROF'L CONDUCT r. 1.7(a) (AM. BAR ASS'N 2014) (stating in relevant part: "A lawyer shall not represent a client, if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.10(a) (stating, in relevant part: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2.").

188. *Lenaway*, 515 B.R. at 564.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 564-65.

193. *Id.* at 565 (citing Pereira v. Allboro Bldg. Maint., Inc. (*In re* Allboro Waterproofing Corp.), 224 B.R. 286, 292 (Bankr. E.D. N.Y. 1998)).

194. *Id.*

195. *Id.*

debtor's decision to consent and the trustee did not and would not consent.[196]

Alternatively, the firm suggested that it withdraw as counsel for the debtor and continue representing the debtor's members.[197] The court rejected this suggestion for multiple reasons.[198] Importantly, the debtor was the client first, not the members.[199] The court noted that courts have "universally [held] that a law firm will not be allowed to drop a client in order to resolve a direct conflict of interest . . . ."[200] The court also observed that the firm had not given any reason why the court should allow it to withdraw from representing the debtor as viewed from the debtor's perspective.[201]

The court further held that even if the firm were allowed to withdraw as counsel for the debtor, Rule 1.9(a) still prohibited the firm from representing the debtor's members.[202] The adversary proceeding was "a substantially related matter" to the bankruptcy case and the debtor's members' interests were "materially adverse" to the debtor's interests for the reasons the court had already explained.[203] And again, the consent exception did not apply because the trustee did not and would not allow the debtor to consent.[204]

Finally, the court rejected the firm's argument that the court was not required to disqualify the firm from representing the debtor's members even if it concluded there was a conflict of interest under the Rules of Professional Conduct.[205] The court held that public policy and preservation of the integrity of the judicial process dictated disqualification after a finding that continued representation of the debtor's members violated the Rules.[206] The court distinguished two cases cited by the firm in support of its argument, noting that the trustee consented in one case and the bankruptcy debtor was not the first client

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 566.
201. *Id.*
202. *Id.*; MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (AM. BAR ASS'N 2014) states: "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."
203. *Lenaway*, 515 B.R. at 566.
204. *Id.*
205. *Id.*
206. *Id.* at 566–67.

in the second case.[207] For all of these reasons, the court disqualified the firm from representing the debtor's members in the adversary proceeding.

III. DISCIPLINARY PROCEEDINGS

A. Attorney Disciplinary Proceedings

The Michigan Supreme Court is constitutionally charged with supervising and disciplining attorneys practicing in Michigan.[208] The Attorney Grievance Commission (AGC) is the Supreme Court's prosecution arm, and the Attorney Discipline Board (ADB) is the adjudicative arm.[209] Some actions that may subject attorneys to discipline include criminal conduct, violations of the Michigan Rules of Professional Conduct, and entering into an agreement or attempting to enter into an agreement that attorney misconduct will not be reported.[210] A separate agency, the Judicial Tenure Commission (JTC), serves the same function for Michigan judges.[211]

1. Attorney Kenneth Flaska

In this matter, the ADB held that an attorney cannot resign under MCR 9.115(M) before a discipline proceeding has been commenced against the attorney. MCR 9.115(M) states, "[a]n attorney's resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment."[212]

The petitioner, Attorney Flaska, filed a petition against himself after pleading guilty to felony embezzlement and money laundering charges.[213] The petition advised that he knew he had a right to a hearing if a disciplinary proceeding was filed against him by the AGC, that he knew the burden and standard of proof in a reinstatement proceeding following disbarment, and requested that the ADB disbar him under MCR 9.115(M).[214]

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207. *Id.* at 567 (discussing Paloian v. Greenfield (*In re* Rest. Dev. Grp., Inc.), 402 B.R. 282 (Bankr. N.D. Ill. 2009) and Pereira v. Allboro Bldg. Maint., Inc. (*In re* Allboro Waterproofing Corp.), 224 B.R. 286 (Bankr. E.D. N.Y. 1998).

