PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

The field of professional responsibility broadly encompasses all law governing lawyers, judges, and the practice of law. The intent of the authors is to familiarize the reader with noteworthy developments in Michigan's law of professional responsibility during the 2007-2008 *Survey* period. To do so, the authors first consider the foundational rules of professional responsibility: the Michigan Rules of Professional Conduct (MRPC), the Michigan Court Rules (MCR), and the Rules Concerning the State Bar of Michigan. The authors then address recent developments in the law of legal malpractice and the law governing attorney fees. Finally, the authors consider significant disciplinary actions taken against Michigan lawyers and judges during the *Survey* period.

II. THE FOUNDATIONAL RULES OF PROFESSIONAL RESPONSIBILITY IN MICHIGAN

A. The Michigan Rules of Professional Conduct

The Michigan Supreme Court first adopted a Code of Professional Responsibility on October 4, 1971,[1] which was replaced by the current Michigan Rules of Professional Conduct on October 1, 1988.[2] The MRPC govern all aspects of an attorney's conduct—both before the tribunal and outside the tribunal.[3] Although the Michigan Rules of Professional Conduct were not amended during this *Survey* period, several of the rules were applied or interpreted by the courts.

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1. Schlossberg v. State Bar Grievance Bd., 388 Mich. 389, 394 n.2, 200 N.W.2d 219, 220, n.2 (1972).

2. Grievance Adm'r v. Fried, 456 Mich. 234, 238 n.5, 570 N.W.2d 262, 264 n.5 (1997).

3. *See* Grievance Adm'r v. Fieger, 476 Mich. 231, 291, 719 N.W.2d 123, 158 (2006) (Cavanagh, J., dissenting).

For example, in *People v. Petri*,[4] the Michigan Court of Appeals considered whether the trial court should have disqualified the prosecutor from trying the case on the ground that the prosecutor was a necessary witness. The appellate court began by noting that "Michigan lawyers are governed by the Michigan Rules of Professional Conduct . . . under which a lawyer generally cannot simultaneously be a witness and an advocate at trial."[5] The *Petri* court then quoted from MRPC 3.7(a), which provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;
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> (2) the testimony relates to the nature and value of legal services rendered in the case; or
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> (3) disqualification of the lawyer would work substantial hardship on the client.[6]

The court also considered the effect of *People v. Tesen*,[7] in which a different panel of the Court of Appeals had affirmed a trial court's decision to disqualify a prosecuting attorney on the ground that the prosecutor was a necessary witness. In *Tesen*, the prosecutor had previously interviewed the child victim and the defendant moved for disqualification on the ground that he intended to call the prosecutor as a witness at trial.[8] The *Tesen* court agreed with the defendant that the prosecutor in that case "may well have . . . personal knowledge of information relevant to contested issues" and that the defendant had satisfied his burden of showing that the prosecutor should be disqualified as a potential witness.[9]

After considering the *Tesen* decision and MRPC 3.7(a), the *Petri* court opined, "[w]e find *Tesen* distinguishable, because here defendant did not make a timely demand to disqualify the prosecutor, nor did he

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4. 279 Mich. App. 407, 760 N.W.2d 882 (2008).

5. *Id.* at 417, 760 N.W.2d at 888; *see also* MICH. R. PROF'L CONDUCT R. 3.7(a).

6. *Id.*

7. 276 Mich. App. 134, 739 N.W.2d 689 (2007). *Tesen* was also decided during the current *Survey* period.

8. *Id.* at 136-37, 144-45, 739 N.W.2d at 691, 695.

9. *Id.* at 144-45, 739 N.W.2d at 695.

demonstrate that the prosecutor would be a necessary witness at trial."[10] In addition, the *Petri* court stated:

> We agree with the trial court's determination that defense counsel failed to establish that the prosecutor was a necessary witness. Although given an opportunity to identify a particular issue on which the prosecutor would be a necessary witness, the gist of defense counsel's argument was that any prosecutor should be automatically disqualified if he or she becomes part of an interview team or conducts a forensic interview. Because defense counsel failed to offer any particularized basis for concluding that the prosecutor's testimony would be material to the defense, we uphold the trial court's denial of the motion to disqualify.[11]

It is apparent that the ultimate outcome in *Petri* was grounded in large part on the fact that the defendant had failed to demonstrate that the prosecutor was "likely to be a necessary witness" within the meaning of MRPC 3.7(a).[12]

In *People v. Walker*,[13] the Michigan Court of Appeals examined an attorney's right to withdraw from representation under the provisions of MRPC 1.16. In *Walker*, the defendant was charged with possession of narcotics.[14] The defendant retained defense counsel in December 2003, and was bound over for trial in January 2004.[15] By the summer of 2004, however, the defendant's relationship with counsel had begun to break down. In July 2004, counsel moved to withdraw, asserting that the defendant, "who had retained him, was not paying him, kept sending him letters, and was 'again going against [his] advice.'"[16] Moreover, counsel "indicated that [the defendant had] told him that if he did not do as [the

10. *Petri*, 279 Mich. App. at 418, 760 N.W.2d at 889.

11. *Id.* at 419, 760 N.W.2d at 890.

12. For similar cases decided during the current *Survey* period in which the defendants urged attorney disqualification under MRPC Rule 3.7(a), *see, e.g.*, People v. Kennedy, No. 271020, 2007 WL 3309995 (Mich. Ct. App., Nov. 8, 2007); People v. Richardson, No. 278500, 2007 WL 2891871 (Mich. Ct. App., Oct. 4, 2007); People v. Patterson, No. 268943, 2007 WL 2560143 (Mich. Ct. App., Sept. 6, 2007).

13. 276 Mich. App. 528, 741 N.W.2d 843 (2007), *vacated in part on other grounds*, 480 Mich. 1059, 743 N.W.2d 912 (2008) and 480 Mich. 1059, 743 N.W.2d 914 (2008).

14. *Id.* at 532, 741 N.W.2d at 847.

15. *Id.*

16. *Id.*

defendant] asked, [the defendant] would sue him."[17] The trial court accordingly granted counsel's motion to withdraw.[18]

Thereafter, in September 2004, a second attorney was appointed to represent the defendant.[19] Trial was adjourned pending several motions filed by the second attorney.[20] Included among these was "a motion requesting that the trial judge recuse herself from the case or allow defense counsel to withdraw . . . ."[21] "The trial court denied [the second attorney's] recusal motion, but allowed him to withdraw from representing [the defendant]."[22]

On appeal, despite admitting "that he 'did not have a good attorney client relationship with either' of his . . . attorneys,"[23] the defendant asserted that the trial court had erred by allowing his first two attorneys to withdraw from the case.[24] But, the Michigan Court of Appeals disagreed. The *Walker* court began by observing that "[a]n attorney who has entered an appearance may withdraw from the action only with the consent of the client or by leave of the court."[25] The court went on to note that "[u]nless ordered to continue to represent a client,"[26] a lawyer's request to withdraw from representing a client is generally governed by MRPC 1.16(b).[27]

After examining the relevant provisions of MRPC 1.16(b), the *Walker* court found "no abuse of discretion in the trial court's granting of [the first attorney's] or [the second attorney's] motion to withdraw."[28] With respect to the first attorney, the court of appeals simply noted that the defendant had "continuously question[ed] [the first attorney's] ability to effectively represent him."[29] The court ruled that the motion to

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17. *Id.*

18. *Id.*

19. *Walker*, 276 Mich. App. at 532, 741 N.W.2d at 847.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 542, 741 N.W.2d at 853.

24. *Id.* at 539, 741 N.W.2d at 851-52.

25. *Walker*, 276 Mich. App. at 547, 741 N.W.2d at 855 (citing MICH. CT. R. 2.117(C)(2) and *In re Withdrawal of Attorney*, 234 Mich. App. 421, 431, 594 N.W.2d 514, 518 (1999)).

26. *Id.* (citing MICH. R. PROF'L CONDUCT R. 1.16(c)).

27. *Id.* at 547-48, 741 N.W.2d at 855-56. *See also In re* Withdrawal of Attorney, 234 Mich. App. at 432, 594 N.W.2d at 519 (observing that although the Michigan Rules of Professional Conduct "do not expressly apply" to a motion to withdraw, it is "logical . . . to consider the question of withdrawal within the framework of our code of professional conduct").

28. *Walker*, 276 Mich. App. at 547, 741 N.W.2d at 855.

29. *Id.* at 548, 741 N.W.2d at 855.

withdraw had been properly granted "on the ground that there had been a breakdown in their attorney-client relationship."[30]

The *Walker* court then considered the second attorney's motion to withdraw. The court reiterated that the attorney had "moved to withdraw as an alternative to his motion requesting the trial judge's recusal. [The attorney] was concerned that his prior, allegedly adverse relationship with the trial judge could adversely affect [the defendant's] interests."[31] Although the trial judge had

> explained that she had no bias or prejudice against [the second attorney] and, after a brief discussion, [the attorney] felt comfortable that they had "cleared the air." Nevertheless, the trial judge nonetheless allowed [the attorney] to withdraw because of the possibility that [the defendant] might continue to question the judge's impartiality.[32]

The court of appeals concluded that the trial court had properly granted the motion to withdraw "in the interest of avoiding any later question about the integrity of the court's decisions solely based on [the second attorney's] continued representation of [the defendant]."[33]

In *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C. v. Bakshi*,[34] the Michigan Court of Appeals considered the accrual of an attorney's breach-of-contract claim against a former client for unpaid legal fees. In concluding that an attorney must wait until the termination of the attorney-client relationship before commencing such an action against a former client, the court found MRPC 1.7(b) instructive.[35] MRPC 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

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30. *Id.*, 741 N.W.2d at 856.

31. *Id.*

32. *Id.*

33. *Id.*

34. 278 Mich. App. 486, 750 N.W.2d 633 (2008). As of the submission of this article, the Michigan Supreme Court had granted leave to appeal on other grounds in *Seyburn, Kahn, Ginn, Bess, Deich & Serlin, P.C. v. Bakshi*, 482 Mich. 1077, 758 N.W.2d 633 (2008).

35. *Seyburn, Kahn*, 278 Mich. App. at 498, 750 N.W.2d at 856.

> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[36]

The court of appeals ruled that "an attorney may not ethically sue a client to recover unpaid legal fees while the attorney represents the client."[37] The court observed that "[s]uch an action would certainly violate MRPC 1.7(b), which prohibits an attorney from representing a client if the representation of that client 'may be materially limited . . . by the lawyer's own interests.'"[38]

In *Kasben v. Hoffman*,[39] the Michigan Court of Appeals considered an attorney's claim that the trial court had improperly held him jointly liable with the defendant for the return of $81,534.90 in funds to the plaintiff.[40] The attorney had "formerly represented [the defendant] in her divorce case."[41]

> At various times throughout the [divorce] proceedings, the trial court awarded [the defendant] attorney fees. The fees were awarded on the basis of need, as well as on [the plaintiff's] unreasonable conduct. The final award totaled more than $144,000. During the divorce proceedings, [the defendant] filed for bankruptcy protection. At the close of the bankruptcy estate, the bankruptcy court placed $125,989.98 into an escrow account pending an order for disbursement by the [state] court . . . . [T]he trial court [ultimately] determined that [the defendant] owed [the plaintiff] $44,455.08, and ordered $44,455.08 to be disbursed to [the plaintiff] from the funds in escrow. And the trial court

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36. MICH. R. PROF'L CONDUCT R. 1.7(b).

37. *Seyburn, Kahn*, 278 Mich. App. at 498, 750 N.W.2d at 640.

38. *Id.* (quoting MICH. R. PROF'L CONDUCT R. 1.7(b)). The court also found instructive "State Bar of Michigan Informal Ethics Opinion RI-159 (April 13, 1993), which states that an attorney who represents a client in a divorce action may not sue the client for unpaid fees before the action is resolved, and also that the assignor of an attorney's claim for unpaid fees may not sue the client until the representation is completed." *Id.* (citing Mich. Comm. on Ethics and Prof'l Responsibility, Informal Op. RI-159 (1993)).

39. 278 Mich. App. 466, 751 N.W.2d 520 (2008).

40. *Id.* at 469, 751 N.W.2d at 522.

41. *Id.* at 467, 751 N.W.2d at 521.

> ordered the remaining $81,534.90 [in the escrow account] to be disbursed jointly to [the defendant] and [her attorney].[42]

The defendant subsequently authorized her attorney to take the $81,534.90 and to "deposit the funds into his business account in partial satisfaction" of his unpaid legal fees.[43] The judgment of divorce was appealed, and the Michigan Court of Appeals concluded that the trial court had miscalculated the amounts due to the parties.[44] As a consequence, the court of appeals remanded the matter and instructed the trial court to order that the $81,534.90 in funds be returned to the plaintiff.[45] "On remand, the trial court concluded that [it was] required . . . to hold [the attorney] jointly liable with [the defendant] for the $81,534.90."[46]

The attorney then appealed, arguing that the trial court had been without authority to hold him jointly liable for the $81,534.90.[47] The Michigan Court of Appeals first observed that "[a]n attorney may receive property that belongs to his or her client or a third party."[48] However, the court cited MRPC 1.15 for the proposition that "the attorney has a duty to notify all interested parties, safeguard the property, and promptly distribute the property to the rightful owners."[49] Specifically, the court stated that "even if an attorney has a claim against funds held for a client, the attorney may not unilaterally seize the funds. Rather, the attorney must hold the funds separately until the dispute is resolved."[50] Accordingly, the *Kasben* court ruled that the defendant's attorney

> had no right to unilaterally take payment of his fees from the disbursed money. Instead, [the attorney] had to obtain [the defendant's] permission or an order from the court before he could pay himself from the disbursed funds . . . . [A]lthough the funds were ostensibly disbursed to [the defendant and her attorney] jointly, the disbursement belonged to [the defendant]

42. *Id.* at 468-69, 751 N.W.2d at 521-22.
43. *Id.* at 469, 751 N.W.2d at 522.
44. *Id.*
45. *Kasben*, 278 Mich. App. at 469, 751 N.W.2d at 522.
46. *Id.*
47. *Id.*, 751 N.W.2d at 523-24 (citing MICH. R. PROF'L CONDUCT R. 1.15).
48. *Id.* at 472, 751 N.W.2d at 523.
49. *Id.*, 751 N.W.2d at 523-24.
50. *Id.* at 472-73, 751 N.W.2d at 524 (citing MICH. R. PROF'L CONDUCT R 1.15(c)).

> until [the attorney] obtained authorization to use the funds to pay his fees.[51]

Of course, the attorney *had* obtained the defendant's authorization to use the funds in the case at bar,[52] and the attorney therefore had not violated MRPC 1.15. As the *Kasben* court stated:

> Once [the defendant] authorized [her attorney] to take his fees out of the disbursed funds, those funds became [the attorney's] property. And the trial court was without the authority to order [the attorney] to relinquish his property on the sole basis that he was paid with funds that were later determined not to have belonged to [the defendant]. Rather, the trial court's authority only extended to ordering [the defendant] to repay the funds that were erroneously disbursed for her benefit.[53]

The *Kasben* court concluded that the trial court had "erred to the extent that it held [the attorney] liable to repay the $81,534.90 erroneously disbursed to [the defendant]."[54]

Similar to *Walker*, *supra*, in *In re Sayles*,[55] the Michigan Court of Appeals once again analyzed the standards for attorney withdrawal under MRPC 1.16. In *Sayles*, counsel moved to withdraw after representing the respondent for ten months.[56] "Counsel asserted that respondent desired his discharge, and he should therefore withdraw pursuant to [MRPC] 1.16(a)(3), which requires withdrawal upon discharge by the client, and that respondent had accused him of not adequately representing her, which allowed withdrawal under [MRPC] 1.16(b)(6), a catchall provision 'for other good cause.'"[57] The Michigan Court of Appeals observed that "[a]lthough the Michigan Rules of Professional Conduct do not expressly apply to a motion to withdraw, it is logical 'to consider the question of withdrawal within the framework of our code of professional conduct.'"[58] The *Sayles* court went on to opine that its

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51. *Kasben*, 278 Mich. App. at 473, 751 N.W.2d at 524.
52. *See id.* at 469, 751 N.W.2d at 522.
53. *Id.* at 474-75, 751 N.W.2d at 525.
54. *Id.* at 475, 751 N.W.2d at 525.
55. No. 281450, 2008 WL 2219926 (Mich. Ct. App. May 29, 2008).
56. *Id.* at *1.
57. *Id.*
58. *Id.* (quoting *In re Withdrawal of Attorney*, 234 Mich. App. at 431, 594 N.W.2d at 518).

> review of the lower court record reveals that counsel ha[s] done an exemplary job representing respondent, vigorously filing motions and arguing on her behalf against petitioner's repeated filings of termination petitions. There was no evidence of counsel's incapacity or inadequacy, or respondent's shortcomings in her relationship with counsel of the type listed under [MRPC] 1.16(b)(1) to (5).[59]

The court noted that the respondent's complaints with counsel "consisted primarily of respondent's perception that her [former] attorney . . . had done a better job, that the case had been going on too long and was not going her way, and that counsel was not adequately answering her questions."[60] The court concluded that these asserted reasons for withdrawal "were not of the nature contemplated by the Rules of Professional Conduct . . . ."[61]

Lastly, in *Deluca v. Jehle*, the Michigan Court of Appeals examined whether the trial court had erred by instructing the jury that it could infer that the defendant-attorney was professionally negligent upon finding that he had violated the MRPC.[62] Specifically, the trial court had instructed the jury: "'If you find the defendant violated the Michigan Rules of Professional Conduct you may infer that the defendant was negligent. However, you should weigh all the evidence that was presented in determining whether the defendant was or was not negligent.'"[63] The defendant argued on appeal that this instruction improperly suggested to the jurors that a violation of the MRPC creates a rebuttable presumption of malpractice.[64]

The *Deluca* court acknowledged that the rules of professional conduct "'do not . . . give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule.'"[65] The court also acknowledged that "'[a] violation of a rule does not . . . create any presumption that a legal duty has been breached.'"[66] However, the *Deluca* court observed that MRPC 1.0(b) "explicitly allows the admission of MRPC as evidence

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59. *Id.* at *2.

60. *Id.*

61. *In re Sayles*, 2008 WL 2219926, at *2.

62. No. 266073, 2007 WL 914350, at *2 (Mich. Ct. App. Mar. 27, 2007). Although this case was decided immediately preceding the current *Survey* period, it is addressed here because it involves an issue of continuing interest to the bench and bar.

63. *Id.* at *3.

64. *Id.* at *2.

65. *Id.* (quoting MICH. R. PROF'L CONDUCT R.1.0(b)).

66. *Id.* (quoting MICH. R. PROF'L CONDUCT R. 1.0 cmt. (2003)).

'governed by the Michigan Rules of Evidence and other provisions of law.'"[67] In light of this provision, the court concluded that the jury instruction had been proper because it "sa[id] nothing about any presumption of negligence," but merely permitted the jury to "use a violation of the MRPC as evidence of negligence[.]"[68] "Thus, the jury instructions on this point fairly and accurately presented the applicable law to the jury."[69]

B. The Michigan Court Rules

Both the Michigan Constitution and Michigan statutory law confer upon the Michigan Supreme Court "the duty and responsibility to regulate and discipline the members of the bar of this state."[70] "Most obviously, this responsibility entails concern for the competence, character, and fitness of attorneys, but historically also has included the issuance of rules regulating the manner in which lawyers communicate to the public about other participants in the legal system . . . ."[71] Under the authority of the Michigan Constitution,[72] the Michigan Supreme Court has promulgated the Michigan Court Rules of 1985.

Chapter 8 of the Michigan Court Rules[73] relates to the field of professional responsibility insofar as it deals with the assessment of legal fees in certain classes of actions[74] and governs the appearance and appointment of attorneys and others in the courts of this state.[75] Chapter 9 of the Michigan Court Rules[76] directly relates to the field of professional responsibility as it sets forth the rules concerning

67. *Id.* at *3 (quoting MICH. R. PROF'L CONDUCT R. 1.0(b)).

