OAKLAND COUNTY
OCBA
BAR ASSOCIATION

LACHES

www.ocba.org | June/July 2021 | Number 639

PUNCH UP THE PERSUASION: Effective Appellate Writing Tips

CIVIL DISCOVERY IN THE AGE OF COVID-19: How Have the Rules Fared?

RULE INTERPLEADER: A Developing Federal Circuit Split on Diversity?

ADVANCE YOUR LEGAL CAREER
WITH AN LL.M. DEGREE

WESTERN MICHIGAN UNIVERSITY
Cooley Law School

WMU-Cooley's Graduate LL.M. programs provide recent law graduates and practitioners an opportunity to develop excellence through an innovative, practice-oriented curriculum with expert faculty; all without interrupting your family or your career.

- Classes are conducted weeknights and weekends.
- Online part-time and full-time options available.
- Degree can be earned in one to two years.

To learn more, download our LL.M. Guide by scanning the QR Code below.
www.wmich.edu/law

ALL RISE.

LACHES

OAKLAND COUNTY BAR ASSOCIATION
1760 S. Telegraph Road, Suite 100
Bloomfield Hills, Michigan 48302-0181
(248) 334-3400 • FAX (248) 334-7757
www.ocba.org

2020-2021 BOARD OF DIRECTORS

LACHES EDITORIAL BOARD

THE MISSION OF THE OAKLAND COUNTY BAR ASSOCIATION IS TO SERVE THE PROFESSIONAL NEEDS OF OUR MEMBERS, IMPROVE THE JUSTICE SYSTEM AND ENSURE THE DELIVERY OF QUALITY LEGAL SERVICES TO THE PUBLIC.

LACHES (ISSN 010765) is the monthly (except July and December) publication of the Oakland County Bar Association, a Michigan nonprofit corporation, 1760 S. Telegraph, Ste. 100, Bloomfield Hills, MI 48302-0181. Copyright © 2021 Oakland County Bar Association. The price of an annual subscription ($20) is included in member dues. Periodical postage paid at Bloomfield Hills, MI 48304 and additional entry offices. Postmaster: Send address changes in writing to Oakland County Bar Association, 1760 S. Telegraph, Ste. 100, Bloomfield Hills, MI 48302-0181.

CONTENTS

JUNE/JULY 2021

FEATURES

DEPARTMENTS

PUBLISHING PARTNER
HOUR CUSTOM PUBLISHING
5750 New King Drive, Ste. 100
Troy, MI 48098
Phone: 248.691.1800 / Fax: 248.691.4531

'Looks Like We Made It'

Barry Manilow, 1976

By Keefe A. Brooks

On June 4, 2020, I was sworn in as president of the Oakland County Bar Association at its 86th Annual Meeting. I had lots of ideas and aspirations for my term as president. I must admit that making a number of cameo appearances on *Hollywood Squares* was not among them.

By June of 2020, the pandemic was unfortunately flourishing, and we could not meet in person. We deferred the annual Awards Ceremony to October in the hope we could all meet by then. The pandemic only got worse. We clung to hope that surely by December we would meet at our annual Holiday Gala. Not to be.

With renewed hope and spirit, we marched into 2021. We hoped that our biennial Circuit-Probate Court Bench/Bar Conference could be conducted in person in March. Again, not to be. (As a side note, I am confident that those who attended would agree that it was nevertheless a wonderful program even though presented in *Hollywood Squares* style. And thank you to Chief Judges Kumar and Ryan for allowing such great participation by our bench.)

Now I am charged with submitting what will be my final column as president of the OCBA. And even as I write this column, we do not know if our Annual Meeting in June will be in person or via remote video.

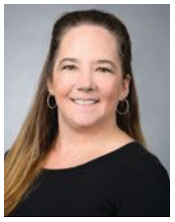
So what is the state of the OCBA coming out of a full year of COVID-19? In actuality, it is in great shape. It is in great shape because of a dedicated group of committee chairs/vice chairs and board members who all stepped up to the challenge, adapted to the COVID times, and carried on the business of the OCBA. But their hard work and dedication notwithstanding, this year perhaps emphasized more than others the wonderful backbone that keeps the machine finely tuned — the staff of the OCBA. So I would be remiss if I did not acknowledge them for ensuring that "we made it."