208. MICH. CT. R. 9.108(A).

209. *Id.*; MICH. CT. R. 9.110(A).

210. MICH. CT. R. 9.104.

211. *See* MICH. CT. RS. 9.200–9.228.

212. MICH. CT. R. 9.115(M).

213. *In re* Kenneth A. Flaska, No. 14-100-MZ (Mich. Att'y Discipline Bd. Dec. 5, 2014), *available at* http://www.adbmich.org/coveo/opinions/2014-12-05-14o-100.pdf.

214. *Id.* at 1.

The panel reviewed the history of how MCR 9.115(M) had been applied since 1992.[215] In some instances, an order of disbarment was entered after a disciplinary hearing was held, but in others, the attorney was permitted to resign by consent, with no formal complaint or hearing.[216]

The panel also noted that the rule referenced resignation and disbarment, two distinct ways of ending bar membership.[217] The key difference between resignation and disbarment is the mechanism for reseeking bar membership at a later date.[218] Although both resignation and disbarment are referenced, it was clear to the panel that under the rule, resignation may only occur pursuant to an order of disbarment.[219]

The prior versions of MCR 9.115(M) required an attorney to admit misconduct before being permitted to resign while a request for investigation or complaint was pending.[220] The panel opined that the prior versions "had always performed the important (and perhaps primary) function of preventing resignation to escape discipline."[221]

The court rules provide that the attorney discipline subchapter should be "liberally construed for the protection of the public, the courts, and the legal profession."[222] Thus, the panel concluded that MCR 9.115(M) should be construed to require an order of disbarment obtained through a procedure described in subchapter 9.100, which requires findings or admissions of misconduct.[223] And except for reciprocal discipline, an order of discipline must be the result of a proceeding conducted before a panel.[224] Therefore, the panel concluded that an attorney may not request resignation under MCR 9.115(M) before a disciplinary proceeding is commenced.[225]

2. Reduction of Discipline Portion of State Bar of Michigan Dues

Under the Michigan Court Rules, the members of the state bar fund the ADB and the AGC.[226] Beginning in 2011, the Michigan Supreme Court reduced the discipline portion of dues from $120 to $110 because

215. *Id.* at 2–3.
216. *Id.* at 2.
217. *Id.* at 3.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 4.
222. *Id.* at 5 (citing MICH. CT. R. 9.102(A)).
223. *Id.* at 5.
224. *Id.*
225. *Id.* at 6.
226. MICH. CT. R. 9.105(B).

of a $5 million surplus in its disciplinary system.[227] In 2014, there was an even greater surplus.[228] As such, the court further reduced the discipline portion of state bar dues to $90.[229]

B. Judicial Discipline

1. Judge Sheila Ann Gibson

The Honorable Sheila Ann Gibson of the 3rd Circuit Court was publicly censured and suspended for thirty days without pay after a local television news crew reported on her late arrivals and early departures from court during one week in October 2012.[230] The news crew reported that during that week, Judge Gibson took the bench at approximately 11 a.m. each day, despite matters being scheduled at 9:00 a.m., 9:30 a.m., and 10:00 a.m. each day.[231] She also left between 4:00 p.m. and 4:30 p.m. each day.[232]

The JTC initially entered into a settlement agreement with Judge Gibson by which she consented to the JTC's findings of fact and conclusions of law, and its recommendation for a public censure.[233] But the Michigan Supreme Court rejected the recommendation of a public censure and remanded the matter to the JTC for a new recommendation or a status report.[234] The JTC issued a second decision and recommendation, with an amended settlement agreement with Judge Gibson, by which she consented to a sanction no greater than a public censure and 30-day suspension without pay.[235]

The Supreme Court conducted a de novo review, mindful of the standards for judicial discipline described in *In re Brown*.[236] These standards are:

[E]verything else being equal:

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227. Adjustment of Discipline Portion of State Bar of Michigan Dues, Michigan Supreme Court Admin. Order 2014-11.