68. *Deluca*, 2007 WL 914350, at *3.

69. *Id. See also* Gadigian v. City of Taylor, No. 279540, 2008 WL 4958570 (Mich. Ct. App. Nov. 20, 2008) (discussing the difference between "inferences" and "presumptions" under Michigan law).

70. *Fieger*, 476 Mich. at 240, 719 N.W.2d at 131 (citing MICH. CONST. 1963, art. VI, § 5, and MICH. COMP. LAWS ANN. § 600.904 (West 2008)).

71. *Id.* at 240-41, 719 N.W.2d at 131.

72. MICH. CONST. 1963, art VI, § 5 ("[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.").

73. MICH. CT. R. 8.101-.126 (2009).

74. *See, e.g.*, MICH. CT. R. 8.121 (governing contingent fees in personal injury and wrongful death actions).

75. *See, e.g.*, MICH. CT. R. 8.120 (permitting law students and recent law school graduates to participate in legal clinics and programs and to appear in court in limited circumstances); MICH. CT. R. 8.122 (governing claims by clients against their attorneys); MICH. CT. R. 8.123 (governing the appointment of attorneys by the trial courts of this state).

76. MICH. CT. R. 9.101-.228 (2009).

disciplinary proceedings for Michigan judges and attorneys. In particular, as will be discussed in more detail in Parts V and VI, *infra*, subchapter 9.100 of the Michigan Court Rules governs the professional discipline of lawyers practicing in Michigan,[77] and subchapter 9.200 of the Michigan Court Rules governs the discipline of Michigan's judges.[78]

On June 27, 2008, the Michigan Supreme Court adopted new Michigan Court Rule 8.126, concerning temporary appearances—also known as pro hac vice appearances—of out-of-state attorneys before the courts of this state.[79] According to the staff comment to Rule 8.126, the new rule "appl[ies] to out-of-state attorneys who seek temporary admission to the bar on or after September 1, 2008[,]" and allows "an out-of-state attorney to be authorized to appear temporarily ("pro hac vice appearance") in no more than five cases within a 365-day period."[80] Rule 8.126 provides in relevant part:

> Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court or before an administrative tribunal or agency in this state when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case. An out-of-state attorney may appear and practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court or administrative tribunal or agency, and may be revoked at any time for misconduct. For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country.[81]

The rule establishes a detailed procedure that must be followed by out-of-state attorneys seeking temporary admission.[82] Among other things, the rule requires an out-of-state attorney to file an affidavit and copies of any out-of-state disciplinary orders in conjunction with his or

77. MICH. CT. R. 9.101-.131 (2009).
78. MICH. CT. R. 9.200-.228 (2009).
79. MICH. CT. R. 8.126 (2008).
80. MICH. CT. R. 8.126, cmt. (2008).
81. MICH. CT. R. 8.126(A).
82. *See* MICH. CT. R. 8.126(A)(1)(a)-(e).

her motion for pro hac vice admission.[83] The rule also specifies that "an attorney seeking temporary admission must be associated with a Michigan attorney," and requires that the motion for pro hac vice admission "include an attestation of the Michigan attorney that the [Michigan] attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed."[84] The rule provides that:

> The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission. Within seven days after receipt of the copy of the motion, the Attorney Grievance Commission must notify the court or administrative tribunal or agency and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances . . . . The court or administrative tribunal or agency shall not enter an order granting permission to appear in a case until the notification is received from the Attorney Grievance Commission.[85]

Rule 8.126 further states:

> Following notification by the Attorney Grievance Commission, if the out-of-state attorney has been granted permission to appear temporarily in fewer than [five] cases within the past 365 days, the court or administrative tribunal or agency *may* enter an order granting permission to the out-of-state attorney to appear temporarily in a case. If an order granting permission is entered, the court shall send a copy of the order to the Michigan attorney and the out-of-state attorney. The Michigan attorney in turn shall send a copy of the order to the Attorney Grievance Commission.[86]

Thus, as the rule makes clear through its use of the word "may," even if the Attorney Grievance Commission notifies the court or administrative tribunal that the out-of-state attorney is otherwise eligible

83. MICH. CT. R. 8.126(A)(1)(a).
84. *Id.*
85. MICH. CT. R. 8.126(A)(1)(b).
86. MICH. CT. R. 8.126(A)(1)(c) (emphasis added).

for pro hac vice admission, the court or tribunal retains discretion concerning whether to actually grant the out-of-state attorney's motion for temporary admission.[87] The Rule goes on to specify that if the court or administrative tribunal ultimately grants the out-of-state attorney's motion, the attorney's temporary admission generally will not become effective until "the attorney pays a fee equal to the discipline and client-protection portions of a [Michigan] bar member's annual dues."[88] "The discipline portion of the fee shall be paid to the State Bar of Michigan for allocation to the attorney discipline system, and the client-protection portion shall be paid to the State Bar of Michigan for allocation to the Client Protection Fund."[89] "The fee is required to be paid only once in each fiscal year of the State Bar of Michigan for which the attorney seeks admission."[90]

As the staff comment explains, this fee is imposed "[b]ecause misconduct will subject the out-of-state attorney to disciplinary action in Michigan."[91] Indeed, as Rule 8.126 provides, "By seeking permission to appear under this rule, an out-of-state attorney consents to the jurisdiction of Michigan's attorney disciplinary system."[92]

In conjunction with its promulgation of new Rule 8.126, the Michigan Supreme Court also amended Rule 9.108 to clarify that temporarily admitted out-of-state attorneys are subject to the professional discipline process applicable to Michigan lawyers.[93] Rule 9.108 now provides in pertinent part that "[t]he Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys *and those temporarily admitted to practice under MCR*

87. *See* Jordan v. Jarvis, 200 Mich. App. 445, 451, 505 N.W.2d 279, 282 (1993) (holding that "the term 'may' designates a permissive provision"); *see also* Mill Creek Coal. v. S. Branch Mill of Creek Intercounty Drainage Dist., 210 Mich. App. 559, 565, 534 N.W.2d 168, 171 (1995) ("[a]s a general rule, the word 'may' will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense.").

88. MICH. CT. R. 8.126(A)(1)(d). However, an "attorney is required to pay the fee only once in any period between October 1 and September 30." *Id.* Therefore, if the out-of-state attorney has already appeared before a Michigan court or tribunal during that same 365-day period, and consequently has already paid the fee for that fiscal year, "a fee is not due," and the court's or tribunal's order granting the motion for temporary admission "shall indicate the effective date of the appearance." *Id.*

89. *Id.*

90. MICH. CT. R. 8.126 cmt.

91. *Id.*

92. MICH. CT. R. 8.126(A)(1)(e).

93. MICH. CT. R. 9.108 (2008).

8.126."[94] The Michigan Supreme Court also amended the Rule to give the Attorney Grievance Commission "the power and duty to . . . compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126."[95]

C. The Rules Concerning the State Bar of Michigan

Statutory law confers upon the Michigan Supreme Court "the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members."[96] Pursuant to this authority, the Michigan Supreme Court has set forth a body of rules known as the "Rules Concerning the State Bar of Michigan."[97]

On June 27, 2008, concomitantly with the adoption of Michigan Court Rule 8.126 and the amendment of Michigan Court Rule 9.108, the Supreme Court amended section 2 of State Bar Rule 15.[98] Section 2 of Rule 15 now provides:

> Any person who is duly licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, may be temporarily admitted under MCR 8.126. The State Bar of Michigan shall inform the Attorney Grievance Commission when an applicant for temporary admission pays the required fee pursuant to MCR 8.126.[99]

III. LEGAL MALPRACTICE

The authors next turn to a consideration of recent developments in Michigan's law of attorney malpractice. This is accomplished by reviewing several noteworthy decisions—both from the Michigan state courts and from federal courts applying Michigan law.

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94. MICH. CT. R. 9.108(A) (emphasis added).
95. MICH. CT. R. 9.108(E)(8).
96. MICH. COMP. LAWS ANN. § 600.904 (West 2008).
97. MICH. STATE BAR R. 1-19 (2008).
98. 481 Mich. lxxviii-lxxxii.
99. MICH. STATE BAR R. 15, § 2.

A. State Court Actions

It seems that legal malpractice litigation is on the rise in Michigan. One common perception is that, in our post-tort-reform world, legal malpractice offers a potential for recovery that may no longer be available through other types of lawsuits.[100] Regardless of the truth of this perception, one cannot deny that it is now commonplace for unsuccessful plaintiffs to file subsequent legal malpractice actions against the attorneys who represented them in the underlying lawsuits.[101]

1. The Timing and Accrual of Legal Malpractice Claims

One issue that has received particular attention in the Michigan state courts is the timing and accrual of legal malpractice claims. In Michigan, "[a] legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."[102] Michigan law further provides:

> [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 in a professional or pseudoprofessional capacity 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.[103]

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100. *See* Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation—Predictions, Analysis, and Proposals*, 30 ST. MARY'S L.J. 143, 181, 187-88 (1998) (speculating that because Texas's tort reform of the mid-1990s had made medical-malpractice recovery more difficult, "plaintiffs' attorneys may seek out other targets, such as attorneys, for lawsuits," and observing that "[t]he disappearance of the traditional sources of litigation awards through tort reform . . . and recent legislation restricting medical malpractice claims is likely to foster an increase in legal malpractice claims").

101. *See, e.g.*, Badalamenti v. Sheldon L. Miller & Assoc., P.C., No. 254790, 2005 WL 3077146 (Mich. Ct. App. Nov. 17, 2005) (discussing case in which the plaintiff sued his attorneys for legal malpractice after the court of appeals overturned the underlying medical-malpractice judgment in Badalamenti v. William Beaumont Hosp., 237 Mich. App. 278, 602 N.W.2d 854 (1999)).

102. Kloian v. Schwartz, 272 Mich. App. 232, 237, 725 N.W.2d 671, 675 (2006) (citing MICH. COMP. LAWS ANN. §§ 600.5805(6), 600.5838 (West 2008)).

103. MICH. COMP. LAWS ANN. § 600.5838(1) (West 2008).

However, no single rule has been laid down concerning when an attorney "discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose" within the meaning of Section 600.5838(1).[104] Indeed, the determination of when a claim for legal malpractice accrues under Michigan law appears to be a factually intensive inquiry, almost entirely dependent on the unique facts of a particular case.

As will be seen below, the Michigan courts have repeatedly been called upon to determine when, exactly, a plaintiff's legal malpractice claim accrues. This is especially true in cases wherein the plaintiff argues that the attorney's follow-up or subsequent ministerial tasks have extended the attorney-client relationship and thus delayed the accrual of the claim.

For instance, in *Wright v. Rinaldo*,[105] the Michigan Court of Appeals analyzed whether the trial court had properly granted summary disposition in favor of the defendant patent attorney on the ground that the plaintiff's legal malpractice claim was barred by the statute of limitations. The plaintiff had retained the defendant in August 2000 "to prosecute his patent application and amendments."[106] However, "[d]uring the summer and fall of 2003, [the plaintiff] became dissatisfied with [the defendant's] work."[107] At that time, a second attorney represented plaintiff in a separate, unrelated matter.[108] The plaintiff intended to ask the second attorney to "pursue litigation to enforce his patent rights against his former business partner . . . and other companies that were marketing a [product] that was similar to [the plaintiff's] invention."[109] By the autumn of 2003, the plaintiff and the second attorney had begun to consult with a third attorney—who also specialized in patent matters—concerning "the enforceability of [the plaintiff's] patent."[110] The plaintiff "ultimately directed [the third attorney] to undertake all of the legal work for the patent" and "signed a document issued by the patent office that *revoked [the defendant's] power of attorney*" on December 18, 2003.[111] At the same time, [the plaintiff] executed a power of attorney for [the third attorney] and

104. *Id.*

105. 279 Mich. App. 526, 761 N.W.2d 114 (2008). Although *Wright* was released for publication just after the current *Survey* period, it is addressed here because it was pending before the Michigan Court of Appeals during the *Survey* period.

106. *Id.* at 530, 761 N.W.2d at 116.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 530.

111. *Wright*, 279 Mich. App. at 530, 761 N.W.2d at 116 (emphasis in original).

instructed the patent office that all future correspondence should go to [the third attorney]. The power of attorney authorized [the third attorney] to prosecute the patent and to transact all business in the United States Patent and Trademark Office connected therewith.[112] The plaintiff subsequently referred to the defendant on at least one occasion as his "previous counsel" and informed the patent office that he had "retained new patent counsel."[113] The plaintiff and his new counsel then became "reluctant to communicate with [the defendant] because they believed that [the defendant's] favorable testimony was critical to [the plaintiff's] lawsuit against [his former business partner]. Indeed, after [the plaintiff] obtained the favorable testimony he sought from [the defendant], [the plaintiff] ceased all communication with her."[114] By February 2005, the plaintiff's new patent counsel had begun filing paperwork on the plaintiff's behalf with the patent office.[115]

"In October 2005, [the defendant] sent [the plaintiff] a letter to advise him that the maintenance fee for his patent was due . . . ."[116] The defendant's letter to the plaintiff also provided:

> [I]f [the plaintiff] wanted [the defendant] or her firm to pay the fee, he would need to pay a retainer fee in advance. [The plaintiff] ultimately had [his new patent counsel] pay the maintenance fee for the patent. Later in October of 2005, [the defendant] sent another letter to [the plaintiff], indicating that she received correspondence from the patent office that it had disallowed some claims she filed in May 2003. [The defendant] also stated that she received notice from the patent office that her power of attorney had been revoked and she asked for information about where to send the file.[117]

Meanwhile, the plaintiff had been considering whether to commence a legal malpractice action against the defendant.[118]

The plaintiff ultimately filed his legal malpractice action against the defendant on February 16, 2006.[119] The trial court ruled that the claim was time barred and granted summary disposition in favor of the

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112. *Id.* at 531, 761 N.W.2d at 116.
113. *Id.*, 761 N.W.2d at 117.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Wright*, 279 Mich. App. at 532, 761 N.W.2d at 117.
118. *Id.*
119. *Id.* at 533, 761 N.W.2d at 118.

defendant.[120] The Michigan Court of Appeals observed that it was undisputed that the plaintiff's legal malpractice claim had accrued on the defendant's last day of professional services.[121] The *Wright* court reiterated the familiar rules that "'[g]enerally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court,'"[122] and that "[r]etention of an alternate attorney effectively terminates the attorney-client relationship."[123] The court then noted that "the dispositive question is when did [the plaintiff] effectively terminate [the defendant's] representation . . . in this patent application."[124]

The *Wright* panel found instructive the court's decision in *Bauer v. Ferriby & Houston, P.C.*,[125] wherein the Michigan Court of Appeals had previously held:

> A lawyer has an ethical duty to serve the client zealously. Some of a lawyer's duties to a client survive the termination of the attorney-client relationship, most notably the general obligations to keep client confidences and to refrain from using information obtained in the course of representation against the former client's interests. Sound public policy would likewise encourage a conscientious lawyer to stand ever prepared to advise a former client of changes in the law bearing on the matter of representation, to make a former client's file available if the former client had need of it, and, indeed, to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention. To hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention. We conclude that the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship.[126]

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120. *Id.*

121. *Id.* at 534, 761 N.W.2d at 118.

122. *Id.* (quoting Mitchell v. Dougherty, 249 Mich. App. 668, 683, 644 N.W.2d 391, 399 (2002)).

123. *Wright*, 279 Mich. App. at 534-35, 761 N.W.2d at 119 (citing *Kloian*, 272 Mich. App. at 237, 725 N.W.2d at 675-76).

124. *Id.* at 535, 761 N.W.2d at 119.

125. 235 Mich. App. 536, 599 N.W.2d 493 (1999).

126. *Id.* at 538-39, 599 N.W.2d at 495 (citations omitted).

The *Wright* court determined that the plaintiff had terminated his attorney-client relationship with the defendant on December 18, 2003, when he revoked the defendant's power of attorney and authorized the new patent attorney to act exclusively on his behalf.[127] The court noted that even though the plaintiff had not *formally discharged* the defendant on this date, "a formal discharge is not required to end an attorney-client relationship, particularly where, as here, a client has retained new counsel."[128] Nor did the court find dispositive that the defendant had sent the plaintiff certain correspondence after December 18, 2003. The court opined that regardless of the defendant's exact motives for doing so, her "ministerial task of sending a reminder letter to [the plaintiff] did not extend the accrual date."[129] Instead, the *Wright* court concluded that the defendant's October, 2005 letters to the plaintiff fell "within the category of matters outlined in *Bauer v. Ferriby*."[130] The *Wright* court stated:

> In sum, [the plaintiff's] conduct clearly demonstrates that he ended the attorney-client relationship with [the defendant] no later than December 18, 2003, although he did so in a somewhat unorthodox fashion. And, because [the plaintiff] failed to file his legal malpractice complaint until February 16, 2006, the trial court correctly ruled that his malpractice claim is time-barred by the two-year statute of limitations.[131]

The Michigan Court of Appeals was faced with a similar issue in *Mamou v. Cutlip*.[132] There, the plaintiff had been involved in a dispute with his cousin concerning his cousin's ownership interest in a closely held business.[133] The plaintiff contacted the defendant attorney, who drafted "a release of any and all claims of ownership of [the business] by [the cousin] in exchange for the payment of $75,000."[134] Both the plaintiff and his cousin signed the release in 1995.[135] However, according to the plaintiff's cousin, the plaintiff had informed him in 1995

127. *Wright*, 279 Mich. App. at 536, 761 N.W.2d at 119.

128. *Id.* at 537, 761 N.W.2d at 120 (citing *Mitchell*, 249 Mich. App. at 683-84, 644 N.W.2d at 399-400).

129. *Id.*

130. *Id.* at 537-38, 761 N.W.2d at 120.

131. *Id.* at 539, 761 N.W.2d at 121.

132. No. 275862, 2008 WL 2357670 (Mich. Ct. App. June 10, 2008). Although *Mamou* was issued just after the current *Survey* period, it is addressed here because it was pending before the Michigan Court of Appeals during the *Survey* period.

133. *Id.* at *1.

134. *Id.*

135. *Id.*

that the document was not a release, but rather a document effectuating the sale of the business to a third party.[136]

The plaintiff's cousin later learned, sometime in late 1999 or early 2000, that the plaintiff still owned the business.[137] Therefore, "[i]n June 2000, [the cousin] filed suit . . . claiming, among other things, that [the plaintiff] had fraudulently induced him to convey his shareholder's interest in [the business]."[138] The plaintiff, who was represented by the defendant attorney

> sought summary disposition, arguing in part that [his cousin's] claims were barred by the 1995 release . . . . In response, [the cousin] claimed . . . that the release was false and fraudulent, [that] he had not signed it, and that, if he had signed it, he had been fraudulently induced into doing so.[139]

In October 2000, the trial court denied the plaintiff's motion for summary disposition, "finding that there was a genuine issue of material fact with respect to the validity of the release."[140] Thereafter, the plaintiff and his cousin settled their dispute, and the trial court eventually entered an order dismissing the matter on December 3, 2002.[141]

On October 18, 2004, the plaintiff filed a legal malpractice action against the defendant attorney based on his allegedly deficient preparation and handling of the 1995 release document.[142] The trial court ultimately granted summary disposition in favor of the defendant, ruling, among other things, that the plaintiff's legal malpractice claim was barred by the applicable two-year period of limitations.[143]

On appeal, the plaintiff argued that the defendant's "representation was not limited to the drafting of the release, but it continued through December 3, 2002, when the [underlying] action was dismissed."[144] The court disagreed, and began with a discussion of the types of activities that *do* generally postpone the accrual of a claim for legal malpractice. The *Mamou* court first examined *Levy v. Martin*,[145] in which the Michigan Supreme Court had previously

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136. *Id.*
137. *Id.*
138. *Mamou*, 2008 WL 2357670, at *1.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Mamou*, 2008 WL 2357670, at *2.
145. 463 Mich. 478, 482-84, 620 N.W.2d 292, 293-95 (2001).