President Brooks commissioned a custom Pewabic tile that will be given as appreciation gifts to each member of the 2020-21 OCBA board of directors and the current OCBA staff.

Notwithstanding the remote presentation of professional development and continuing education seminars, Merri Lee Jones made sure the band played on. She worked closely and tirelessly with many committees, including the Professional Development Committee, Criminal and Juvenile Law committees, and the Providing Access to Legal Services Committee. Remote presentation notwithstanding, Merri Lee made sure the OCBA committees presenting substantive content were able not only to carry on but, in many cases, increase participation due to the ease of joining the remote broadcast of these valuable programs.

One of the great programs of the OCBA is the provision of District Court Case Evaluation services. This provides a service to the courts and is part of the revenue base of the OCBA. Kari Ross does a super job overseeing and coordinating this program, as well as performing other duties at the same time.

Merri Lee Jones



Kari Ross

Michelle Kryska

Mary Kuhn

Sue Maczko

Nehita Burnett

Michelle Kryska is our sales and marketing director. She works on drumming up support for our programs and is likely the one who has knocked on your door once or twice looking for sponsors. Especially in a year where we could not hold so many of our traditional events, her work has proved invaluable. She is a champion of our brand and assists leadership in promoting the organization to members and member prospects alike.

One person you are all likely to recognize is Mary Kuhn, our receptionist. She is that friendly face at the front desk when you arrive, and that friendly voice on the other end of the telephone when you call the OCBA.

Like any other organization that is successful, there are persons at the OCBA that you likely do not know or with whom you have not had contact. Their importance equals that of all the others. Sue Maczko is our finance director, but she does so much more than that. In addition to financial planning and reporting, Sue serves as liaison to our phone and information technology vendors, and also serves as staff liaison to many of our committees.

Other behind-the-scenes persons of equal import include Nehita Burnett, who assists Kari with District Court Case Evaluation, and Merri Lee with coordinat-


Ann Neilson


Mayly McRae


Lori Dec


Katie Tillinger


Jennifer Roosenberg

ing MIDC training; Ann Neilson, who manages the Lawyer Referral Service of the OCBA and coordinates with the LRS Committee; Mayly McRae, our bookkeeper who assists with event registrations, tracking member profiles, and other back-end duties; and our newest staff member, Lori Dec, who not only has to put up with and support the two persons mentioned next, but who also assists with coordination of meetings and events, as well as coordinating with the publisher of *LACHES*. If our nurses and other health care professionals are the heroes of getting us through COVID (and they are), these persons are the backbone that got us through the 2020-2021 bar year.

One of the more familiar faces to you is Katie Tillinger. Katie is the deputy director of membership and foundation. What she really does is oversee day-to-day operations of the OCBF; she is invaluable in making the whole thing work. (No, Katie, I can't give you a raise.) She tirelessly oversees so many functions and events, and serves as liaison to the Membership, New Lawyers, Real Estate, Circuit Court, and Diversity and Inclusion committees.

Last, but certainly not least, is our executive director, Jennifer Roosenberg. During my tenure on the board, I have worked with three executive directors. By any measure, Jennifer's talents and energy equal or exceed the others with whom I have had the pleasure of working. She works closely with the officers, the Executive Committee, and the full board to assist in developing policy and procedures, all while supervising the 10-person staff discussed previously. While it takes a team to make any organization work well, every team needs a captain. We are fortunate indeed to have Jennifer as our captain. (Yes, Jennifer, I can give you a raise, but no fair using anything in this column in support of your request.)

So to all the committee chairs/vice chairs, board members, and OCBA staff, I leave you my thanks for helping us make it through the 2020-2021 bar year. Yes, looks like we made it. And as for next year, I leave you with the following:

I did my best
To get us through
But could not have done it
Without you

So on to next year
When you have Kaveh
And while I wish you all well
I have to say, oy vey

Keefe A. Brooks is president of the Oakland County Bar Association.