228. *Id.*

229. *Id.*

230. *In re* Gibson, 497 Mich. 858, 852 N.W.2d 891 (2014).

231. *Id.* at 859–60, 852 N.W.2d at 892–93.

232. *Id.*

233. *Id.* at 858, 852 N.W.2d at 891.

234. *Id.*

235. *Id.*

236. *Id.* at 858, 852 N.W.2d at 891–92 (citing *In re* Brown, 461 Mich. 1291, 1291–93, 625 N.W.2d 744–46 (2000)).

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench:
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.[237]

The court adopted the findings of fact stipulated to by Judge Gibson and the JTC regarding her arrival and departure times and the matters that were scheduled on those days.[238] The court also adopted the JTC's conclusion that the facts demonstrated, by a preponderance of the evidence, that Judge Gibson breached the standards of judicial conduct, and that she was responsible for misconduct in office, conduct prejudicial to the administration of justice, and conduct involving impropriety and the appearance of impropriety, among other things.[239] Based on its review, the court accepted the JTC's recommendation and

237. *Id.*
238. *Id.* at 859, 852 N.W.2d at 892.
239. *Id.* at 860–61, 852 N.W.2d at 893–94.

ordered that Judge Gibson be publicly censured and suspended for thirty days without pay.[240]

2. Judge Bruce Morrow

The Honorable Bruce Morrow of the 3rd Circuit Court was suspended for sixty days without pay.[241] The JTC recommended a ninety-day suspension, but a majority of the Michigan Supreme Court held that a sixty-day suspension was proportionate to the judicial misconduct established in the record.[242]

Before a formal complaint was filed, Judge Morrow entered into a settlement agreement, stipulating to a set of facts involving his conduct in four criminal cases and consenting to a public censure.[243] The JTC agreed, with two members dissenting, that the stipulated facts established misconduct and recommended that the Michigan Supreme Court impose the public censure.[244] The two dissenting members would have recommended a sixty to ninety day suspension.[245]

The court held that the public censure was too lenient and remanded the matter for further proceedings.[246] After remand, the parties were unable to reach a new settlement agreement.[247] The court then entered a confidential order stating that a ninety-day suspension was appropriate and that such sanction would be imposed unless Judge Morrow objected by withdrawing his consent to be disciplined.[248]

Judge Morrow withdrew his consent, and the JTC filed a formal complaint against him, alleging ten counts of misconduct.[249] The alleged misconduct included closing his courtroom to the public and victim's family during a post-conviction hearing without specifically stating the reasons for the closure or entering a written order as required by court rule, and telling his court reporter not to prepare transcripts of the hearing; failing to sentence defendants in accordance with mandatory minimums or sentencing guidelines; subpoenaing a defendant's medical records without the parties' knowledge or consent; and personally

240. *Id.* at 861, 852 N.W.2d at 894.
241. *In re* Morrow, 496 Mich. 291, 854 N.W.2d 89 (2014).
242. *Id.* at 294, 854 N.W.2d at 91.
243. *Id.* at 294–95, 854 N.W.2d at 91.
244. *Id.* at 295, 854 N.W.2d at 91.
245. *Id.*
246. *Id.*, 854 N.W.2d at 92.
247. *Id.*
248. *Id.*
249. *Id.*

bringing a defendant to his courtroom from lockup and sentencing him without restraints or courtroom security present.[250]

The court appointed retired Honorable Edward Sosnick as master.[251] The master found that a preponderance of the evidence established the factual basis for the allegations, but that only two counts constituted judicial misconduct.[252] The JTC heard arguments on objections to the master's report and issued a decision and recommendation.[253] The JTC disagreed with the master's conclusions of law and concluded that eight of the ten counts constituted judicial misconduct.[254] On the basis of the *Brown* factors, the JTC recommended a 90-day suspension without pay.[255]