> applied [Section] 5838(1) and held that, where the defendant accountants had prepared the plaintiffs' annual tax returns from 1974 until 1996, the plaintiff's malpractice claims regarding returns filed in 1992 and 1993 did not accrue until 1996, when the professional relationship ended. The [*Levy*] [c]ourt found that the defendants had provided the plaintiffs with "generalized tax preparation services," rather than "professional advice for a specific problem," and the defendants had presented no evidence that "each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions."[146]

The *Mamou* court then considered *Maddox v. Burlingame*,[147] in which the Michigan Court of Appeals had earlier held

> that an attorney continued to represent clients with respect to the sale of their business nearly two years after the closing because he had contacted them and their Florida attorney, conducted research on applicable Florida law, prepared a memorandum for the file, and billed them for the work he performed. It is also worth noting that the *Maddox* [c]ourt observed that the plaintiffs had alleged in their complaint that the defendant had been in continuous contact with them from the time of the closing until the date he spoke with the Florida attorney and performed research on Florida law.[148]

After reviewing the decisions in *Levy* and *Maddox*, the *Mamou* panel observed that the Michigan Court of Appeals had "reached a contrary result" in *Bauer v. Ferriby & Houston, P.C.*[149] With respect to the facts of *Bauer*, the *Mamou* court noted:

> The defendant attorney attempted to correct an alleged error in an order that had been entered with respect to a worker's compensation settlement he had effected because the plaintiff's subsequent attorney informed him that it might affect the plaintiff's social security benefits. The [*Bauer*] [c]ourt noted that

146. *Mamou*, 2008 WL 2357670, at *2 (citation omitted). Although *Levy* was an accounting malpractice case, the accrual statute at issue, MICH. COMP. LAWS ANN. § 600.5838(1) (West 2008), applies equally to accounting malpractice claims and legal malpractice claims.

147. 205 Mich. App. 446, 447-48, 451, 620 N.W.2d 292, 293-95 (1994).

148. *Mamou*, 2008 WL 2357670, at *2 (citations omitted).

149. *Id.* at *2.

> the defendant had not billed the plaintiff for the "follow-up efforts," and it found that the defendant's activities were "a response to a complaint about an earlier, terminated representation," rather than a "legal service in furtherance of a continuing or renewed attorney-client relationship."[150]

Turning to the facts of the case at bar, the *Mamou* court observed that the defendant attorney had represented the plaintiff and the business "in various matters . . . beginning in 1991 or 1992."[151] The court noted:

> [The plaintiff] had called [the defendant] in May or June 1995, explained his dispute with [his cousin] and their oral agreement, and requested a release. When [the plaintiff] received the release in the mail, he was satisfied that it fulfilled the purpose for which he had requested it. [The plaintiff] admitted that, after signing the release on June 15, 1995, he thought the dispute concerning [his cousin's] claim to [the business] was over, and he did not ask [the defendant and the defendant's law firm] to do anything further with respect to that dispute for the rest of 1995, 1996, 1997, or 1998 . . . . [The plaintiff] did not contact [the defendant] again until late 1999 or early 2000, when [his cousin] confronted [him] and claimed to own half of [the business].[152]

"Given this significant period of inactivity," the *Mamou* court had no apparent difficulty concluding that the defendant had ceased representing or serving the plaintiff with respect to the 1995 release by the time the plaintiff contacted him in 1999 or 2000.[153] The court opined that this made "the facts of this case significantly different from those in *Maddox*."[154] Similarly, the court opined that

> [t]here is no evidence that [the defendant and the defendant's law firm] were providing [the plaintiff] with 'continuing services' during this period, unlike *Levy*. Further, even if [the defendant] were providing continuing services to plaintiffs, there is no

150. *Id.* (citations to *Bauer* omitted).
151. *Id.* at *3.
152. *Id.*
153. *Id.*
154. *Mamou*, 2008 WL 2357670, at *3.

> evidence to suggest that these continuing services were "the matters out of which the claim for malpractice arose."[155]

In the end, the *Mamou* court determined that "the preparation of the release was a discrete transaction" and that the defendant's act of representing the plaintiff in 2000 "was a separate matter from the preparation of the release in 1995."[156] The court concluded that the "plaintiffs' claim of malpractice with respect to the release accrued in June 1995, after the release was signed, and the statute of limitations expired in 1997."[157]

Lastly, although the precise issue before the Michigan Court of Appeals in *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C.*[158] was not one of legal malpractice, the court's decision nonetheless appears to be relevant in the legal malpractice context. In *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C.*, the plaintiff law firm represented the defendant in litigation that occurred from 1989 until 1992.[159] However, the defendant "was ultimately unsuccessful" in the litigation and refused to pay the substantial legal fees due to the law firm for its services.[160] While the case was on appeal, the court of appeals granted the law firm's motion to withdraw as the defendant's counsel on September 30, 1993.[161] "Thereafter, [the defendant] asked [the law firm] for his litigation file, and, as of October 12, 1993, [the law firm] reviewed, copied, and sent relevant documents to [the defendant] and billed him . . . for the [file] review and . . . for photocopying . . . ."[162]

The law firm sued the defendant on October 9, 1999, alleging that the defendant had breached his contract with the firm by refusing to pay the outstanding legal fees.[163] As aptly noted by the court,

> the dispositive question [was] whether [the law firm's] breach of contract claim is (1) time-barred by the six-year statute of limitations because its claim accrued on September 30, 1993, when this [c]ourt granted [the law firm's] motion to withdraw as counsel, or (2) timely because its cause of action accrued on

155. *Id.* (citation omitted).
156. *Id.*
157. *Id.*
158. 278 Mich. App. 486, 750 N.W.2d 633.
159. *Id.* at 488, 750 N.W.2d at 634-35.
160. *Id.*, 750 N.W.2d at 635.
161. *Id.*
162. *Id.*
163. *Id.*

> October 12, 1993, when [the law firm] reviewed and copied [the defendant's] file.[164]

The court of appeals held that the law firm's contract claim was "time-barred because it accrued on September 30, 1993, when this [c]ourt granted [the law firm] the right to withdraw from its representation of [the defendant] in the underlying litigation."[165] The court further held that the law firm's "activities associated with copying and returning [the defendant's] litigation file do not extend the accrual date."[166] The court observed that "[i]f . . . as here, [the attorney-client] relationship continues formally and legally beyond the last date of services performed, the termination date, and not the last date of service, is the dispositive date for the accrual of the attorney's claim for fees."[167] However, citing *Bauer*, the court concluded that "[t]he attorney-client relationship is not extended (and the accrual date is not postponed) merely because the attorney renders a compensable, but ministerial, service like returning the client's file, as occurred in this case."[168]

2. Expert Testimony in Legal Malpractice Actions

In *Adamasu v. Gifford*,[169] the Michigan Court of Appeals considered the necessity of expert testimony in the litigation of legal malpractice claims. In *Adamasu*, the defendant attorneys had represented the plaintiff in an underlying matter concerning "the revival of an abandoned United States patent application."[170] The defendant attorneys "revive[d] the application, which resulted in the issuance of U.S. Patent No.

164. *Seyburn, Kahn*, 278 Mich. App. at 488-89, 750 N.W.2d at 635.

165. *Id.* at 489, 750 N.W.2d at 635.

166. *Id.*

167. *Id.* at 497, 750 N.W.2d at 639-40 (citing Pellettieri, Rabstein & Altman v. Protopapas, 890 A.2d 1022 (N.J. Super. Ct. App. Div. 2006)). We caution practitioners that this sentence from *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin* likely has no relevance in the context of legal malpractice claims. It is important to recall that *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin* was a breach of contract case—not a legal malpractice case. It is doubtful that a continuation of the relationship between an attorney and client "formally and legally beyond the last date of services performed" would be "the dispositive date for the accrual" of a legal malpractice claim. This would run directly counter to MICH. COMP. LAWS ANN. § 600.5838(1) (West 2008), which provides that a legal malpractice claim accrues "at the time [the attorney] discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose."

168. *Seyburn, Kahn*, 278 Mich. App. at 497, 750 N.W.2d at 640 (citing *Bauer*, 235 Mich. App. at 538-39, 599 N.W.2d at 495).

169. No. 273895, 2008 WL 2066048 (Mich. Ct. App. May 15, 2008).

170. *Id.* at *1.

6,314,368[.]"[171] However, believing that the defendants had revived the patent in a deficient manner, the plaintiff filed a legal malpractice action against them; specifically, the "[p]laintiff alleged that the manner in which defendants revived the patent application resulted in the patent's greatly reduced life expectancy and the ensuing loss of potential royalties and licensing fees."[172]

"The trial court granted summary disposition for defendants on the basis that plaintiff failed to produce evidence to enable a jury to determine what the manufacturers would have paid had the [revived] patent been issued with a longer life."[173] "The trial court opined that this determination could not be made absent evidence of how plaintiff's patents worked and how the manufacturers' operations infringed on the patents."[174] "The trial court . . . determine[ed] that expert testimony was necessary to establish causation and damages because these issues were too complex for an ordinary layperson."[175] The *Adamasu* court ultimately affirmed the grant of summary disposition for the defendant attorneys on this ground.[176]

The court of appeals began with the oft-cited rule that "'[i]n professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation.'"[177] The *Adamasu* court did note that "[i]f the absence of professional care is so manifest . . . that it can be determined within the common knowledge and experience of an ordinary layman that the defendants were careless, a plaintiff may maintain a malpractice action absent expert testimony."[178] However, the court opined that whether the defendant attorneys in the case at bar had actually "shortened the life of the patent and caused plaintiff economic harm is not an issue within the common knowledge and experience of an ordinary layman."[179]

The plaintiff relied on the written report of an expert. But the report contained little specific factual information, stating only that the expert "was prepared to testify regarding such matters as royalty rates for similar patents in similar industries, the nature and scope of a license, the

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Adamasu*, 2008 WL 2066048, at *2.
176. *Id.* at *5.
177. *Id.* at *2 (quoting Dean v. Tucker, 205 Mich. App. 547, 550, 517 N.W.2d 835, 837 (1994)).
178. *Id.* (citing Law Offices of Lawrence J. Stockler, P.C. v. Rose, 174 Mich. App. 14, 48, 436 N.W.2d 70, 87 (1989)).
179. *Id.*

existing value of plaintiff's invention, and the cost of designing a comparable system performing a similar function that may not infringe the patent."[180] The *Adamasu* court observed that "[c]learly, these matters are not within the common knowledge and experience of an ordinary layman. Accordingly, expert testimony was required to establish damages."[181] The plaintiff also relied on the lay testimony of two patent attorneys.[182] However, these two attorneys "did not have the technical expertise to explain to a jury how the [revived] patent worked or how manufacturers were infringing on the patent."[183] Moreover, the deposition testimony of the two attorneys was speculative at best, providing merely "that manufacturers *may* have been willing to discuss the [revived] patent had it not expired[,]"[184] and that the revived patent might "have been licensed for more money had it not expired prematurely."[185] The court stated that "[a] theory of causation must have some basis in established fact and a 'plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the [defendants'] conduct, the plaintiff's injuries would not have occurred.'"[186] The *Adamasu* court concluded that the "[p]laintiff could have proffered expert testimony to establish its causation theory, but failed to do so. In short, plaintiff failed to present evidence that manufacturers would have paid more for the [revived] patent had it been issued with a longer life."[187]

The plaintiff also relied on the deposition testimony of his expert concerning the issue of damages. [188] As noted by the court of appeals, the expert had "purported to offer expert testimony regarding the quantum of damages that plaintiff suffered as a result of defendants' alleged malpractice."[189] However, the court found that

> [a] review of [the expert's] deposition testimony reveals that he is unable or unqualified to testify regarding many of the topics listed in his report. Foremost, he misunderstands the nature of the invention at issue in the [revived] patent. . . . [The expert]

180. *Id.*
181. *Adamasu*, 2008 WL 2066048, *2.
182. *Id.* at *3.
183. *Id.*
184. *Id.* (emphasis in original).
185. *Id.*
186. *Id.* (quoting Pontiac School Dist. v. Miller, Canfield, Paddock & Stone, 221 Mich. App. 602, 614, 563 N.W.2d 693, 698-99 (1997)).
187. *Adamasu*, 2008 WL 2066048, at *3.
188. *Id.*
189. *Id.*

> also testified that he is not an expert regarding the scope or content of the [revived] patent, had no knowledge of any products covered by the patent, and had not analyzed the patent's validity.[190]

After specifically addressing several areas of the expert's deposition testimony that it found particularly problematic, the *Adamasu* court concluded that "[t]he trial court properly determined that sufficient evidence was not produced to enable a jury to determine plaintiff's damages, i.e., what the licensees would have paid had the [revived] patent been issued with a longer life."[191]

> The trial court correctly concluded that plaintiff's damages could not be determined without evidence of how plaintiff's patents worked and how they were infringed on. Accordingly, the trial court did not err by determining that, given plaintiff's evidence, any determination with respect to damages could only be based on speculation and conjecture.[192]

As *Adamasu* makes clear, practitioners in the area of legal malpractice are obligated to carefully examine the claims that they bring for their clients to determine whether the claims are "within the common knowledge and experience of an ordinary layman."[193] If they are not, practitioners will be required to support their theories of causation and damages with appropriate expert testimony.

3. Legal Malpractice Claims Based on the Settlement of an Underlying Action

In *Stenli v. Baker*,[194] the Michigan Court of Appeals considered the special rules applicable to legal malpractice claims based on allegedly deficient legal representation in the settlement of an underlying action. The *Stenli* court noted:

> while it is generally more difficult to establish attorney malpractice in cases where the underlying action is terminated

190. *Id.*
191. *Id.* at *5.
192. *Id.*
193. *Adamasu*, 2008 WL 2066048, at *2; *see also Law Offices of Lawrence J. Stockler*, 174 Mich. App. at 48, 436 N.W.2d at 87.
194. No. 276143, 2008 WL 649789 (Mich. Ct. App. Mar. 11, 2008).

> by settlement rather than involuntary dismissal or adverse judgment, "a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse."[195]

The *Stenli* court also noted that a plaintiff is

> not precluded from maintaining an action for legal malpractice where her attorney's refusal to try the underlying case at a point too late for the plaintiff to obtain another attorney place[s] the plaintiff "in a position where settlement [i]s her only reasonable choice despite her own reservations about the settlement."[196]

Turning to the case at bar, the court of appeals observed that "the evidence shows only that [the plaintiff] was required to choose between proceeding to trial . . . or accepting the offer, and that he decided to accept his attorney's assessment of the merits and value of his case."[197] The court pointed out that, even viewing the evidence in a light most favorable to the plaintiff, the evidence showed that the plaintiff had known "that he might receive less than the settlement offer" if he proceeded to trial in the underlying action.[198] "Indeed, [the plaintiff] acknowledged at deposition that [the defendant attorney] at no time refused to proceed with a trial of the matter and there is no allegation that [the defendant] was not prepared to competently do so."[199] Because there was no genuine issue of material fact concerning whether the plaintiff "was left with no other reasonable course but to settle his [underlying] suit,"[200] the court affirmed the trial court's grant of summary disposition in favor of the defendant attorney.[201]

The Michigan Court of Appeals opinion in *Stenli* demonstrates that it will be difficult for plaintiffs to recover for alleged attorney malpractice in the settlement of an underlying lawsuit unless they can factually establish that they had no other reasonable option but to accept the settlement.

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195. *Id.* at *2 (quoting Espinoza v. Thomas, 189 Mich. App. 110, 124, 472 N.W.2d 16, 23 (1991)).

196. *Id.* at *3 (quoting Lowman v. Karp, 190 Mich. App. 448, 452-53, 476 N.W.2d 428, 430-31 (1991)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Stenli*, 2008 WL 649789, at *3.

201. *Id.* at *4.

4. A Duty to Maximize Returns on Investments?

Finally, in *Brian M. Kelly Trust v. Adkison, Need, Green & Allen, P.L.L.C.*,[202] the Michigan Supreme Court implicitly decided that probate attorneys do not owe their clients a legal duty to maximize returns on their client's investments. The court of appeals majority opinion set forth the facts of *Kelly Trust*:

> Brian M. Kelly (decedent) died unexpectedly on August 20, 2000, as a result of injuries he sustained in an automobile accident. The decedent had a complex estate plan, which included several trusts. Petitioners Dennis and Sean Kelly are two of the decedent's ten children and co-trustees of the Brian M. Kelly Family Trust (the trust). The trust was the contingent beneficiary of an [Individual Retirement Account ("IRA")] that the decedent opened with Charles Schwab on March 16, 1993. The IRA was funded by six mutual funds and one money market fund. These funds were very volatile, and the value of the IRA diminished dramatically before the proceeds could be distributed to the beneficiaries. In December 2002, petitioners filed a legal malpractice complaint against . . . law firm Adkison, Need, Green & Allen, PLLC, and . . . Paul Green and John Yun, individual attorneys with the firm. The basis of petitioners' malpractice complaint was [the attorney's] alleged delay in advising or assisting them in effectuating the transfer of the aforementioned IRA that the decedent possessed at the time of his death to petitioners' control. Petitioners alleged that [the attorneys'] delay caused a significant diminution in the value of the IRA.[203]

The petitioners argued that their attorneys had possessed "sufficient knowledge and understanding as reasonable and prudent attorneys working in the field of probate and trusts to know that the stock had to be sold to generate a change in the investment mix."[204] The petitioners ultimately contended that because of their attorneys' delays and inactions, they were "unable to gain access to the decedent's IRA until April 2001, and . . . by that time, the value of the IRA had decreased by approximately $470,000."[205]

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202. 480 Mich. 909, 739 N.W.2d 622 (2007).
203. *Id.* at *1.
204. *Id.*
205. *Id.*

The attorneys moved for summary disposition, arguing, among other things, that "there was no genuine issue of material fact regarding whether [the attorneys] caused petitioners' damages."[206] Specifically, the attorneys "argued in their brief in support of their motion for summary disposition that summary disposition was appropriate based on a lack of causation. In their brief, they contended that the falling stock market, not their conduct, caused the decrease in value of the IRA."[207] The trial court granted summary disposition in favor of the attorneys and their law firm.[208]

On appeal, the court of appeals majority reversed. The majority noted that "[i]t is clear that petitioners were relying on the knowledge and skill of [the attorneys] regarding the handling of the decedent's estate and specifically the decedent's IRA."[209] The petitioners claimed that they had seasonably informed their attorneys that the assets were "very volatile."[210] One of the petitioners' experts had testified that "within 48 hours of learning that an asset in an estate was volatile, a reasonable and prudent probate lawyer would have undertaken to transfer the funds into more conservative holdings."[211] The expert opined that the attorneys "should have moved within 48 hours of learning of the volatility of the funds to safeguard the IRA" and that one of the attorneys had "violated the standard of care by accepting a case for which the firm did not have the requisite knowledge."[212]

After observing that "proximate cause in legal malpractice cases is generally a factual inquiry for the jury,"[213] the court of appeals majority ruled that petitioners had "established a genuine issue of fact regarding whether [the attorneys] were a cause in fact of the decrease in the value of the decedent's IRA, at least from August 20, 2000, until petitioners retained alternative counsel in December 2000 or January 2001."[214] Moreover, the majority ruled that "[v]iewing the evidence in the light most favorable to petitioners, as the non-moving party, [the attorneys] knew about the volatility of the decedent's IRA."[215] The majority concluded that "[b]ecause an attorney client relationship existed in this

206. *Id.*
207. *Id.* at *6.
208. *Kelly Trust*, 2007 WL 708598, at *6.
209. *Id.* at *7.
210. *Id.*
211. *Id.*
212. *Id.* at *8.
213. *Id.* at *9 (citing Fiser v. City of Ann Arbor, 417 Mich. 461, 475, 339 N.W.2d 413, 418 (1983)).
214. *Kelly Trust*, 2007 WL 708598, at *9.
215. *Id.* at *9.

case, [the attorneys] had a duty to safeguard the assets of the decedent's estate."[216]

The dissenting court of appeals judge observed that it is generally the duty of the trustee—and not the probate attorney—"to administer a trust expeditiously for the benefit of the beneficiaries[.]"[217] The dissenting judge observed that although a trustee may delegate his or her investment and management duties to others under M.C.L. Section 700.1510, "there was no credible evidence" that the trustees had done so in the case at bar.[218] The dissenting judge continued:

> Moreover, although petitioner's proposed expert opined that [the attorneys] . . . had the duty to move the volatile IRA assets into a more stable and conservative investment within 48 hours, I have located no support for this proposition in our statutes or case law. In the absence of specific evidence that the trustees delegated their investment and management duties pursuant to MCL 700.1510(1), I conclude that [the attorneys] owed no duty to prudently invest or manage the assets of the IRA. [The attorneys'] sole duty was to exercise due care in the *rendering of legal services*, by acting "as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances."[219]

The dissenting court of appeals judge concluded by stating that "[t]he duty to prudently invest and manage the trust assets was separate from the duty to provide legal services, and it belonged to the trustees alone rather than to [the attorneys]."[220]

In lieu of granting leave to appeal, the Michigan Supreme Court partially reversed the court of appeals majority opinion "for the reasons stated in the court of appeals dissenting opinion."[221] The Supreme Court remanded the matter to the trial court "for entry of an order granting summary disposition to the [attorneys]."[222] Thus, although the Michigan Supreme Court's order was brief and lacking in detail, it appears that the

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216. *Id.*

217. *Id.* (Jansen, J., concurring in part and dissenting in part) (citing MICH. COMP. LAWS ANN. § 700.7301 (West 2008)).