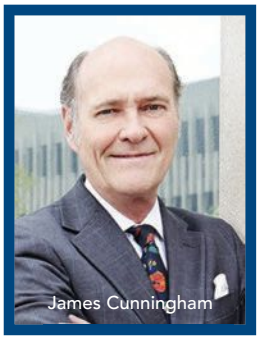
Plenty of Room at This Inn

By Hon. Jacob James Cunningham

Dear Friends:

Let me start by being frank: I have very big shoes to fill. Though I am writing to you as vice chancellor of the OCBA's Inns of Court, I'd be remiss if I did not take a brief moment to acknowledge this full-circle moment for me in authoring this article. You see, I am a second-generation *LACHES* contributor. As many of you habitual readers are well aware, my mother, Judy Cunningham, contributed to *LACHES* substantially when she was the Sixth Circuit Court administrator from 1988-1999 and then again contributed during her tenure as president of this organization from 2012-2013. My father, James Cunningham, contributed to the president's page during his tenure as president from 2003-2004. (I should also note my father was an Inns of Court member when I was a child, and I remember a resounding rendition in a presentation of him impersonating Oscar Wilde. If anyone has a copy of that performance, please call me.) So when the chancellor of the Inns, Oakland County Chief Probate Judge Kathleen Ryan, and I were asked to contribute to *LACHES* on this year's program and to discuss the great member benefits of being involved with the Inns of Court, I felt the need to take a quick moment to pay homage to my amazing parents and their prior and respective columns to this publication. So, thank you, Mom and Dad, for your contributions to our profession and for introducing me to it. And thank you, readers, for allowing me to take that liberty.

Judy Cunningham



James Cunningham

Which brings me to my assigned topic. Historically, the Inns of Court program kicked off for the year in September with a social gathering and a "meet your teammates" caucus. Formal introductions were made, the team topics distributed, contact information exchanged, and inevitably, unlucky team one, whose presentation would be only four weeks from that first September meeting, went into the organized-panic anxiety whirlwind most lawyers shine and thrive in. Throughout my many years and different roles with the Inns of Court, I've always found team one's presentation sets the bar (pun intended) very high, even with their short turnaround. (The "first up" honor this year was bestowed to a team led by my colleagues Judges Julie A. McDonald and Kameshia D. Gant, and true to form, even with the pandemic adjustments, team one delivered.) The other teams, whose presentations are scattered through the rest of the bar year, typically on the second Wednesday of the month (save December), continuously work to up the informational and entertainment ante through the final presentation in May, which includes a happy hour, refreshments, and is off-site from the OCBA. Prior to and at the conclusion of presentations, members have an opportunity to mingle and network. To sum it up succinctly, the Inns of Court combines the best that the OCBA offers us as lawyers: networking, education, and camaraderie all in one.

Like all things after March 2020, the 2020-2021 Inns of Court program looks different, was moved to the virtual platform, and took on some slight structural adjustments. As of this writing, we do not yet know what the next few months will bring as far as the changes in the pandemic operating procedures. This certain uncertainty has been maybe the only constant we have known over the course of this crisis. As far as the Inns of Court is concerned, Judge Ryan and I have worked with OCBA staff and the Inns Executive Board to bridge the gap from what we used to experience, to coming up with a meaningful, pandemic-friendly alternative.

In the fall, we gathered on Zoom for a virtual group meeting (BYOB, if you please), introduced ourselves, and virtually mingled in a not-too-dissimilar format from our traditional September meeting. Though I think everyone shares some degree of Zoom fatigue, I think there is a comfort in knowing your peers and colleagues are experiencing the same extraordinary professional challenges of this era as well.

Our next session a month later was Zoom "tips, tricks, and horror stories" (it was our October meeting, after all). Many members contributed a few great, and some not so great, Zoom court experiences. (None of our OCBA colleagues had it quite as bad as the "Judge, I'm not a cat" gentleman from Texas, but many came close.) We rounded out the fall with a presentation in November from a lawyer/film producer who advised our group on making us look our best in our own little virtual boxes in which we currently live and litigate.

Around the holidays, after some members expressed an interest in reviving the team presentation format, an abbreviated team roster was created, and topics distributed. The decision was made to cancel our January meeting to allow team one time to create a presentation on professionalism and how to be agreeable while still disagreeing. Not to be outdone, team two, led by retired 46th District Court Judge

Bill Richards, presented a skit on business valuations and the challenges of valuing assets due to the economic impact of the pandemic. Even through Zoom, both teams shined and presented us all with useful tidbits of information and resources.