On de novo review, a majority of the court agreed that a preponderance of the evidence established the factual basis of the allegations.[256] The court also adopted the JTC's conclusions of law.[257] The court rejected Judge Morrow's claim that he was immune from the JTC's action because he "acted in good faith and with due diligence," holding that acting in disregard for the law and established limits of the judicial role "to pursue a perceived notion of the higher good" is not "good faith."[258] The court also disagreed that its decision would "spell[] the end of judicial independence," stating it instead reinforced the principle that judicial officers should strive to do justice but must do so under the law and within the confines of their adjudicative roles.[259]

But the court rejected the JTC's recommendation of a ninety-day suspension.[260] First, the court noted its duty to treat equivalent cases in an equivalent manner and unequivalent cases in a proportionate manner.[261] The court encouraged the JTC to develop standards for determining the appropriate sanction for particular misconduct for use in future judicial discipline matters.[262] Under that framework, the fact that Judge Morrow did not seek to personally benefit from his misconduct was a mitigating factor.[263] That contrasted with two other cases in which the judges'

250. *Id.* at 295–97, 854 N.W.2d at 92–93.
251. *Id.* at 297, 854 N.W.2d at 93.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*; *see supra,* notes 222–231 and accompanying text.
256. *Morrow,* 496 Mich. at 298, 854 N.W.2d at 93.
257. *Id.*, 854 N.W.2d at 93–94.
258. *Id.* at 300, 854 N.W.2d at 94–95.
259. *Id.*
260. *Id.* at 302, 854 N.W.2d at 95.
261. *Id.* (internal citation omitted).
262. *Id.* n. 19, 854 N.W.2d at 96 n.19.
263. *Id.* at 303, 854 N.W.2d at 96.

misconduct included using their office for personal gain and in which the judges received ninety-day suspensions.[264]

Another mitigating factor was the court's disagreement with the JTC's analysis of whether the judge had "a pattern of willfully disregarding the law and proper legal procedures in the handling of cases."[265] The court concluded that four of the cases revealed a pattern of disregard of controlling authority, but that the other four cases had nothing in common except for judicial misconduct.[266]

Finally, the court recognized the difficulty in identifying a baseline for discipline because there were no recent similar cases.[267] The court acknowledged that, individually, the allegations would likely not warrant more than a public censure or short suspension, but that taken together, a greater sanction was necessary to protect the integrity of the judiciary.[268] Thus, the court concluded that the appropriate sanction was a sixty-day suspension without pay.[269]

Justice Robert Young concurred in part and dissented in part.[270] He agreed that the court should accept the JTC's findings of fact and conclusions of law, but disagreed with departing from the recommendation of a ninety-day suspension.[271] He believed this was based in part on the lack of a coherent theory of discipline from the Court and JTC.[272]

Justice Young then endeavored to set forth what he believed should be a marker to guide future judicial sanctions in similar cases.[273] According to Justice Young, "[w]hen the record reflects that a judge has demonstrated a pattern of lawlessness in the discharge of his judicial duties (not mere mistakes in the application of the law), the sanction should presumptively be *no less than* a ninety-day suspension without pay."[274] Justice Young joined the majority in encouraging the JTC to develop standards to use when considering judicial discipline.[275]

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264. *Id.* at 303–04, 854 N.W.2d at 96–97.
265. *Id.* at 304–05, 854 N.W.2d at 97.
266. *Id.* at 305, 854 N.W.2d at 97.
267. *Id.* at 306, 854 N.W.2d at 98.
268. *Id.* at 306–07, 854 N.W.2d at 98.
269. *Id.* at 307, 854 N.W.2d at 98.
270. *Id.* at 308, 854 N.W.2d at 99.
271. *Id.* at 309, 854 N.W.2d at 99 (Young, C.J. concurring in part and dissenting in part).
272. *Id.*
273. *Id.* at 314, 854 N.W.2d at 102.
274. *Id.*
275. *Id.* at 318, 854 N.W.2d at 104.

Justice Michael F. Cavanagh also dissented, concluding that public censure, as first recommended by the JTC, was the appropriate sanction.[276]

276. *Id.* at 319, 854 N.W.2d at 105 (Cavanagh, J dissenting).