218. *Id.* at *10 (Jansen, J., concurring in part and dissenting in part).

219. *Id.* (Jansen, J., concurring in part and dissenting in part) (quoting Simko v. Blake, 448 Mich. 648, 658, 532 N.W.2d 842, 847 (1995)).

220. *Kelly Trust*, 2007 WL 708598, at *10 (Jansen, J., concurring in part and dissenting in part).

221. *Kelly Trust*, 480 Mich. at 909, 739 N.W.2d at 622.

222. *Id.*

Supreme Court agreed with the dissenting court of appeals judge that "[t]he duty to prudently invest and manage the trust assets was separate from the duty to provide legal services, and it belonged to the trustees alone rather than to [the attorneys]."[223] It remains to be seen what answers the Michigan Supreme Court will provide when, and if, it grants leave in the future to decide questions concerning an attorney's duty with respect to a client's investments in similar cases.

B. Federal Court Actions

During the *Survey* period, the federal courts addressed a claim of attorney malpractice against a legal services plan, questions of personal jurisdiction over out-of-state attorneys, and a complicated case involving a concurrent state court divorce case and a federal bankruptcy proceeding.

In *Pearce ex. rel. Estate of Wilcox v. Bidwell*, the personal representative of a decedent's estate brought suit against UAW-GM Legal Services Plan (Plan) for failure to pursue a first-party no-fault lawsuit against State Farm.[224] The Plan was a "fringe benefit provided to the unionized, hourly workers of the General Motors Corporation."[225] The Plan provided for its members, inter alia, "litigation benefits for first-party no-fault automobile insurance claims if litigation is deemed 'necessary and appropriate.'"[226] The decedent was seriously injured in an automobile accident in 2002, and State Farm paid first-party benefits under Michigan's no-fault act.[227] The plaintiff's representative contacted the Plan about State Farm's claim that the latter had overpaid the plaintiff's benefits by $100,000.[228] The Plan requested that the plaintiff's decedent furnish some additional information that would be relevant to a potential lawsuit against State Farm.[229] The plaintiff's representative failed to do so.[230] After the statute of limitations expired on the potential claim against State Farm, the plaintiff filed suit in Michigan state court against the Plan, claiming that it had committed legal malpractice by not pursuing the potential lawsuit.[231] The Plan removed to federal court on

223. *Kelly Trust*, 2007 WL 708598, at *10 (Jansen, J., concurring in part and dissenting in part).
224. No. 06-15643, 2007 WL 2463338 (E.D. Mich. Aug. 30, 2007) (unpublished).
225. *Id.* at *1.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Pearce*, 2007 WL 2463338, at *3.
231. *Id.*

the basis of federal question jurisdiction under the Employee Retirement Income Security Act (ERISA).[232]

The district court held that ERISA regulated the Plan; and consequently, the Plan's relevant decisions would be reviewed under an "arbitrary and capricious" standard.[233] The court concluded that the Plan's refusal to file a lawsuit against State Farm as a result of the plaintiff's failure to provide the necessary information was not "arbitrary and capricious."[234] Furthermore, the court held, without significant discussion, that the Plan was not liable for attorney malpractice for the same reasons since it did not have "factual information indicating that [the p]laintiff's decedent had a viable claim[.]"[235]

In *Taylor v. Kochanowski*,[236] the district court remanded the legal malpractice claim to Michigan state court, rejecting the defendants' arguments that the fact that the underlying case involved a patent suit created a federal question jurisdiction.[237] The plaintiff asserted that the defendant law firm committed legal malpractice in the underlying case when it advised the plaintiff to dismiss without prejudice one of the defendants, as well as an inadequate representation claim.[238] The plaintiff filed his legal malpractice claim in state court, and the defendant law firm removed to federal court based on the theory that the legal malpractice claim would involve questions of federal patent law.[239] The district court easily dispensed with that argument, recognizing that legal malpractice is a state law cause of action and that the underlying suit does not provide a basis for a federal question.[240]

In two different cases, the federal district courts confronted the issue of whether they had personal jurisdiction over out-of-state attorneys to entertain a legal malpractice claim asserted by Michigan residents. In *Hockman v. Schuler*,[241] the district court denied the out-of-state attorney's attempt to dismiss the case for lack of personal jurisdiction.[242] The plaintiffs alleged that the attorney, a resident of Ohio, committed legal malpractice in connection with a settlement of a lawsuit against the

232. *Id.* at *2; *see* 29 U.S.C.A. §§ 1001-1461 (West 2009).
233. *Pearce*, 2007 WL 2463338, at *3.
234. *Id.*
235. *Id.*
236. No. 07-11867, 2008 U.S. Dist. LEXIS 20430 (E.D. Mich. Mar. 14, 2008).
237. *Id.* at *8.
238. *Id.* at *2-3.
239. *Id.*
240. *Id.* at *4-8 (citing Adamasu v. Gifford, Krass, Groh, Sprinkle, Anderson & Citkowski, P.C., 409 F. Supp. 2d 788 (E.D. Mich. 2005)).
241. No. 07-CV-14268, 2008 WL 724274 (E.D. Mich. Mar. 18, 2008).
242. *Id.* at *1.

plaintiffs in Ohio state court.[243] The attorney was the sole member of an LLC that had significant relationships with the plaintiffs' company.[244] Another company sued the plaintiffs' company in Ohio state court, claiming that the plaintiffs' company committed securities fraud in connection with a business entitled South Beach Investors, LLC (SBI), in which the attorney had an ownership interest.[245] The plaintiffs alleged that the attorney not only had significant contacts with the plaintiffs' business office in Michigan, but also agreed to defend them in the Ohio state court suit.[246] The plaintiffs initially defaulted in the Ohio suit, but then the attorney settled the case for $1,500,000, with $2,100,000 in collateral to be placed in escrow.[247] The plaintiffs then defaulted on the settlement, and the company executed the collateral and obtained a further judgment for $1,300,000.[248] The plaintiffs then filed suit against the attorney in Michigan state court claiming legal malpractice based on the settlement agreement and the attorney's conflict of interest as a member of SBI.[249] The attorney then removed the case to federal court on the basis of diversity jurisdiction.[250]

The attorney denied ever entering into an attorney-client relationship and moved to dismiss the case for lack of personal jurisdiction.[251] The district court denied the motion, basing its conclusion on the fact that the attorney's business contacts (including frequent telephone and email contracts, as well as two visits to Michigan) with Michigan were inextricably intertwined with the underlying Ohio lawsuit.[252]

After the district court's decision, the attorney filed a motion for reconsideration and a supplemental affidavit denying that he had any ownership interest in any of the plaintiffs' businesses or in SBI, or that he ever represented the plaintiffs as an attorney.[253] Although the district court held that these contraventions created a genuine issue of material fact as to whether personal jurisdiction existed, it concluded that the attorney had preserved this defense for a determination at trial.[254]

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243. *Id.* at *2.
244. *Id.* at*1.
245. *Id.*
246. *Id.*
247. *Hockman*, 2008 WL 724274, at *2.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at *4-7.
253. Hockman v. Schuler, No. 07-CV-14268, 2008 WL 1766659 (E.D. Mich. Apr. 17, 2008).
254. *Id.* at *3.

On the other hand, in *Constantakis v. Law Offices of Patricia Lester Clowdus, P.C.*,[255] the defendant law firm successfully challenged the district court's exercise of personal jurisdiction over it. The plaintiff and his wife traveled from Michigan to Colorado to visit their daughter.[256] While in Colorado, the plaintiff's wife fell ill and the plaintiff's daughter agreed to care for her in Colorado during her convalescence.[257] Under the alleged influence of her daughter, the wife met with the defendant Colorado law firm to formulate an estate plan.[258] The plaintiff alleged that the daughter resisted his efforts to return the wife to Michigan.[259] The plaintiff then filed a petition for guardianship and conservatorship in a Michigan probate court, which was granted.[260] The plaintiff then filed a guardianship petition and to transfer proceedings to Michigan in a Colorado court.[261] The conservator then flew to Colorado to retrieve his wife, and withdrew his petition in Colorado state court the next day.[262] On that same day, the defendant law firm filed an appearance on behalf of the wife.[263] The wife expressed "several times" to the defendant law firm that she no longer needed its representation.[264] The law firm nevertheless continued to pursue the Colorado action, hired a Michigan law firm to represent the wife in Michigan, and presented a $20,248.30 claim against the wife's estate.[265] The conservator filed a complaint in Michigan state court alleging claims of legal malpractice and violations of the Colorado Consumer Protection Act.[266] The law firm then removed the case to federal court on the basis of diversity of citizenship, and moved for a dismissal based on lack of personal jurisdiction.[267]

The district court agreed and dismissed the case for lack of personal jurisdiction. The plaintiff identified four "contacts" to establish personal jurisdiction:

> (1) [the] solicit[ation of] a Michigan client; (2) [the] contact [] and corresponde[nce] with the client, her husband, attorneys in

255. No. 07-15350, 2008 WL 1735298 (E.D. Mich. Apr. 14, 2008).
256. *Id.* at *1.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Constantakis*, 2008 WL 1735298, at *2-3.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Constantakis*, 2008 WL 1735298, at *2.

> Michigan, and the [Michigan] Probate Court; (3) [the] hir[ing] and pa[ying of] Michigan attorneys to act as [the d]efendants' agent in Michigan court; and (4) [the] submi[ssion of] a claim to the [Michigan] Probate Court for their services.[268]

In reaching its decision, the district court relied upon several out-of-circuit cases.[269] The district court found significant the following

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268. *Id.* at *3.

269. In *Sawtelle v. Farell*, 70 F.3d 1381 (1st Cir. 1995), the First Circuit affirmed the New Hampshire district court's decision dismissing the plaintiffs' legal malpractice claim for lack of personal jurisdiction. The plaintiffs' son was flying an airplane over the New Hampshire-Vermont border when he collided with another airplane from Florida. *Id.* at 1386. The plaintiffs contacted a California law firm inquiring about a possible suit, and the firm referred the plaintiffs to its Washington D.C. office. *Id.* Although the attorneys in the D.C. firm never actually met the plaintiffs or traveled to New Hampshire, they sent substantial mailed correspondence and had many telephone conversations with the plaintiffs. *Id.* The D.C. firm advised the plaintiffs that Florida was the most advantageous forum for suit, and hired a Florida law firm as local counsel. *Id.* The D.C. and Florida law firms then filed a wrongful-death suit in Florida state court. *Id.* Upon receiving a settlement offer of $155,000, both law firms advised the plaintiffs to accept. *Santelle*, 70 F.3d. at 1386-87. The plaintiffs accepted, but later discovered that their sons' co-pilot accepted a settlement of $500,000. *Id.* at 1387. The plaintiffs then filed a legal malpractice action against both firms in New Hampshire district court. *Id.* The district court granted the defendants' motions to dismiss for lack of personal jurisdiction. *Id.* The First Circuit affirmed the district court's decision on the basis that assuming personal jurisdiction in New Hampshire over the out-of-state defendants would violate due process:

> For the Virginia defendants . . . the relevant contact was the . . . letter mailed to the plaintiffs in New Hampshire, in which [the attorney] stated that he believed it to be in the [plaintiffs'] best interest to accept the $155,000 settlement offer. For the Florida defendants . . . the relevant contact with the forum . . . was [the attorney's] telephone call to New Hampshire in which he concurred in the settlement recommendation. The transmission of information into New Hampshire by way of telephone or mail is unquestionably a contact for purposes of our analysis. It would, however, be illogical to conclude that those isolateD recommendations constituted the negligent conduct that caused the Florida injury and thus were in-forum acts sufficient to establish personal jurisdiction in New Hampshire. . . . Ultimately, however, the gravamen of the [plaintiffs'] claims is that they suffered in New Hampshire the "effects" of the defendants' negligence committed elsewhere. . . . . The mere act of agreeing to represent (and then representing) an out-of-state client, without more, does not suffice to demonstrate voluntary purposeful availment of the benefits and protections of the laws of the client's home state.

Id. at 1389-1390, 1394. In *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987), the Eighth Circuit affirmed a South Dakota federal district's court decision dismissing the plaintiff's legal malpractice claim for lack of personal jurisdiction. A president of a New York sporting goods business recruited the plaintiff to join a declaratory judgment lawsuit against a patent-holder to declare that patent invalid. *Id.* at 224. The New York individual retained a New York law firm to handle the lawsuit. *Id.*

considerations: (1) the plaintiff's claim was under Colorado law; (2) the act of representation of the wife occurred in Colorado; and (3) the decision to continue representation notwithstanding the wife's requests occurred in Colorado.[270]

Finally, in *Nieswand v. Milne*,[271] the district court confronted a claim of legal malpractice against an attorney and his former law firm, arising out of the attorney's advice to file a Chapter 7 bankruptcy petition during the pendency of his state court divorce proceeding.[272] The plaintiff and his wife, married for sixteen years, owned a house in Michigan and three condominiums in Florida used to generate rental income.[273] The couple held these four properties as tenancies by the entirety, with an approximate value of $1.6 million with about $735,000 in equity.[274] On Christmas Eve 2004, the plaintiff's wife discovered that the plaintiff had been having an affair with a Florida waitress.[275] At that time, the plaintiff's personal business was in arrears, and he had outstanding personal debts of $490,000 on a personal guaranty to a bank, and approximately $122,000 in credit card debt.[276] As a result, in late 2004, the plaintiff had discussed filing a bankruptcy petition with his

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The law firm then commenced an action in a Maryland federal district court. *Id.* at 224-25. The New York firm sent an associate and a law clerk to South Dakota to obtain various relevant documents from the plaintiff. *Id.* at 225. After learning that the New York law firm's fees going forward to trial were much higher than anticipated, the plaintiff terminated its relationship with the New York firm. After the New York firm complained that the plaintiff had not paid its outstanding legal bill, the plaintiff filed suit for breach of fiduciary duty and professional malpractice in South Dakota federal district court. *Id.* The South Dakota court dismissed the plaintiff's claim for lack of personal jurisdiction. Affirming the district court's decision, the Eighth Circuit explained:

> [The New York law firm] does not maintain an office in South Dakota nor do any of its attorneys reside there or maintain a license to practice law there. [The New York firm] has never advertised or solicited business in South Dakota. Further, [the New York law firm] did not actively seek out [the plaintiff] as a client. . . . Finally, the actions giving rise to this lawsuit took place in Maryland, not in South Dakota. In short, [the New York law firm's] only "substantial connection" with South Dakota was its representation of a South Dakota corporation in connection with litigation taking place wholly outside South Dakota.

Austad Co., 823 F.2d at 226-27.

270. *Constantakis*, 2008 WL 1735298, at *16-17.

271. No. 07-10541, 2008 WL 1735298 (E.D. Mich. May 30, 2008).

272. *Id.* at *1.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

attorney.[277] Soon after the discovery of the affair, the plaintiff's wife filed for divorce in Michigan state court.[278]

During January 2005, the attorney was in the process of leaving his former firm, setting up a separate client trust fund account, and directing correspondence to his home address.[279] However, the attorney was still working out of his firm's office space.[280] During this time, the plaintiff met with the attorney to discuss possible bankruptcy options.[281] The attorney developed a plan with the plaintiff's divorce attorney where they would file a Chapter 7 bankruptcy to take advantage of the fact that the plaintiff's properties were "tenancies by the entirety"—thus could not be reached by his creditors.[282] The strategy also depended upon the wife's consent to concurrent stay of the divorce proceedings until the end of the bankruptcy, and then the state court could divide the intact properties between the plaintiff and his wife.[283]

The attorney initially learned pre-bankruptcy filing that the plaintiff's wife had hired an attorney to represent her in the plaintiff's bankruptcy case.[284] The attorney learned at that time that the plaintiff's wife would not be cooperative and was mainly interested in "revenge."[285] On March 15, 2005, the attorney filed the Chapter 7 bankruptcy petition.[286] At an April 15, 2005 meeting among the attorneys involved in the divorce and bankruptcy cases, the plaintiff's wife expressed that she was planning to seek a side-agreement with the trustee to dissolve the entireties, negotiate the properties' distribution, and leave the plaintiff only with his $30,000 exemption.[287]

In late April 2005, the attorney took a position at a law firm that performed extensive work on behalf of creditors and withdrew from representation of the plaintiff.[288] The plaintiff's subsequent counsel attempted to resist the motion to compromise the estate brought by the trustee and the plaintiff's wife, but the bankruptcy court granted the motion.[289] At the end of the distribution to his wife and his creditors, the

277. *Nieswand*, 2008 WL 2242554, at *2.
278. *Id.* at *1.
279. *Id.* at *2.
280. *Id.*
281. *Id.*
282. *Id.* at *2-3.
283. *Nieswand*, 2008 WL 2242554, at *3.
284. *Id.*
285. *Id.* at *5.
286. *Id.*
287. *Id.* at *6.
288. *Id.* at *7.
289. *Nieswand*, 2008 WL 2242554, at *7-8.

plaintiff was left only with his $30,000 exemption, which was later ordered by the bankruptcy court to be paid to his wife to satisfy outstanding support obligations.[290]

The plaintiff filed a malpractice action against his first attorney, claiming primarily that the attorney should have accounted for the possibility of collusion between the trustee and his wife, and also for failing to advise him to homestead a property in Florida that may have been exempt throughout the bankruptcy.[291] The plaintiff further maintained that the attorney should have attempted to dismiss the bankruptcy petition once he learned of the possibility of collusion.[292] The district court disagreed, holding that under Michigan law, the attorney's advice to file a bankruptcy petition in these circumstances could not support an attorney malpractice claim.[293] The district court held that the attorney's advice was a "tactical decision grounded in a good faith belief that the strategy would benefit his client" and that "attorneys are not required to have special clairvoyance, nor act as guarantors of judgments for their clients."[294] The district court further found the plaintiff's theory about homesteading a Florida property depended equally upon a number of speculative assumptions.[295] Finally, the district court held that the attorney's former firm could not be held liable,[296] although it noted in a footnote that the plaintiff did not establish vicarious liability.[297]

IV. ATTORNEY FEES

Intimately connected with the field of professional responsibility is the law governing attorney fees and attorney-fee collection. Several decisions concerning attorney fees were issued during this *Survey* period.