As of this writing, team three's presentation, led by Court of Appeals Judge Elizabeth Gleicher, on the changes to our discovery rules and team four's techniques in successful facilitation tactics, also led by Judge Richards, remain to be debuted. However, I am confident that all members will leave those presentations equally as entertained and enlightened. And despite having to scour our email inbox for yet another meeting ID, I do not believe anyone ever regrets logging in. The brief moments to check in with fellow colleagues, learn something new, and inevitably have a few laughs have become a welcome distraction to the other Zoom calls on which we find ourselves. Whether we are on Zoom or in person, I've never left an Inns of Court meeting without feeling it was time well spent.

Over the years, I have come to sincerely appreciate my involvement with our award-winning Inns of Court program and encourage all OCBA members to contemplate leaving their comfort zone and sign up. Through the Inns of Court, I have been given a unique opportunity to work very closely with attorneys I had never met and probably would not have naturally interacted with based on the diverse areas in which we all practice. Many members share that they, too, appreciate making new acquaintances with peers that, absent the Inns of Court, they would not have otherwise had an opportunity to work closely with. So, if you are reading this and contemplating joining the Inns of Court program, I implore you, please do consider signing up. We have plenty of room at our Inn to meet, learn, and laugh with fellow OCBA members. And though I cannot guarantee whether it will be on Zoom or in person, I do look forward to meeting new and reacquainting with current members in September. Hopefully by then, next year's team one will be enlightening us on a reintroduction to in-person lawyering.


American Inns of Court

Achieving Excellence

Bronze Distinction

is presented to

The Oakland County Bar Association
American Inn of Court
Oakland County, Michigan

In recognition of the Inn's outstanding efforts in effective administration, communications, program development, mentoring, community outreach and participation in the American Inns of Court movement for the year 2019–2020.

The Honorable Kent A. Jordan, President

You can learn more about the OCBA's chapter of the American Inns of Court by visiting *ocba.org/inns.*

Judge Jacob James Cunningham serves the Sixth Judicial Circuit Court in the Family Division and is vice chancellor of the OCBA's chapter of the American Inns of Court.

CALENDAR OF EVENTS

Please Note: Dates listed below were sent to the publisher on March 25, 2021. Due to the uncertainty surrounding COVID-19, it is possible that some of the events listed below have since been altered, canceled, or postponed. Please check *ocba.org/events* for the most up-to-date schedule of events.

JUNE

ANNUAL MEETING & AWARDS CEREMONY

3

Join the OCBA in acknowledging outstanding leaders in the law and celebrating another amazing year. Spend time with judges, OCBA leadership, and other OCBA members at this annual celebration. At the event, outgoing OCBA President Keefe A. Brooks will pass the gavel to incoming President Kaveh Kashef. Kashef will then be sworn in as the bar's 89th president, and his first action as the new leader will be to deliver remarks about his vision for the year ahead. We invite you to join us as we celebrate the great work of these important bar leaders, reflect on the past year, and look ahead to a great future! Due to COVID-19 restrictions on large gatherings, this event will be held virtually, but we will be building in time for networking in smaller breakout rooms. Visit *ocba.org/annual-meeting* for more information and to register for this free event.

JULY

5 **OCBA OFFICE CLOSED IN OBSERVANCE OF INDEPENDENCE DAY**

BAR FOR THE COURSE GOLF TOURNAMENT

26

Join your colleagues and treat your clients to a fun day at the beautifully renovated Wabeek Country Club in Bloomfield Hills. Top off your day on the greens with lunch, cocktails, hors d'oeuvres, and a decadent dinner and prizes. COVID-19 protocols will be followed. Early-bird pricing runs through July 2! Don't golf? You can still register for dinner and prizes only at a special reduced rate. Register at *ocba.org/golf*.