A. Actions for the Collection of Attorney Fees

In *Dykema Gossett P.L.L.C. v. Ajluni*,[298] the plaintiff law firm entered into a retention agreement with its clients, the defendants.[299] The

290. *Id.* at *8.
291. *Id.* at *9.
292. *Id.*
293. *Id.* at *11.
294. *Id.*
295. *Nieswand*, 2008 WL 2242554, at *13.
296. *Id.*
297. *Id.* at n.7.
298. 273 Mich. App. 1, 730 N.W.2d 29 (2007), *aff'd in part, vacated in part*, 480 Mich. 913, 739 N.W.2d 629 (2007).
299. *Id.* at 5, 730 N.W.2d at 33.

retention agreement "was a mixed hourly and contingency fee agreement."[300] When the defendants failed to pay after "nearly four years of representation," the plaintiff brought an action for the past-due attorney fees.[301] In its complaint, the plaintiff set forth claims, among others, of breach of contract and quantum meruit.[302] The defendants filed a pretrial motion for summary disposition,[303] seeking dismissal of the quantum meruit claim on the ground that quantum meruit is not an available remedy when there is an express contract.[304] The trial court denied the motion and allowed the quantum meruit claim to go forward.[305] Following trial, the jury concluded that the defendants had breached the retention agreement and further concluded that the defendants had been unjustly enriched.[306] Judgment was entered in favor of the plaintiff.[307]

The Michigan Court of Appeals ruled, in a split decision, that the trial court had properly denied the plaintiff's pretrial motion for summary disposition.[308] The two-judge majority acknowledged that the jury had "found liability . . . on the breach of contract theory,"[309] but nonetheless ruled that the plaintiff had been entitled to recover on its theory of quantum meruit.[310] The third court of appeals judge concurred in the result reached by the majority, but dissented "insofar as the majority announce[d] a new rule of law."[311]

On further appeal, the Michigan Supreme Court affirmed the result reached by the court of appeals, but peremptorily vacated in part the reasoning of the court of appeals "for the reasons stated in the separate [c]ourt of [a]ppeals opinion of Judge Jansen, who concurred in part and dissented in part."[312] By doing so, the Michigan Supreme Court implicitly recognized that the proper avenue of relief for the plaintiff had been recovery at law for breach of contract rather than recovery in equity on the theory of quantum meruit.[313] The court's peremptory order in

300. *Id.*
301. *Id.* at 7, 730 N.W.2d at 34.
302. *Id.*
303. MICH. CT. R. 2.116(C)(8) and (C)(10).
304. *Dykema Gossett*, 273 Mich. App. at 8, 730 N.W.2d at 34.
305. *Id.*
306. *See id.*
307. *Id.* at 7-8, 730 N.W.2d at 34-35.
308. *Id.* at 9-10, 730 N.W.2d at 35.
309. *Id.* at 10 n.9, 730 N.W.2d at 35 n.9.
310. *Dykema Gossett*, 273 Mich. App. at 10, 730 N.W.2d at 35-36.
311. *Id.* at 24, 730 N.W.2d at 43 (Jansen, J., concurring in part and dissenting in part).
312. *Dykema Gossett*, 480 Mich. 913, 739 N.W.2d 629.
313. *See Dykema Gossett*, 273 Mich. App. at 25, 730 N.W.2d at 43 (Jansen, J., concurring in part and dissenting in part) (observing that recovery was proper on the basis

Dykema Gossett therefore extended to the context of actions for the collection of attorney fees the well-settled principle that recovery in quasi contract is not permitted when there exists an express contract between the same parties covering the same subject matter.[314]

In *Seyburn, Kahn, Ginn, Bess, Deich & Serlin, P.C.*, the Michigan Court of Appeals considered an attorney's contract-based right of action to recover unpaid legal fees from a former client.[315] The court held that "an attorney's cause of action for breach of contract against his or her client, for fees arising out of representation in litigation, accrues on the date of the termination of the attorney-client relationship."[316] The court went on to note that "[i]f . . . as here, that relationship continues formally and legally beyond the last date of services performed, the termination date, and not the last date of service, is the dispositive date for the accrual of the attorney's claim for fees."[317]

B. Contingency-Fee Agreements and the Reasonableness of Attorney Fees

In *Reed v. Breton*, the Michigan Court of Appeals was faced with the question whether the circuit court had properly refused to approve a proposed distribution of attorney fees in a wrongful-death action when that proposed distribution would have awarded attorney fees to a single

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of the defendants' breach of the parties' express contract, and that it was therefore unnecessary to determine whether recovery was appropriate under the alternative theory of quantum meruit).

314. *See, e.g.*, Biagini v. Mocnik, 369 Mich. 657, 659, 120 N.W.2d 827, 828 (1963); Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 194, 729 N.W.2d 898, 903 (2006); Keywell & Rosenfeld v. Bithell, 254 Mich. App. 300, 328, 657 N.W.2d 759, 776 (2002).

315. 278 Mich. App. at 486, 494, 497, 750 N.W.2d at 638, 639-40. As of the submission of this article, the Michigan Supreme Court had granted leave to appeal on other grounds in *Seyburn, Kahn, Ginn, Bess, Deich & Serlin, P.C.*, 482 Mich. 1077, 758 N.W.2d 248.

316. *Seyburn, Kahn*, 278 Mich. App. at 497, 750 N.W.2d at 639.

317. *Id.*, 750 N.W.2d at 639-40 (citing Pellettieri, Rabstein & Altman v. Protopapas, 890 A.2d 1022 (N.J. App., 2006)). As noted, *supra* note 167, we caution practitioners that this sentence from *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin* likely has no relevance in the context of legal malpractice claims. It is important to recall that *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin* was a breach of contract case—not a legal malpractice case. It is doubtful that a continuation of the relationship between an attorney and client "formally and legally beyond the last date of services performed" would be "the dispositive date for the accrual" of a legal malpractice claim. This would run directly counter to M.C.L. Section 600.5838(1), which provides that a legal malpractice claim accrues "at the time [the attorney] discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose." MICH. COMP. LAWS ANN. § 600.5838(1) (West. 2008).

law firm that were in excess of one-third of the plaintiff's net recovery.[318] The plaintiff's son had been killed in a drunk-driving accident and the plaintiff, as personal representative of his son's estate, sued both the intoxicated driver and two dramshop defendants.[319] The plaintiff retained a law firm to represent the estate and "entered into a contingency fee agreement whereby plaintiff agreed to pay [the law firm] 'one-third (1/3) of all monies collected.'"[320] The contingency fee agreement "expressly provided that it did not apply to appeals."[321]

The circuit court granted summary disposition in favor of one of the dramshop defendants, and the plaintiff appealed that decision to the Michigan Court of Appeals.[322] The court of appeals reversed, reinstating the plaintiff's original claim against the dramshop defendant.[323] "Upon further appeal, however, [the Michigan] Supreme Court reversed the [court of appeals] decision and affirmed the grant of summary disposition in favor of [the dramshop defendant]."[324]

"Because the original contingency-fee agreement did not cover appeals," the plaintiff had entered into a new fee agreement with the law firm for representation before the Michigan Court of Appeals.[325] After the proceedings before the Michigan Court of Appeals, the plaintiff then "entered into a separate hourly fee agreement" with a second law firm for representation before the Michigan Supreme Court.[326]

"After all appeals were concluded, plaintiff reached a settlement with the remaining parties for the net amount of $120,065.41."[327] The plaintiff then "filed a motion in the circuit court for entry of a settlement order and approval of the proposed distribution of funds."[328] As explained by the Michigan Court of Appeals:

> The motion sought a distribution of total attorney fees in the amount of $82,073.87, consisting of $40,021.80 (one-third of the net settlement) for [the first law firm's] representation in the circuit court, $14,578.29 for [the first law firm's] representation before [the Court of Appeals], and $27,473.78 for the [second]

318. *Id.* at 240, 756 N.W.2d at 90 (2008).
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at 240-41, 756 N.W.2d at 90.
323. *Reed*, 279 Mich. App. at 241, 756 N.W.2d at 90.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.* at 241, 756 N.W.2d at 91.

> law firm's representation before the [s]upreme [c]ourt. The circuit court, observing that the total requested attorney fees exceeded one-third of plaintiff's net recovery, refused to approve the proposed distribution.[329]

Relying in part on State Bar of Michigan Formal Ethics Opinion R-011 (issued July 26, 1991), the Michigan Court of Appeals ruled that Mich. Ct. Rule 8.121 "limits the total allowable attorney fee payable to [the first law firm] in this case to one-third of the net amount recovered by plaintiff."[330] The *Reed* court held that the circuit court had "properly concluded that the proposed distribution of proceeds in this wrongful-death action violated [Mich. Ct. Rule 8.121] to the extent that it allocates to [the first law firm] attorney fees in excess of one-third of the amount of plaintiff's net recovery."[331]

As the *Reed* decision makes clear, an attorney who represents a plaintiff in a wrongful-death or personal-injury matter on a contingency-fee basis may not collect more than one-third of the plaintiff's net recovery, even if that attorney continues to represent the plaintiff on appeal under the terms of a separate fee agreement covering the appeal only. But this limitation apparently does not extend to separate attorneys who represent the plaintiff on appeal only, and who have not participated in the matter at the trial-court level.[332]

In *University Rehabilitation Alliance, Inc. v. Farm Bureau General Insurance Company of Michigan*,[333] the Michigan Court of Appeals considered whether a 25-percent contingency fee to which the plaintiff had agreed was "reasonable" within the meaning of Michigan's No-Fault Act.[334] The *University Rehabilitation* court observed that "a reasonable attorney fee is determined by considering the totality of the

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329. *Reed*, 279 Mich. App. at 241, 756 N.W.2d at 91.

330. *Id.* at 243, 756 N.W.2d at 92.

331. *Id.* at 244, 756 N.W.2d at 92.

332. *See id.* at 244 n.2, 756 N.W.2d at 92 n.2 (observing that the fees payable to the second law firm in *Reed* "were not barred by the one-third rule of [Mich. Ct. Rule 8.121]" because they "were not incurred pursuant to the original contingent-fee agreement between plaintiff and [the first law firm], but were incurred pursuant to a *separate* fee agreement, which covered proceedings before the Michigan Supreme Court only").

333. 279 Mich. App. 691, 760 N.W.2d 574 (2008). Although *University Rehabilitation* was released for publication just after the current *Survey* period, it is addressed here because it was pending before the Michigan Court of Appeals during the *Survey* period.

334. *Id.* at 693, 760 N.W.2d at 576; *see also* MICH. COMP. LAWS ANN. § 500.3148(1) (West 2008) ("[a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue.").

circumstances,"[335] and cited with approval the general factors to be considered in the computation of a reasonable attorney fee:

> There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.[336]

The *University Rehabilitation* court also observed that "[w]hile a contingent fee is neither presumptively reasonable nor presumptively unreasonable,"[337] the existence of a contingency-fee agreement is an additional factor to be considered in determining whether a particular attorney fee is reasonable under the circumstances.[338]

In *Smith v. Khouri*,[339] a case that produced three separate opinions and no clear majority,[340] the Michigan Supreme Court addressed the computation of a reasonable attorney fee in the context of case evaluation sanctions.[341] Although the Michigan Supreme Court's decision in *Smith* was issued just after the conclusion of the *Survey* period at issue here, the *Smith* opinion forms an important piece of the present discussion. In his lead opinion, joined by Justice Young, Former

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335. *University Rehabilitation*, 279 Mich. App. at 700, 700 N.W.2d at 580.

336. *Id.* at 698-99, 760 N.W.2d at 579 (quoting Liddell v. Detroit Auto. Inter-Ins. Exch., 102 Mich. App. 636, 652, 302 N.W.2d 260, 267 (1981) (quoting Crawley v. Schick, 48 Mich. App. 728, 737, 211 N.W.2d 217, 222 (1973))); *see also* Wood v. Detroit Auto. Inter-Ins. Exch., 413 Mich. 573, 588, 321 N.W.2d 653, 661 (1982).

337. *University Rehabilitation*, 279 Mich. App. at 700, 760 N.W.2d at 580.

338. *Id.* at 699, 760 N.W.2d at 579 (citing *Liddell*, 102 Mich. App. at 652, 302 N.W.2d at 267, and MICH. R. PROF'L CONDUCT 1.5(a)(8)).

339. 481 Mich. 519, 751 N.W.2d 472 (2008). Although *Smith* was decided just after the current *Survey* period, it is addressed here because it was pending before the Michigan Supreme Court during the *Survey* period.

340. *See id.* at 522-38, 751 N.W.2d at 475-83 (opinion of Taylor, C.J.); *Id.* at 538-43, 751 N.W.2d at 483-86 (opinion of Corrigan, J.); *Id.* at 543-57, 751 N.W.2d at 486-93 (opinion of Cavanagh, J.).

341. *Id.* at 522, 751 N.W.2d at 475; *see also* MICH. CT. R. 2.403(O). It is unclear whether *Smith* applies to the calculation of reasonable attorney fees outside the context of case evaluation sanctions. *See, e.g.*, *University Rehabilitation*, 279 Mich. App. at 700 n.3, 760 N.W.2d at 580 n.3 (suggesting that *Smith* might not control the determination of a reasonable attorney fee pursuant to Michigan's no-fault act because the reasoning of *Smith* may be limited to the context of case evaluation sanctions).

Chief Justice Taylor began by reiterating the general factors to be considered in the calculation of a reasonable attorney fee.[342] After citing *Wood*[343] and MRPC 1.5(a), Former Chief Justice Taylor opined that the current approach to determining a reasonable attorney fee was in need of "some fine tuning,"[344] and concluded:

> [A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services .... In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case .... The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards.[345]

The former chief justice observed that "[m]ultiplying the reasonable hourly rate by the reasonable hours billed will produce a baseline figure,"[346] and opined that only after this "baseline figure" is first determined should the trial court "consider the remaining . . . factors [of *Wood* and MRPC 1.5(a)] to determine whether an up or down adjustment is appropriate."[347]

In a separate opinion, joined by Justice Markman, Justice Corrigan "concur[red] with the reasoning and result of the lead opinion," but expressed her opinion that the two factors discounted by the chief justice in the lead opinion should be taken into consideration when calculating a reasonable attorney fee in the case evaluation context.[348] First, Justice Corrigan opined that the trial court should consider "whether the fee is fixed or contingent" when calculating a reasonable attorney fee.[349] She

342. *Id.* at 529-30, 751 N.W.2d at 479 (opinion of Taylor, C.J.).

343. 413 Mich. at 588, 321 N.W.2d at 661.

344. *Smith*, 481 Mich. at 530, 751 N.W.2d at 479 (opinion of Taylor, C.J.).

345. *Id.* at 530-31, 751 N.W.2d at 479 (opinion of Taylor, C.J.).

346. *Id.* at 533, 751 N.W.2d at 480 (opinion of Taylor, C.J.).

347. *Id.* at 531, 751 N.W.2d at 480 (opinion of Taylor, C.J.).

348. *Id.* at 538, 751 N.W.2d at 484 (opinion of Corrigan, J.). The lead opinion had specifically concluded that "'the amount in question and the results achieved'" "is not a relevant consideration in determining a reasonable attorney fee for case evaluation sanctions" and that "[a]lthough . . . 'whether the fee is fixed or contingent' may be relevant in other situations, . . . it is not relevant in determining a reasonable attorney fee for case evaluation sanctions." *Id.* at 534 n.20, 751 N.W.2d at 481 n.20 (opinion of Taylor, C.J.).

349. *Smith*, 481 Mich. at 538, 751 N.W.2d at 483 (opinion of Corrigan, J.).

noted that "[c]ontrary to the assertion in the lead opinion, consideration of whether a fee is fixed or contingent may be helpful in determining a reasonable attorney fee award for case evaluation sanctions."[350] Justice Corrigan continued:

> If a court establishes that an attorney was working under a contingency fee agreement, knowledge of the percentage of the fee may prove to be a useful tool. Contingency fee percentages express an attorney's expectations of the case and the risks involved. While the actual percentage of a contingency fee need not be used in determining a reasonable fee award, this potentially useful information certainly should not be eliminated outright from consideration as a factor in a reasonableness analysis.[351]

Second, Justice Corrigan expressed her opinion that the trial court should consider the "results obtained" when determining a reasonable attorney fee in case evaluation situations.[352] Justice Corrigan observed that various federal courts have "consistently acknowledge[d] the relevance of the results obtained" in the calculation of reasonable attorney fees, and pointed out that the lead opinion had provided "no authority for its conclusion that the results obtained should be excluded from consideration when calculating reasonable attorney fees for case evaluation sanctions."[353] In conclusion, Justice Corrigan opined that "the 'results obtained' and 'whether a fee is fixed or contingent' are appropriate factors to consider in assessing the reasonableness of attorney fee awards," and wrote that she perceived "no principled reason for altering the factors that should be considered when assessing reasonable attorney fees for case evaluation sanctions."[354]

In his dissenting opinion, joined by Justices Weaver and Kelly, Justice Cavanagh opined that the opinions of then Chief Justice Taylor and Justice Corrigan had "sa[id] much, but change[d] little" in the "attempt at 'fine tuning' . . . our longstanding method for assessing reasonable attorney fees under [Mich. Ct. Rule 2.403(O)]," which had "remained unchanged" since the Michigan Supreme Court's opinion in *Wood*[355] twenty-five years earlier.[356] Justice Cavanagh wrote that this

350. *Id.* at 540, 751 N.W.2d at 484 (opinion of Corrigan, J.).
351. *Id.*
352. *Id.* at 538, 751 N.W.2d at 484 (opinion of Corrigan, J.).
353. *Id.* at 540, 751 N.W.2d at 484-85 (opinion of Corrigan, J.).
354. *Id.* at 543, 751 N.W.2d at 486 (opinion of Corrigan, J.).
355. 413 Mich. 573, 321 N.W.2d 653.

attempt to vary the traditional factors for determining the reasonableness of attorney fees "changes little because, in the end, it still leaves the trial court with broad discretion in awarding reasonable attorney fees under [Mich. Ct. Rule 2.403(O)]."[357]

The practical effect of *Smith* is yet to be seen. Indeed, it may ultimately prove true, in the words of Justice Cavanagh, that *Smith* has "change[d] little."[358] Only with the passage of time will it become clear whether *Smith* has substantively altered the *Wood* factors for determining the reasonableness of attorney fees in Michigan.

V. ATTORNEY DISCIPLINE IN MICHIGAN

As noted previously, Chapter 9 of the Michigan Court Rules[359] governs the attorney discipline process in Michigan. Justice Cavanagh aptly described the attorney discipline process in *Grievance Administrator v. Fieger*:

> In carrying out our duty to regulate the legal profession in the state of Michigan . . . we created a governing body that operates as a court system reserved for attorney disciplinary matters, and which mirrors the ordinary trial and appellate system. *See* MCR 9.101 *et seq.* The attorney discipline system consists of a prosecutorial component (the Attorney Grievance Commission [AGC]), MCR 9.108; hearing panels composed of members who act as judges by conducting public, trial-like proceedings during which they receive evidence and after which they render any necessary discipline, MCR 9.111; and a review board (the ADB), which fulfills the judge-like appellate function should an attorney dispute a disciplinary order of a hearing panel, MCR 9.110. Notably, MCR 9.110(A) describes the authority we bestowed on the ADB as follows: "The Attorney Discipline Board is the adjudicative arm of the Supreme Court for *discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys*." (Emphasis added.) The ADB is further charged with disciplining attorneys, MCR 9.110(E)(5), suspending and disbarring attorneys, MCR

356. *Smith*, 481 Mich. at 543, 751 N.W.2d at 486 (Cavanagh, J., dissenting).
357. *Id.* at 543-44, 751 N.W.2d at 486 (Cavanagh, J., dissenting).
358. *Id.* (Cavanagh, J., dissenting).
359. MICH. CT. R. 9.101-9.131.

> 9.110(E)(6), and reviewing the AGC's final orders of discipline, MCR 9.110(E)(4).[360]

Michigan's Attorney Discipline Board (ADB) issued several formal opinions during the current *Survey* period.[361] Those of particular interest to the bench and bar are briefly considered below.

In *Grievance Administrator v. Thornton*,[362] the ADB considered whether an attorney had violated the Michigan Rules of Professional Conduct by threatening to report her client's husband to the immigration authorities after her client requested a refund of prepaid attorney fees.[363] The attorney had originally been retained to assist the client in obtaining a green card, and the client had apparently prepaid for the attorney's services.[364] However, "the client's green card arrived before any of [the attorney's] work product had been filed," and the client therefore requested a refund.[365] The client indicated that if the fees were not refunded, she would pursue legal avenues in order to obtain a return of the fees.[366] Thereafter, the attorney "left a message on her client's answering machine threatening to notify immigration authorities of the client's spouse's outstanding arrest warrant."[367] The attorney also told her client and her client's husband "that they were in for a battle they would wish they had never started, that the husband's green card could be taken away and that the client 'will be kicked out of the country.'"[368]

On review of the hearing panel's decision, the ADB concluded that the attorney had violated MRPC 1.9(c),[369] which provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

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360. *Feiger*, 476 Mich. at 284-85, 719 N.W.2d at 155 (Cavanagh, J., dissenting).

361. *See* Michigan Attorney Discipline Board, *Recent Opinions & Notices of Discipline*, *available at* http://www.adbmich.org/recentnopn.htm (last visited Mar. 10, 2009) [hereinafter Recent Opinions]. For the ADB decisions released during the current *Survey* period that are not addressed here, *see Grievance Adm'r v. Radulovich*, No. 06-000050-GA (Mich. Att'y Discipline Bd. Sept.18, 2007); *Grievance And'r v. Lippman*, No. 04-000120-GA (Mich. Att'y Discipline Bd. Sept. 28, 2007); *Grievance Adm'r v. Gehrke*, No. 05-000029-GA (Mich. Att'y Discipline Bd. Apr. 4, 2008).

362. No. 05-000112-GA (Mich. Att'y Discipline Bd. June 21, 2007).

363. *Id.* at 2.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Thornton*, No 05-000112-GA, at 2.

369. *Id.*

> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.[370]

The ADB found instructive its own previous decision in *Grievance Administrator v. Meretsky*,[371] in which it had concluded that an attorney committed "a serious breach of ethics"[372] by sending a "written threat to 'tell the true facts' regarding a client's case in connection with a dispute over the client's payment of legal fees."[373]

The ADB noted that it "agree[d] with the Administrator that the facts here establish a violation of MRPC 1.9(c)(1), and that [the attorney's] conduct is troubling—even if, as [the attorney] asserted, she honestly believed herself to have been threatened by her client's husband."[374] The ADB further observed that "such conduct 'goes beyond mere poor judgment and lack of professional decorum and severely undermines the image of the legal profession as well as the integrity of the attorney/client privilege.'"[375] "Under the unique circumstances presented," the ADB determined that "a reprimand is the appropriate level of discipline for this particular case."[376]

In *Grievance Administrator v. Watts*,[377] the attorney was charged with having converted funds that rightfully belonged to his client's previous counsel.[378] Both the attorney at issue and the client's previous counsel had represented the client in an underlying dog bite case.[379] The case proceeded to trial and the client was ultimately awarded $40,000.[380] The defendant in the dog bite case entered a satisfaction of judgment and transmitted $45,569 to the clerk of the court.[381] The two attorneys were

370. MICH. R. PROF'L CONDUCT 1.9(c)(1).
371. No. DP 244/82 (Mich. Att'y Discipline Bd. Aug. 16, 1984).
372. *Id.* at 2.
373. *Thornton*, slip op. at 3 (quoting *Meretsky*, No. DP 244/82, at 1).
374. *Id.*
375. *Id.* (quoting *Meretsky*, No. DP 244/82, at 2).
376. *Id.*
377. No. 05-000151-GA (Mich. Att'y Discipline Bd. Aug. 23, 2007).
378. *Id.* at 2.
379. *Id.*
380. *Id.*
381. *Id.*

unable to reach an agreement concerning the allocation of their respective attorney fees.[382]

Thereafter, the attorney at issue filed a motion seeking disbursal of $15,021 in attorney fees—including "$12,081.84 to be divided between the two attorneys."[383] However, the attorney never informed his client's previous counsel of this motion.[384] The trial court granted the attorney's motion and the attorney obtained a check from the clerk of the court in the amount of $17,355.40.[385] He then deposited the vast majority of the funds into a personal checking account.[386]

Unaware that the attorney had already obtained the check from the clerk of the court, the client's previous counsel then filed a motion seeking disbursal of his portion of the attorney fees.[387] Sometime later, the attorney at issue told the previous counsel that he had already "unilaterally obtained release of the funds."[388] The attorney informed the previous counsel "that he had the money, would work out the issue of attorney fees, and would call [the previous counsel]" to discuss the matter.[389] However, the attorney never called the client's previous counsel, and the previous counsel was therefore required to file a civil action against the attorney in order "to obtain his portion of the fee."[390]

The Grievance Administrator argued that "[the attorney's] conduct was of a type that should generally result in disbarment under the [American Bar Association] Standards."[391] The ADB found that the American Bar Association Standards were strictly inapplicable because they "d[id] not specifically address the consequences of a lawyer's knowing conversion of property belonging to an individual[,] group or entity *other than the client*."[392] Nonetheless, the ADB "f[oun]d nothing in the [American Bar Association] Standards which suggests that conversion of funds held in trust for another lawyer is somehow less egregious than conversion of funds held on behalf of a client."[393] The ADB opined that it would be "untenable to give this [attorney] a break simply because he stole money belonging to another lawyer rather than

382. *Id.*
383. *Watts*, No. 05-000151-GA, at 2.
384. *Id.* at 2-3.
385. *Id.* at 3.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Watts*, No. 05-000151-GA, at 3.
390. *Id.*
391. *Id.* at 4.
392. *Id.* at 6 (emphasis added).
393. *Id.* at 7.

money belonging to a client."[394] The ADB agreed with the Grievance Administrator that disbarment was a possible consideration under American Bar Association Standard 6.11, especially in light of the attorney's deceptive conduct in the case.[395] In light of American Bar Association Standard 6.11, and after considering the attorney's history of ethical violations, reprimands, and suspensions, the ADB ordered "a revocation of [the attorney's] license to practice law."[396]

In *Grievance Administrator v. Baker*,[397] the ADB considered the appropriate level of discipline for an attorney who fails to answer the Grievance Administrator's request for investigation. The ADB cited *Grievance Administrator v. Lopatin*, in which the Michigan Supreme Court had held that the ADB should generally use the American Bar Association Standards for determining the appropriate level of sanction for attorneys.[398] In *Lopatin*, the supreme court had further explained:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion.[399]

The ADB observed that it had

> previously held that failure to answer a request for investigation or to comply with an Attorney Grievance Commission subpoena is a violation of a duty owed to the legal profession and would therefore fall under ABA Standard 7.0 . . . . Under this Standard, absent aggravating or mitigating circumstances, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession,

394. *Id.*
395. *Watts*, No. 05-000151-GA, at 7-8.
396. *Id.* at 9.
397. No. 06-000066-GA (Mich. Att'y Discipline Bd. Sept. 11, 2007).
398. 462 Mich. 235, 612 N.W.2d 120 (2000).
399. *Id.* at 247 n. 13, 612 N.W.2d at 128 n.13.

> while reprimand is generally appropriate when a lawyer negligently engages in such conduct.[400]

The ADB then revisited several of its own prior decisions in which it had determined that suspension was the appropriate level of discipline for an attorney's failure to answer a request for investigation.[401] In the end, while the ADB was "not without sympathy for [the attorney] in light of the personal and professional pressures recited to the panel and the Board,"[402] the ADB "enter[ed] an order suspending [the attorney's] license to practice law in Michigan for 30 days."[403]

In *Grievance Administrator v. Cooper*,[404] the attorney was charged with having imposed an excessive or illegal fee.[405] There, the client retained the attorney and entered into a fee agreement, which "provided that $4,000 was paid to [the attorney] for work to be performed in a divorce matter."[406] "The agreement characterized this as a 'minimum fee,' stated that it entitled the client to attorney time at a certain hourly rate, and provided that no part of the minimum fee would be refundable."[407] However, "[a] few weeks after retaining the [attorney], the client changed her mind about the divorce and asked for an itemization and a refund of unearned fees. After continued requests by the client, [the attorney] eventually prepared a bill for $1,228.50 and, 'out of the goodness of her heart,' refunded $1,385.75, thus bringing the total amount kept by respondent to $2,614.25."[408] The hearing panel "dismissed the formal complaint."[409]

On review, the ADB issued a lengthy decision in which it (1) addressed the applicability of MRPC 1.5(a), 1.15(b), and 1.16(d), (2) discussed the concept of a "non-refundable retainer," and (3) attempted to explain the difference between "retainers" and "advance fees."[410] The ADB ultimately concluded that "[t]he $4,000 paid to [the attorney] was clearly for legal services to be performed. As such, it is a fee paid in

400. *Baker*, No. 06-66-GA, at 6 (citations omitted).
401. *Id.* at 6-7.
402. *Id.* at 8.
403. *Id.* at 9.
404. No. 06-000036-GA (Mich. Att'y Discipline Bd. Sept. 17, 2007).
405. *Id.* at 1.
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *See Cooper*, No. 06-36-GA, at 5-26.

advance—not a general retainer—and belongs to the client until earned in accordance with the fee agreement."[411] The ADB continued:

> The fact that the agreement says "NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances" does not change this. Such language does not by itself establish that a fee is earned, especially when accompanied by other language that clearly states, "This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below. Respondent owed her client a refund under the fee agreement drafted by respondent, and under the Rules of Professional Conduct. The failure to refund these unearned fees was a violation of MRPC 1.16(d) and MRPC 1.15(b).[412]

Although the ADB found misconduct, it noted that "the law and ethics opinions in this area have afforded something less than coherent guidance."[413] Accordingly, the ADB "conclude[ed] that it is appropriate to enter an order imposing no discipline under the circumstances of this case."[414] The ADB did, however, order the attorney to "pay restitution to her client in the amount of $1,385.75, the balance of the unearned fees."[415]

On appeal, the Michigan Supreme Court unanimously reversed the decision of the ADB and reinstated the hearing panel's original dismissal of the formal complaint.[416] The Supreme Court's order stated:

> The Attorney Discipline Board erred in holding that the . . . fee agreement was ambiguous as to whether the $4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the [attorney] was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the [attorney's] retention of the

411. *Id.* at 29-30.
412. *Id.* at 30.
413. *Id.*
414. *Id.*
415. *Id.*
416. Grievance Adm'r v. Cooper, 757 N.W.2d 867 (Mich. 2008).

> minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MPRC 1.15(b) or MRPC 1.16(d).[417]

In *Grievance Administrator v. Weideman*,[418] the ADB considered the appropriate level of discipline for a Michigan attorney who took funds from an out-of-state decedent's estate and loaned them to himself and his own law firm for unrelated personal and business use. The attorney's cousin "lived and died in California."[419] The attorney was appointed executor of his late cousin's estate in 2001; the estate thereafter retained California lawyers "to assist in probating the estate."[420] The attorney, however, did not cooperate with these California lawyers. He delayed in responding to their letters and did not provide the relevant accounting information that they requested.[421]

Among the assets of the estate was a considerable amount of cash.[422] In July 2001, the attorney deposited $264,905.20 from the estate into his own law firm's Interest on Lawyers' Trust Accounts (IOLTA) account.[423] The attorney then used a considerable portion of this money for business expenses and to repay a $25,000 personal loan.[424] In September 2002, the attorney finally submitted an accounting, signed under penalty of perjury, informing the California court that the estate had $258,888.23 in cash on hand.[425] In reality, however, the attorney had already spent much of this money; at that time, the attorney's IOLTA account contained only $171,714.01.[426]

In May 2003, the California court issued a final order authorizing the attorney to distribute the decedent's entire residuary estate, including the "$258,888.23 [which] is cash."[427] Nonetheless, the attorney did nothing to comply with this order.[428] In January 2004, a lawyer for several of the estate's beneficiaries filed a motion in the California court requesting that the attorney show cause why he had not distributed the estate.[429]

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417. *Id.*, 757 N.W.2d at 867.
418. No. 05-79-GA (Mich. Att'y Discipline Bd. Sept. 28, 2007).
419. *Id.* at 2.
420. *Id.*
421. *Id.*
422. *See id.* at 2-3.
423. *Id.* at 2.
424. *Weideman*, No. 05-79-GA at 2.
425. *Id.* at 2-3.
426. *Id.*
427. *Id.* at 3.
428. *Id.*
429. *Id.*

That same lawyer also filed a request for investigation with the Michigan Attorney Grievance Commission.[430]

After the request for investigation had been filed, the attorney admitted during an "investigatory statement under oath" that he had loaned himself funds from the estate pursuant to a "Line of Credit Agreement."[431] The attorney had told no one, except his father, about this loan or the Line of Credit Agreement.[432] As already noted, rather than placing the "loaned" funds in a separate account and preserving them, the attorney had "instead placed them in [his law firm's] IOLTA account and used the funds to pay business and personal expenses."[433] The hearing panel concluded that the attorney had violated MRPC 3.3(a)(1), (2), and (4) by intentionally misrepresenting the status and amount of the estate's cash assets to the California court.[434] The panel further concluded that the attorney had made intentionally deceptive statements concerning the estate's cash assets to the estate's California lawyers.[435] Lastly, the panel concluded that the attorney had violated MCR 9.104(A) and MRPC 8.4 by engaging in self-dealing conduct and violating his fiduciary obligations to the trust contrary to the California Probate Code.[436]

On review before the ADB, the attorney argued that the Grievance Administrator lacked authority to investigate his conduct because it had occurred outside the state of Michigan.[437] The ADB disagreed, observing in relevant part that "this Board and its panels have in fact found misconduct based on violation of . . . the probate law of another state."[438] The ADB similarly rejected the attorney's argument that the Michigan Rules of Professional Conduct "cannot have 'extraterritorial application.'"[439] Furthermore, the ADB noted that even if it were inclined to accept the attorney's argument in this regard, "the misconduct clearly took place in Michigan. Michigan is where the . . . IOLTA account was located. Some misrepresentations may have been repeated in California, but they originated here."[440]

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430. *Weideman*, No. 05-79-GA, at 2.
431. *Id.* at 3-4.
432. *Id.* at 4.
433. *Id.*
434. *Id.*
435. *Id.*
436. *Weideman*, No. 05-79-GA , at 5.
437. *Id.* at 6.
438. *Id.* at 7 (citing Grievance Adm'r v. Neaton, No. 00-78-GA (Mich. Att'y Discipline Bd. Feb. 2, 2001)).
439. *Id.*
440. *Id.* at 8.

With respect to the appropriate level of punishment, the ADB began by noting that, pursuant to American Bar Association Standard 4.11, "disbarment is the presumptively appropriate discipline for intentional conversion of client funds and should be imposed absent compelling mitigation."[441] However, the ADB observed that this standard did not apply in the case at bar because "client funds [were] not involved."[442] The ADB did not agree with the Grievance Administrator's argument "that the intentional misappropriation of funds belonging to a non-client third party should, as a general proposition, be considered to be as serious as the theft of client funds."[443] Nor did the ADB agree with the Grievance Administrator's argument that the attorney was subject to disbarment under American Bar Association Standard 5.11(a) for having violated the substantive criminal law of California.[444] As the ADB observed, the hearing panel had found that the attorney's conduct did not rise to the level of a criminal law violation, and the ADB was apparently disinclined to substitute its judgment for that of the hearing panel on this matter.[445]

However, the ADB did find that "in general, a secret loan arrangement by a lawyer in violation of fiduciary duties is serious misconduct."[446] The ADB went on to opine that "such conduct should, in the future, generally be regarded as tantamount to knowing conversion."[447] In light of the attorney's knowing misrepresentations to the California court concerning the amount of cash that the estate had on hand, the ADB concluded that the hearing panel had properly applied American Bar Association Standard 6.12, which relates to the submission of knowingly false documents or statements to the tribunal.[448] Although the attorney had made restitution by repaying the "loan" with interest, the ADB took note of the facts that the attorney had formerly been suspended from the practice of law for thirty days and had been admonished on several previous occasions.[449] The ADB suspended the attorney from the practice of law for four years.[450]

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441. *Id.*, slip op. at 10 (citing Grievance Adm'r v. Petz, No. 99-102-GA, (Mich. Att'y Discipline Bd. July 23 2001)).

442. *Weideman*, No. 05-79-GA, at 11.

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.* at 12.

447. *Id.*

448. *Weideman*, No. 05-79-GA, at 12-13.

449. *Id.* at 13.

450. *Id.*

Finally, in *Grievance Administrator v. Hamood*,[451] the ADB considered the appropriate level of discipline for an attorney who breached his obligations to a client and to a third party.[452] The Grievance Administrator charged the attorney with two counts of misconduct. Regarding the first count, the hearing panel found that the attorney had violated MRPC 1.8(a) "by entering into a business relationship with his client . . . without sufficiently advising her, in writing and in a manner . . . which could be reasonably understood, that she should seek advice of other counsel before investing the proceeds of a life insurance settlement in a restaurant venture owned by [the attorney] and a partner."[453] With respect to the second count, concerning an unrelated matter, the hearing panel found that the attorney had

> achieved a settlement of $30,000 in an employment discrimination case and received a wire transfer from the [employment discrimination] defendant in the approximate amount of $30,000. It is undisputed that the . . . [employment discrimination defendant] then mistakenly made a second wire transfer deposit of $30,000 to [the attorney's] trust account. The panel found that [the attorney] misappropriated the overpayment of $29,986.50 by disbursing those funds as part of the settlement of another client's matter, resulting in his inability to return the overpayment to the original payor. The panel concluded that [the attorney] failed to safeguard the property of [the employment discrimination defendant]; failed to promptly return the entire amount of the overpayment of $29,986.50 to [the employment discrimination defendant] as soon as he was made aware of the overpayment; and failed to segregate the funds belonging to [the employment discrimination defendant], all in violation of MRPC 1.15(a)-(d). The panel also found that respondent's conduct was in violation of MRPC 8.4(b), MCR 9.104(A)(2) and MCR 9.104(A)(3).[454]

With respect to the attorney's handling of the overpayment by the employment discrimination defendant, the ADB noted that the case at bar was distinguishable from several previous matters in which attorneys had knowingly and intentionally stolen the money of third parties.[455] The

451. No. 05-000026-GA (Mich. Att'y Discipline Bd. Apr. 30, 2008).
452. *Id.* at 1.
453. *Id.* at 1-2.
454. *Id.* at 2.
455. *Id.* at 4.

ADB observed that the attorney had not knowingly and intentionally converted the employment discrimination defendant's funds, but had instead neglected to return the funds after receiving the overpayment.[456] Although the attorney's conduct had not risen to the level of intentional conversion, and the case therefore did "not involve a prior premeditated decision to take or 'borrow' funds,"[457] the ADB nonetheless found that the attorney had violated MRPC 1.15 in his handling of the funds.[458] "[T]he misconduct under MRPC 1.15 in this case resulted from [the attorney's] failure to make [the employment discrimination defendant] whole by returning the mistakenly-deposited $29,986.50 immediately."[459]

According to the ADB, even accepting as true the attorney's arguments that he had not become immediately aware of the employment discrimination defendant's overpayment, the attorney still "should have known about the improper distribution."[460] "It was his responsibility as a fiduciary to know what money was coming in and going out of his trust account. More importantly, when [the attorney] did have actual knowledge that funds belonging to [the employment discrimination defendant] had mistakenly been disbursed from the account, it was his responsibility to rectify the situation immediately."[461] "Strict compliance with MRPC 1.15 should be the hallmark of every attorney's handling of funds belonging to another."[462] In light of "the importance of a lawyer's fiduciary obligations under MRPC 1.15," the ADB suspended the attorney from the practice of law for 180 days.[463]

VI. JUDICIAL DISCIPLINE IN MICHIGAN

A. The Role and Authority of the Judicial Tenure Commission

Michigan's 1963 Constitution created the Judicial Tenure Commission (JTC), an independent state agency charged with the investigation of judicial misconduct and judicial incapacity for all active state court judges, and then recommending appropriate discipline for these individuals to the Michigan Supreme Court.[464] Pursuant to its

456. *Id.*
457. *Hamood*, No. 05-000026-GA, at 4.
458. *Id.*
459. *Id.*
460. *Id.* at 5.
461. *Id.*
462. *Id.* at 6.
463. *Hamood*, No. 05-000026-GA, at 6.
464. MICH. CONST. 1963, art. 6, § 30.

constitutional authority, the Michigan Supreme Court has issued pertinent regulations, codified in subchapter 9.200 of the Michigan Court Rules.[465] Pursuant to the court rules, the JTC has issued further internal procedural and administrative operating rules.[466]

The JTC consists of nine members who are elected to staggered terms by mail vote by the members of the State Bar of Michigan—four state court judges, three state bar members (one of whom is a judge), and two non-judges chosen by the governor.[467] In addition to the commission members, the JTC also employs a professional staff to aid in screenings and investigations.[468] The Michigan Supreme Court has exclusive superintending control over the JTC.[469]

The JTC typically relies on four sources of law in evaluating conduct alleged to constitute judicial misconduct: (1) Section 30, Article VI of the Michigan Constitution; (2) Michigan Court Rule 9.205; (3) the Michigan Rules of Professional Conduct and the Michigan Code of Judicial Conduct (MCJC); and (4) Michigan Supreme Court jurisprudence interpreting the first three.[470] In the scope and penalties for judicial misconduct, the Michigan Constitution states:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his

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465. On January 21, 2003, the Michigan Supreme Court amended subchapter 9.200 in its entirety. *See* State of Michigan Judicial Tenure Comm'n, *Commission Jurisdiction and Legal Authority*, *available at* http://jtc.courts.mi.gov/jurisdiction.htm (last visited Mar. 10, 2009). According to the Staff Comment to Rule 9.202, these amendments were the first major revision of the rules governing the JTC since the original rules were adopted more than thirty years ago in response to the addition of Article VI, Section 30 of the Michigan Constitution. The amendments encapsulate in formal rules several unwritten practices of the commission that separate the investigative and prosecutorial functions of its staff from the commission's decision-making function. Other rules strengthen due process rights by providing respondent judges with earlier and fuller notice, and sharpen the commission's investigative tools. The purpose of this subchapter is to ensure the integrity of the courts and the judicial process in Michigan.
MICH. CT. R. 9.2 cmt.

466. MICH. CT. R. 9.203(A), *available at* http://jtc.courts.mi.gov/iops.htm (last visited Mar. 10, 2009).

467. MICH. CONST. 1963, art. 6, § 30(1); MICH. CT. R. 9.202(A)-(C).

468. MICH. CT. R. 9.202(G).

469. MICH. CT. R. 9.203(C).

470. *See* State of Michigan Judicial Tenure Comm'n, *supra* note 465.

> duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.[471]

The Michigan Court Rule additionally provides that in addition to the sanctions enumerated in the statute:

> A judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.[472]

The court rules further define "misconduct in office" as:

> (a) persistent incompetence in the performance of judicial duties;
>
> (b) persistent neglect in the timely performance of judicial duties;
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> (c) persistent failure to treat persons fairly and courteously;
>
> (d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;
>
> (e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and
>
> (f) failure to cooperate with a reasonable request made by the commission in its investigation of a judge.
>
> (2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, whether the conduct occurred before or after the respondent became a judge or was related to judicial office.[473]

471. MICH. CONST. 1963, art. 6, § 30(2).
472. MICH. CT. R. 9.205(B).
473. *Id.*

The court rules provide two avenues for the initiation of judicial investigation—either through a grievance or upon the JTC's own initiative.[474] The court rules permit the JTC to "take evidence" for the purposes of a preliminary investigation, and require that a "judge, clerk, court employee, member of the bar, or other officer of the court must comply with a reasonable request made by the commission during its investigation."[475] The court rules provide blanket civil immunity for "statements and communications transmitted solely to the commission."[476] In "extraordinary circumstances," the JTC may directly petition the Michigan Supreme Court to suspend a judge during the preliminary investigation period, even before the decision to file a formal complaint has been made.[477]

If during the initial grievance screening process, the JTC determines that the request for investigation is "unfounded or frivolous" the process ends there.[478] If the request is not "unfounded or frivolous," then the JTC may still find "insufficient cause to warrant filing a complaint" and consequently:

> (1) dismiss the matter, (2) dismiss the matter with letter of explanation or caution that addresses the [judge's] conduct, (3) dismiss the matter contingent upon the satisfaction of conditions imposed by the Commission, which may include a period of monitoring, (4) admonish the [judge], or (5) recommend to the Supreme Court private censure, with a statement of reasons.[479]

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474. MICH. CT. R. 9.207(A). The court rules further provide that if an investigation request is received for a judge whose election date is within ninety days, then "the [JTC] shall postpone its investigation until after the election unless two-thirds of the commission members determine that the public interest and the interests of justice require otherwise." MICH. CT. R. 9.207(C).

475. MICH. CT. R. 9.208(A)-(B). The JTC enjoys subpoena and contempt power during the preliminary investigation. MICH. CT. R. 9.212(A)(1).

476. MICH. CT. R. 9.227. Similarly, "[m]embers of the commission . . . . are absolutely immune from civil suit for all conduct in the course of their official duties." *Id.*

477. MICH. CT. R. 9.219(A)(2).

478. MICH. CT. R. 9.207(B).

479. MICH. CT. R. 9.207(B)(1)-(5). Before taking any action under (B)(2)-(4), the JTC must provide written notice to the judge, and provide the latter with the opportunity to respond in writing. MICH. CT. R. 9.207(D)(2). Before recommending private censure under (B)(5), the JTC must likewise provide specific written notice and afford the judge twenty-eight days to respond to the allegations. MICH. CT. R. 9.207(D)(1). In addition to the opportunity to provide a written response, a judge may request "an opportunity to appear informally before the commission to present such information as the judge may choose[.]" MICH. CT. R. 9.207(D)(3). If the JTC decides to admonish a judge under

If the process falls short of filing a formal complaint, the JTC then provides final "written notice of the disposition to the judge who was the subject of the request" and to the complainant.[480] JTC investigative files and internal documents are generally "confidential and privileged from disclosure."[481]

At the conclusion of the preliminary investigation, the JTC may decide to file a formal complaint, which is then served upon the judge.[482] Within fourteen days of service of the complaint, the judge must file an answer that must include "a full and fair disclosure of all facts and circumstances pertaining to the allegations" and any affirmative defenses.[483] At any time after the filing of the complaint, the JTC may petition the Michigan Supreme Court to suspend the target judge pending the final adjudication.[484]

Upon the reception of the judge's answer, the JTC then typically schedules the formal complaint for a hearing.[485] The JTC can request that the Michigan Supreme Court appoint a master to conduct the hearing and "rule on all motions and other procedural matters incident to the complaint, answer, and hearing."[486] The JTC executive director acts as the examiner throughout the formal complaint process.[487] At least twenty-one days prior to the hearing, the parties exchange the names, addresses, and any statement or affidavits of the individuals they seek to call as witnesses.[488] The JTC must also turn over all affirmative and exculpatory evidence in its possession to the judge.[489]

At the hearing, the normal rules of procedure and evidence apply, and the examiner has the ultimate burden of proof by a preponderance of the evidence.[490] The judge is entitled to representation by an attorney.[491]

(B)(4), the judge has the right to file a petition for review to the Michigan Supreme Court, to which the JTC executive director can respond. MICH. CT. R. 9.207(D)(5).

480. MICH. CT. R. 9.207(D)(4).

481. MICH. CT. R. 9.221(A). These confidentiality and privilege provisions can be waived in certain circumstances, with the consent of all of the parties and the JTC. MICH. CT. R. 9.221(C). The JTC has the authority upon a majority vote and "in the public interest" to disclose the existence of a pending investigation. MICH. CT. R. 9.221(B)(2).

482. MICH. CT. R. 9.209(A).

483. MICH. CT. R. 9.209(B)(2)-(3).

484. MICH. CT. R. 9.219(A)(1).

485. MICH. CT. R. 9.210(A).

486. MICH. CT. R. 9.210(B).

487. MICH. CT. R. 9.210(C).

488. MICH. CT. R. 9.208(C)(1)(a)(i). The rules allow witnesses who are out-of-state or unable to attend the hearing to be deposed. MICH. CT. R. 9.208(C)(2). The JTC retains its subpoena and contempt power to compel attendance of witnesses and production of documents and tangible evidence. MICH. CT. R. 9.212(A)(2).

489. MICH. CT. R. 9.208(C)(1)(a)(ii).

490. MICH. CT. R. 9.211(A).

Within twenty-one days after the hearing transcript is provided, the master must provide a report that contains his findings of fact and conclusions of law.[492] The examiner or the respondent may file objections to the report, and the other party has an opportunity to respond to those objections.[493] The JTC then provides a hearing on those objections.[494]

The JTC must then acquire at least five votes before recommending an action taken against a judge.[495] Although the JTC is required to "make written findings of facts and conclusions of law," it may also simply wish to adopt, in whole or part, the master's report.[496]

The JTC then takes its final recommendation and files it with the Michigan Supreme Court.[497] The judge may file a petition to reject or to modify the recommendation, and the JTC has an opportunity to file a brief in response.[498] The Michigan Supreme Court may hear oral argument and has the authority to remand the matter to add additional evidence to the record.[499] The Michigan Supreme Court then decides whether to accept, reject, or modify the commission's recommendations on the facts, law, and sanction.[500] Even if the judge and the JTC decide to consent to a course of action, the Michigan Supreme Court has the authority to modify the proposed sanction.[501]

B. JTC Actions within the Survey Period

According to published statistics, the JTC closed approximately 570 cases during 2007.[502] Of the 570, the JTC found 554 "alleged facts [that], even if true, would not [have] constituted judicial misconduct."[503] In

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491. *Id.*
492. MICH. CT. R. 9.214.
493. MICH. CT. R. 9.215.
494. MICH. CT. R. 9.216.
495. MICH. CT. R. 9.220(A)(1).
496. MICH. CT. R. 9.220(B)(1). In other words, the JTC performs a de novo review of the master's report. *In re* Chrzanowski, 465 Mich. 468, 480, 636 N.W.2d 758, 766 (2001). The Michigan Supreme Court has outlined seven factors that the JTC should consider before recommending the appropriate sanction. *In re* Brown, 461 Mich. 1291, 1292-93, 625 N.W.2d 714, 745 (2000).
497. MICH. CT. R. 9.223.
498. MICH. CT. R. 9.224(A)-(B).
499. MICH. CT. R. 9.224(E)-(F).
500. MICH. CT. R. 9.225.
501. *Id.*
502. 2007 MICH. JUDICIAL TENURE COMM'N. CALENDAR YEAR STATISTICS, *available at* http://jtc.courts.mi.gov/statsbudget.htm (last visited Mar. 10, 2009).
503. *Id.*

thirteen, the JTC issued cautionary and explanatory letters, and three formal complaints, discussed below.[504]

Litigants, including prisoners, filed eighty-eight percent of the grievances received by the JTC.[505] The JTC deemed sixty percent of the grievances received sought to challenge the judge's underlying legal ruling.[506] Civil, domestic relations, and criminal cases combined made up the vast majority of complaints. Circuit court judges, who comprise about twenty percent of the judiciary, accounted for half of the grievances. Out of 624 total closings, approximately ninety-six percent fell short of attaining even a letter of explanation. The JTC issue no public censures or accepted no voluntary resignations or retirements as the result of formal proceedings.[507]

1. Resolved Formal Complaints

a. Judge Beverley Nettles-Nickerson

In 2003, Judge Beverley Nettles-Nickerson was the first African-American judge elected to the Ingham County Circuit Court. This ensuing JTC investigation eventually arose from a sharp personal dispute between Chief Judge William Collette and Judge Beverley Nettles-Nickerson.[508] In mid-January 2006, Judge Nettles-Nickerson filed a complaint with the Michigan Civil Rights Commission alleging that Judge Collette was discriminating against her on the basis of race.[509] In particular, the dispute between the two judges centered around Judge Nettles-Nickerson's allegations that Judge Collette unreasonably interfered with matters involving her court reporter and the her work schedule.[510] On January 25, 2006, Judge Nettles-Nickerson withdrew her complaint.[511]

A year later, on January 26, 2007, Judge Nettles-Nickerson renewed her allegations that Judge Collette was treating her and her court reporter,

504. *Id.*
505. *Id.*
506. *Id.*
507. *Id.*
508. Chris Andrews, *Ingham Judge Alleges Racial Discrimination by Colleague*, LANSING ST. J., Jan. 14, 2006, at 1A.
509. *Id.*
510. *Id.*
511. Chris Andrews, *Judge Withdraws Civil Rights Complaint*, LANSING ST. J., Jan. 26, 2006, at 1A. Chief Justice Taylor appointed retired Clinton County Probate Judge Marvin Robertson to investigate the discrimination charges. Hugh Leach, *Ingham Judge, Court Reporter Complain of Bias*, LANSING ST. J., Jan. 27, 2007, at 1A. During March 2006, Judge Robertson concluded that the allegations were meritless. *Id.*

both African-Americans, differently.[512] She also publicly announced that the JTC was investigating her.[513]

On February 14, 2007, Judge Nettles-Nickerson's former secretary filed a lawsuit against her in Ingham County Circuit Court alleging that the judge fired her on December 1, 2006, for responding to a subpoena issued by the JTC.[514] The former secretary alleged that the judge falsified a letter to the circuit court administer who accepted the secretary's resignation.[515] On March 24, 2007, the Ingham County defendants and the secretary reached a settlement of $15,000, without including Judge Nettles-Nickerson or her attorney in the negotiations.[516]

On April 30, 2007, Nettles-Nickerson filed a suit for declaratory relief in federal district court seeking a declaration that "the JTC investigation was initiated in bad faith and to deter the exercise of her First Amendment rights."[517] On February 11, 2008, the district court dismissed her complaint on *Younger* abstention grounds.[518]

On May 16, 2007, the JTC filed a ten-count complaint against Judge Nettles-Nickerson.[519] Among the laundry list of allegations included: (1) Fraudulent claim of residency to obtain a divorce in Kent County Michigan;[520] (2) Falsifying an email that she produced to the JTC about her alleged vacation time;[521] (3) Falsely claiming to counsel that they had not appeared at a no-progress hearing;[522] (4) Coercing her former

512. Leach, *supra* note 511.

513. *Id.*

514. Kevin Grasha, *Judge's Former Secretary Files Suit*, LANSING ST. J., Feb. 16, 2007, at 1A.

515. *Id.*

516. Kevin Grasha, *Ingham County Settles Lawsuit Against Judge*, LANSING ST. J., Mar. 24, 2007, at 1A. The judge publicly responded that she discovered that her secretary was openly looking for a new job, and that the secretary had agreed to resign on December 1, 2006, only to change her mind. *Id.*

517. Nettles-Nickerson v. Fischer, No. 07-11886, 2008 WL 363212, *1 (E.D. Mich. Feb. 11, 2008).

518. *Id.* at *2-6. Nettles-Nickerson was further unable to convince the district court that the "bad faith, harassment, or flagrant unconstitutionality" exception to *Younger* applied. *Id.* at *5 (finding that a State Court Administrative Office complaint letter, a press release from the Michigan Department of Civil Rights, and the timing of the filing of the JTC's formal complaint were insufficient to demonstrate that the JTC's investigation constituted "bad faith" or "harassment").

519. Complaint, Mich. Judicial Tenure Comm'n, *In re* Nettles-Nickerson, No. 81, *available at* http://jtc.courts.mi.gov/downloads/FC81.CommissionD&R.pdf (last visited Mar. 10, 2009).

520. Mich. Judicial Tenure Comm'n, *Recent Commission Action and Notices*, *available at* http://jtc.courts.mi.gov/recentaction.htm (last visited Mar. 10, 2009).

521. *Id.*

522. *Id.*

court reporter to tell Judge Collette that she was receiving her proper lunch breaks;[523] (5) Falsely accusing Judge Collette of attempting to initiate an improper relationship with her;[524] (6) Falsely accusing Judge Collette and State Court Administrative Office (SCAO) administrator James Hughes of advocating the termination of her new court reporter;[525] (7) Pressuring court employees to list active cases on the "no progress docket";[526] (8) Excessive absenteeism and tardiness for scheduled matters;[527] (9) Improper ex parte communications with attorneys;[528] (10) Permitting social relationships in influencing the release of a criminal defendant from probation and then attempting to retaliate against the probation supervisor;[529] (11) Improper termination of her secretary in retaliation for her participation in the JTC investigation;[530] (12) Failure to pay for gasoline at a service station, attempting to use her status as a judge to avoid payment;[531] and (13) Falsely accusing Judge Collette of racism, filing a spurious complaint with the Michigan Civil Rights Commission, and making other "unsubstantiated allegations of racial discrimination."[532]

On June 6, 2007, the Michigan Supreme Court suspended her with pay pending the outcome of the JTC procedure.[533] During mid-January 2008, the JTC shortened the normal deadlines for the master's report, objections, and the JTC's hearing in order to have review of that final decision before the Michigan Supreme Court finished its session on July 31, 2008.[534]

After entertaining proofs for eight weeks and examining 141 exhibits, the appointed master issued his February 12, 2008 report concluding that the JTC had proven all allegations in the complaint by a preponderance of the evidence, except for the allegations concerning ex parte communications, retaliation against the probation department, and

523. *Id.*
524. *Id.*
525. *Id.*
526. Mich. Judicial Tenure Comm'n, *supra* note 520.
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.*
531. *Id.*
532. Mich. Judicial Tenure Comm'n, *supra* note 520.
533. Ronald J. Hansen, *High Court Suspends Lansing Circuit Court Judge*, THE DETROIT NEWS, June 7, 2007.
534. Chris Andrews, *Nettles-Nickerson Case Picks Up Pace*, LANSING ST. J., Jan. 22, 2008, at 1B.

the improper termination of her secretary.[535] The JTC ultimately adopted all of the master's findings, with the exception of allegations pertaining to racism.[536] The JTC recommended that Judge Nettles-Nickerson be removed from office, and five members also recommended in addition to her removal that she also be suspended for six years if she were re-elected in November 2008.[537] The JTC also imposed $128,861.26 on her in cost, fees, and expenses.[538]

On June 11, 2008, the Michigan Supreme Court held oral argument on the JTC recommendation.[539] Only two days later, the Michigan Supreme Court adopted in part the decision of the JTC.[540] In particular, the court found that Judge Nettles-Nickerson: (1) made two false statements regarding her divorce; (2) submitted fabricated evidence to the JTC; (3) listed improperly cases as no-progress on her docket; (4) was absent from the bench excessively; (5) allowed social contacts to influence her decision on releasing a criminal defendant from probation; and (6) "recklessly flaunted her judicial office."[541] The court affirmed the sanction of removing her from office, imposing a six-year conditional

535. *See* The Masters Findings of Fact and Conclusions of Law, *In re Nettles-Nickerson*, No. 81, *available at* http://www.lansingstatejournal.com/assets/pdf/-A399716213.PDF (last visited Mar.10, 2009).

536. *See In re* Honorable Beverley Nettles-Nickerson, 481 Mich. 321, 327-28, 750 N.W.2d 560, 562-63 (2008).

537. *See id.* at 339, 750 N.W.2d at 568. Two members of the JTC dissented on the basis that removal was proper, but the voters of Ingham County should decide whether to re-elect her. *Id.* at 342-45, 750 N.W.2d at 569-70.

538. *See id.*, 481 Mich. at 340, 750 N.W.2d at 568. According to a newspaper report, the State of Michigan and Ingham County spent more than $380,000 in pursuing the complaint against Nettles-Nickerson. Kevin Grasha, *Costs Hit $380,000 in Judge's Litigation*, LANSING ST. J., Apr. 21, 2008, at 1A.

539. *In re Nettles-Nickerson*, 481 Mich. 321, 750 N.W.2d 560. Four organizations filed amicus briefs to the Michigan Supreme Court. Kevin Grasha, *Nettles-Nickerson Case at High Court*, LANSING ST. J., June 11, 2008, at 1A. The Wolverine Bar Association contended that the removal and the conditional suspension would violate the Michigan Constitution and that she should not be liable for the $70,000 that the JTC spent in retaining an attorney. *Id.* The Association of Black Judges of Michigan argued that she should not have to endure the costs incurred because of the case. *Id.* Finally, the Michigan Department of Civil Rights and Civil Rights Commission jointly maintained that she should not have to pay the costs associated with her claims that she was discriminated against. *Id.*

540. *In re Nettles-Nickerson*, 481 Mich. 321, 750 N.W.2d 560. This turnaround prompted Nettles-Nickerson's attorney to remark that he had "never seen a decision in one of these case handed down this fast." David Runk, *Michigan Supreme Court Removes Ingham County Judge*, AP PRESS ST. & LOCAL WIRE, June 13, 2008.

541. *In re Nettles-Nickerson*, 481 Mich. at 322-23, 750 N.W.2d 560-61.

sentence, and ordering that she reimburse the JTC for fees, costs, and expenses in the amount of $128,861.26.[542]

b. Judge Mary Barglind

On February 12, 2008, the JTC filed a two-count complaint against Judge Mary B. Barglind of the Forty-first Circuit Court, alleging that she engaged in a pattern of delay in deciding cases and failing to comply with SCAO inquiries.[543] The complaint alleged that Judge Barglind exhibited extreme delay in deciding fifteen cases,[544] failed to respond to SCAO inquiries about those cases, did not submit accurate reports of matters undecided for four months to the SCAO, and failed to comply with a 2007 implementation plan involving computerized case management.[545]

Judge Barglind eventually entered into a settlement agreement with the JTC.[546] The settlement agreement contained stipulations that Judge Barglind unreasonably delayed adjudication of twelve cases, failed to report to the SCAO, left cases off the pending case reports, and failed to implement properly the computerized case management plan.[547] The agreement further recommended that Judge Barglind be suspended for thirty days without pay.[548] The JTC adopted and incorporated the settlement agreement as its final recommendation to the Michigan Supreme Court.[549]

542. Justice Elizabeth A. Weaver dissented in part on the basis of her belief that Article 6, Section 30 did not provide authority for the Michigan Supreme Court or the JTC to impose costs on disciplined judges. 481 Mich. at 323-24, 750 N.W.2d at 561-62 (Weaver, J., dissenting in part).

543. *See* Decision and Recommendation of Discipline, Mich. Judicial Tenure, Comm'n, *In re* Honorable Mary Barglind, No. 83 (July 14, 2008) [hereinafter *In re Barglind*, No. 83], *available at* http://jtc.courts.mi.gov/downloads/FC83.Commission%-20Decision.pdf (last visited Mar. 10, 2009).

544. *See id.* The complaint asserted that Judge Barglind would occasionally take two years or more to render a decision on a pending motion or bench trial. *See id.*

545. *See id.*

546. *Id.*

547. *Id.*

548. *In re Barglind*, No. 83. at 21.

549. *Id.*

2. Pending Formal Complaints before the Supreme Court

a. Judge William C. Hultgren

On July 10, 2007, the JTC filed a formal one-count complaint against Nineteenth District Court Judge William C. Hultgren, alleging essentially that Hultgren had intervened on behalf of a party in lawsuit pending before another judge in his judicial district.[550] The examiner alleged that Hultgren's conduct amounted to judicial misconduct under the Michigan constitution and violated various provisions of the MCJC.[551]

The JTC alleged the following facts. On October 16, 2007, a social acquaintance of Hultgren, Mr. Beydoun, arranged a meeting with the judge to discuss legal problems faced by a Hussein Dabaja, a cousin of Beydoun's business partner.[552] At that meeting, Dabaja informed Hultgren that the former was a defendant in a pending civil debt-collection lawsuit in front of another judge, and that someone had stolen his identity.[553] Dabaja then presented his passport and social security card to Hultgren.[554] Hultgren then asked his secretary to check the court docketing computer to verify the existence of Dabaja's case.[555] That inquiry revealed that Dabaja's case was pending before Judge Mark W. Somers in the same district.[556] Hultgren then contacted the creditor's attorney to explain the alleged mistaken identity, and subsequently faxed a letter on Nineteenth District Court letterhead to that effect.[557]

When Somers discovered Hultgren's meeting with Dabaja, Somers wrote a memo asking Hultgren to explain his involvement in the case.[558] Hultgren did not respond to the first memo.[559] Somers sent a second similar memo to Hultgren, to which the latter replied that his actions were "an isolated good faith by a judge to request a lawyer in a credit card collection mill to take a second look at objective facts supporting a

550. Complaint, Mich. Judicial Tenure Comm'n, *In re* Honorable William C. Hultgren, No. 82 (July 14, 2008), *available at* http://jtc.courts.mi.gov/downloads/FC%2082.pdf (last visited Mar. 10, 2009).

551. *Id.*

552. Decision and Recommendation for Order of Discipline, Mich. Judicial Tenure Comm'n, *In re Honorable William C. Hultgren*, at 4 [hereinafter *In re Hultgren*, No. 82], *available at* http://jtc.courts.mi.gov/downloads/FC82.Commission%20Decision.pdf (last visited Mar. 10, 2009).

553. *Id.*

554. *Id.*

555. *Id.* at 4-5.

556. *Id.* at 5.

557. *Id.*

558. *In re Hultgren*, No. 82, *supra* note 570 at 5.

559. *Id.*

default judgment against a non-English speaking immigrant and take whatever action he may deem appropriate."[560]

The examiner contended that Hultgren "commit[ed] misconduct when he . . . use[d] the prestige of his . . . office to influence the administration of justice" in violation of Canon 2C of the MCJC.[561] The examiner's legal argument divided Hultgren's alleged conduct into three separate, and purportedly independent, actions: (1) the failure to terminate the meeting; (2) the intervention of behalf of Dabaja; and (3) the demeaning comment about collection attorneys.[562] The examiner recommended a sanction of public censure and one year's suspension.[563]

After holding a hearing, the master issued his report on March 31, 2008, in which he concluded that Hultgren's activities did not constitute any actionable judicial misconduct.[564] On April 16, 2008, the examiner submitted his objections to the master's report.[565]

The JTC rejected the master's legal conclusions and recommended that Hultgren's actions constituted a violation of Canon 2C.[566] The JTC did not analyze the conduct as independent violations, but rather saw Hultgren's actions as one unified course of conduct.[567] However, seven members recommended that Hultgren only receive public censure and sixty days' suspension without pay.[568] Two members concurred and suggested that Hultgren's conduct warranted a public censure plus one year's suspension without pay.[569]

b. Judge Steven R. Servaas

On February 14, 2008, the examiner filed a three-count complaint against Sixty-third District Court Judge Steven R. Servaas, alleging that the latter vacated his office by failing to reside in the appropriate division of his judicial district, failed to comply with statutory drivers' license

560. *Id.* at 5-6.

561. *Id.* at 7. Canon 2C provides:

> A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed.

MICH. CODE JUD. CONDUCT, Canon 2C.

562. *See In re Hultgren*, No. 82, *supra* note 552, at 2-3.

563. *Id.* at 12.

564. *Id.* at 3.

565. *Id.*

566. *Id.* at 2.

567. *Id.* at 12-13.

568. *See In re Hultgren*, No. 82, *supra* note 552, at 14.

569. *See id.*

notification requirements, and made rude and sexually inappropriate comments to members of his staff.[570] Judge Servaas, represented by counsel, vigorously challenged the examiner's interpretation of Michigan law and of the pertinent facts.[571] At present, Servaas' case is pending before the Michigan Supreme Court.[572]

The examiner alleges that Servaas "vacated his office" under the Michigan Constitution and Michigan law when he moved from a residence in the first division of the Sixty-third District to the Second Division in 2005.[573]

The Sixty-third District Court in Kent County is divided into two divisions.[574] Servaas has been serving as the elected judge of the 1st Division since 1973.[575] Until 2005, Servaas resided in the First Division at which point he moved his primary residence to the Second Division.[576]

The Michigan Constitution states that "[w]henever 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."[577] Michigan statutory law recognizes that "[a] candidate for and a judge of the district court shall be licensed to practice law in this state and shall be a registered elector of the district and election division in which he seeks and holds office."[578]

On the basis of these two provisions, the examiner alleged that Servaas was required to be a "registered elector" in the First District of the Sixty-third District in order to hold the judgeship.[579]

In response, Servaas argues that: (1) M.C.L. Section 600.8201 did not require that district judges reside in the specific division of a district

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570. Complaint, Michigan Judicial Tenure Comm'n, *In re* Honorable Steven R. Servaas, No. 84 (Feb. 14, 2008) [hereinafter Complaint, *In re Servaas*], *available at* http://jtc.courts.mi.gov/downloads/FC%2084%20Complaint.pdf (last visited Mar. 10, 2009).

571. *See* Michigan Judicial Tenure Comm'n, Press Release Archives, *available at* http://jtc.courts.mi.gov/pressreleasesarchives.htm (last visited Mar. 10, 2009).

572. *See* Complaint, *In re Servaas*, *supra* note 570, at ¶¶ 3-16.

573. *Id.* at 5.

574. Access Kent: Kent County, Michigan, *63rd District Court*, *available at* http://www.accesskent.com/CourtsAndLawEnforcement/63rdDistrictCourt/63rdDistrictCourt.htm (last visited Mar. 10, 2009).

575. Master's Report, Michigan Judicial Tenure Comm'n, *In re Honorable Steven R. Servaas*, No. 84 (May 12, 2008) [hereinafter Master's Report, *In re Servaas*], *available at* http://jtc.courts.mi.gov/downloads/FC%2084.Masters%20Report.pdf (last visited Mar.10, 2009).

576. *Id.*

577. MICH. CONST. 1963, art. 6, § 20.

578. MICH. COMP. LAWS ANN. § 600.8201 (West 2008).

579. *See* Complaint, *In re Servaas*, *supra* note 570, at 2-5.

court;[580] (2) M.C.L. Section 600.8201 by its plain terms does not require a judge to maintain a residence;[581] (3) failure to satisfy M.C.L. Section 600.8201 does not warrant an office to be vacated;[582] (4) although Michigan law explicitly provides that certain types of judges vacate their office when they move from their districts, there is no explicit provision applicable to district judges;[583] and (5) Servaas subsequently moved back to the 1st Division, which mooted the issue.[584]

The JTC ultimately found that in addition to his admission that he lived in the Second Division from 2005 to 2008, Servaas had in fact maintained his primary residence in the Second Division from 2000 to 2005 as well.[585] Consequently, the JTC noted that Servaas had illegally voted in the First Division, falsely swore to a wrong address on his concealed weapons permit, and provided false testimony to the master on the subject.[586] The JTC made the legal conclusion that the Michigan Constitution's use of the phrase "the territory from which he was elected or appointed" meant that a judge must reside in the particular division of the district court.[587]

In connection with his changes of residency, the complaint charged Servaas with failing to immediately update his drivers' license information with the secretary of state,[588] and with failing to change his voter registration.[589]

The master recommended that Count II be dismissed, since the examiner cited the wrong statute in alleging that Servaas failed to change his voter registration. Moreover, the master recommended that the failure

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580. *See* Answer, Honorable Steven R. Servaas, *In re Honorable Steven R. Servaas*, No. 84 (Feb. 27, 2008), at 3-4 [hereinafter Answer, *In re Servaas*], *available at* http://jtc.courts.mi.gov/downloads/FC84.answertocomplaint.pdf (last visited Mar. 10, 2009).

581. *See id.* at 3.

582. *See id.*

583. *See id.* 5-6.

584. *See id.* at 4.

585. Decision and Recommendation for Order of Discipline, Michigan Judicial Tenure Comm'n, *In re Honorable Steven R. Servaas*, No. 84, at 4 [hereinafter Decision, *In re Servaas*], *available at* http://jtc.courts.mi.gov/downloads/FC84.decisionandrecommendation.pdf (last visited Mar. 10, 2009).

586. *Id.* at 10.

587. *Id.* at 11-12. The JTC arrived at this conclusion using the "common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Id.* (quoting Nat'l Pride at Work, Inc. v. Governor of Mich., 481 Mich. 56, 67-68, 748 N.W.2d 524, 532-33 (2008)).

588. Complaint, *In re Servaas*, *supra* note 570, at 6-8. *See also* MICH. COMP. LAWS ANN. § 257.315(1) (West 2008).

589. Complaint, *In re Servaas*, *supra* note 570, at 6-8. *See also* MICH. COMP. LAWS ANN. § 168.507(1) (West 2008).

to notify the secretary of state immediately upon changing his address constituted a mere civil infraction and did "not rise to a level of judicial or professional misconduct." The JTC summarily adopted the master's recommendation on Count II.[590]

The complaint also charged Servaas with rude and sexually inappropriate comments based upon three specific incidents: (1) a comment to a female staff member about the size of her chest; (2) giving of a doodle of female breasts to female staff members; and (3) drawing a doodle of a male sex organ and giving it to a female court employee.[591]

Although Servaas admitted that he had made a bad joke about the chest size of a female employee and that he had drawn a doodle of a large-breasted woman as a caricature of a woman who had appeared in his court, he vigorously denied the examiner's characterization of those incidents.[592] As to the chest remark, Servaas contended that the context involved a work-party where the employee, petite and older, was wearing an oversized University of Michigan sweatshirt and that he attempted to make a joke that she needed a larger chest size for the size of the school.[593] He averred that the participants in the conversation perceived the remark as a joke, that the employee was known for "making mountains out of molehills," and that he tried to apologize to her later.[594] He also pointed out that the remark did not create a hostile work environment since he was not that employee's supervisor.[595] As to the breast doodle, the examiner was never able to produce a copy of it, nor elicit any testimony that any court employee was offended by it.[596] As to the male sex organ doodle, Servaas contended that the examiner did not prove that the doodle was a sex organ and never offered any direct evidence that he authored the drawing.[597] Lastly, Servaas argued that there was no support for the master's conclusion that the clerks were "intimidated" into laughing at the doodles.[598]

Without discussing Servaas' arguments, the JTC summarily adopted the findings of the master of this issue and additionally noted that

590. *Id.*
591. Complaint, *In re Servaas*, *supra* note 570, at 2.
592. Answer, *In re Servaas*, *supra* note 580, at 8-9.
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.*
598. Answer, *In re Servaas*, *supra* note 580, at 8-9.

Servaas "lied under oath on multiple occasions before and during these proceedings in an effort to conceal his misconduct[.]"[599]

Applying the seven relevant factors for proposed discipline, the JTC recommended that the Michigan Supreme Court remove Servaas from office and to pay the $8,364.38 in fees and expenses incurred by the commission.[600] While admitting that, standing alone, the conduct alleged in Count III would only merit a public censure, the JTC emphasized that the vacation of office formed the primary basis for his suggested removal.[601]

Servaas' case is pending before the Michigan Supreme Court.

3. Other Completed Actions

a. Judge Norene S. Redmond

The Michigan Supreme Court affirmed the public censure of Thirty-eighth District Court Judge Norene S. Redmond on the basis of four grievances.[602]

The first grievance arose out of a bail hearing on misdemeanor domestic violence and felony resisting and obstructing charge.[603] A sixteen year old had called the police and reported that his mother had hit him with a belt.[604] When the police arrived, the officers attempted to have the mother go back inside the house; but she refused to comply.[605] When the officers attempted to arrest her, she ran back inside of the house and locked herself in the bathroom with another son.[606] When she eventually emerged, the officers arrested her for misdemeanor domestic violence, resisting arrest, and obstruction of justice.[607] Judge Redmond initially set her bond at $5000, or ten percent.[608] After the bond hearing, the mother's son made a derogatory remark about the judge, which was

599. Decision, *In re Servaas*, *supra* note 585, at 2. The JTC concluded that Servaas' hearing testimony that he had no knowledge of making a doodle of a female breast directly contradicted the position that he took in his answer. *Id.* at 11. Additionally, the JTC accepted the master's credibility determination that Servaas was "less than truthful" when his testimony compared to that of a court clerk. *Id.*

600. *Id.* at 20.

601. *Id.* at 18-19.

602. *In re* the Honorable Norene S. Redmond, 480 Mich. 1227, 739 N.W.2d 626 (2008).

603. *Id.* at 1229-30.

604. *Id.* at 1229.

605. *Id.*

606. *Id.*

607. *Id.*

608. *In re Redmond*, 480 Mich. at 1229.

then relayed to her.[609] Judge Redmond immediately went back on the record and raised the mother's bond to $25,000 cash, citing the violent nature of the son.[610] After the son apologized in open court, she continued to refuse to change the bond.[611]

The second grievance involved another situation where Judge Redmond allegedly set a grossly disproportionate bail for two defendants accused of swindling a ninety year-old lady.[612] The two defendants had taken $800 in cash from the lady, and gave her an inflated estimate for painting her house.[613] They were charged with the felonies of embezzlement from a vulnerable adult and larceny in a building.[614] Although the first defendant possessed an out-of-state drivers license and had no criminal record, Judge Redmond set his bond at $750,000.[615] Although the second defendant also possessed out-of-state identification and had a minimal criminal record, Judge Redmond set his bond at $1,000,000.[616] Both defendants eventually plead guilty to the embezzlement charge, and the prosecutors dropped the larceny charge.[617]

The final two grievances arose from a case involving Judge Redmond's imposition of a grossly disproportion sentence imposed in response to a violation of a municipal noise ordinance. The defendant was hosting a large party at her residence, and one of her guests stepped out of the house to make a cell phone call, which allegedly involved yelling or talking loudly.[618] The police, who were waiting down the street, approached the defendant and cited her for the noise violation.[619] Judge Redmond allowed several favorable and unfavorable petitions from the defendant's neighbors to be read into the record.[620] Judge Redmond did not disclose that she personally knew some of the defendant's neighbors.[621] After making several editorial remarks about the incident, Judge Redmond imposed a sentence upon the defendant including fines, costs, two years of probation, thirty days in the Macomb County jail, daily preliminary breath tests at the police department and at

609. *Id.*
610. *Id.* at 1229-30.
611. *Id.* at 1230.
612. *Id.*
613. *Id.*
614. *In re Redmond*, 480 Mich. at 1230.
615. *Id.* at 1230-31.
616. *Id.* at 1232.
617. *Id.*
618. *Id.*
619. *Id.*
620. *In re Redmond*, 480 Mich. 1232-33.
621. *Id.*

Thirty-eighth District Court, 100 hours of community service, no further parties unless approved by the petitioners, and no overnight guests.[622]

The Michigan Supreme Court adopted the settlement agreement and publicly censured Judge Redmond.[623]

4. Non-Public Dispositions

During the *Survey* period, the JTC also issued a series of letters of explanation, caution, or admonishment to certain judges.[624] These issues involved contempt of court, delay, treatment of others while acting in a judicial capacity, misuse of judicial authority, improper conduct, disqualification, a judge's submission of an affidavit without a subpoena, and timely appearance on the bench.[625] The JTC's website contains short synopses of these actions.[626]

VII. CONCLUSION

As is true of all areas of the law, the field of professional responsibility is dynamic and ever-changing. However, unlike other areas of the law, in which we may not specialize or practice, the field of professional responsibility directly and tangibly affects all of us as attorneys and judges. It is the hope of the authors that this article has helped to explain and clarify the major developments in Michigan's law of professional responsibility during the 2007-2008 *Survey* period.

622. *Id.* at 1233.

623. *Id.* at 1235. In a concurring comment, joined by Justice Corrigan, Justice Weaver pointed out that commissioner's recommendation included facts to which Judge Redmond did not stipulate. *Id.* (Weaver, J., concurring).

624. *See* Michigan Judicial Tenure Commission, NON-PUBLIC DISPOSITIONS, *available at* http://jtc.courts.mi.gov/recentaction.htm (last accessed visited Mar. 10, 2009).

625. *See id.*

626. *See id.*