PROFESSIONAL DEVELOPMENT & CONTINUING LEGAL EDUCATION

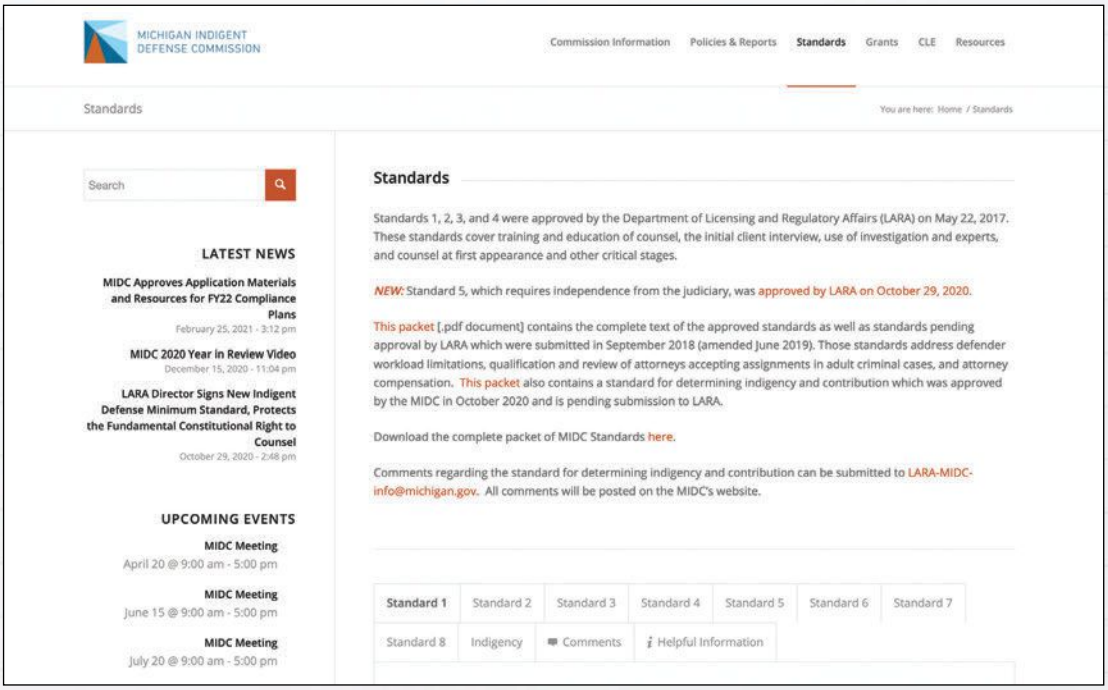
Expand Your Knowledge with These Great Seminars!

JUNE

8 **An Update on the State of Criminal Law (Noon – 1 p.m.)**
Presenter: Alona Sharon, Esq.
This seminar will provide an overview of the most recent published Michigan Court of Appeals and Supreme Court cases. We will also review the most important decisions from the United States Supreme Court.
Worth 1 hour of criminal and juvenile training credit for appointed counsel

10 **The Juvenile Intake Process (11:30 a.m. – 1 p.m.)**
Presenters: Sonia Cannon, Esq., Cannon Law PC, and Karla J. Mallett, Oakland County Circuit Court, Family Division
Our experts will provide an overview of current intake practices.
Worth 1.5 hours of juvenile training credit for appointed counsel

15 **Social Media as Evidence in Criminal Cases (Noon – 1 p.m.)**
Presenter: Neil Rockind, Esq., Rockind Law
Social media sites are prolific, and their power is undeniable. During this seminar, we will discuss how to best leverage social media evidence in court. Topics of discussion will include ethically accessing a party or witness's social media and strategies for entering it into evidence or keeping it out of evidence.
Worth 1 hour of criminal and juvenile training credit for appointed counsel



AUGUST

12 **Trial Practice (11:30 a.m. – 1 p.m.)**
Presenter: Robert J. Zivian, Esq.
Practitioners will receive practical advice for conducting a trial in Oakland County courts.
Worth 1.5 hours of criminal and juvenile training credit for appointed counsel

19 **MIDC Updates (Noon – 1 p.m.)**
Presenters: Mary Ann Jerge, Esq., Oakland County Corporation Counsel, and Nicole Smithson, Esq., Michigan Indigent Defense Commission
Join us for an overview of current MIDC standards as well as proposed standards regarding representation of indigent criminal defendants in Michigan.
Worth 1 hour of criminal and juvenile training credit for appointed counsel

SEPTEMBER

21 **Representing the Client with Mental Illness (Noon – 1 p.m.)**
Presenter: Judith Gracey, Esq., The Gracey Law Firm
This seminar will provide guidance for attorneys who are working with a client who has or may have a mental illness, including legal options and available assistance in Oakland County.
Worth 1 hour of criminal and juvenile training credit for appointed counsel

Learn more and register at *ocba.org/events*

PUNCH UP THE PERSUASION: Effective Appellate Writing Tips

By Stephen Cooley

Great legal writing is no accident. In my experience, it is the natural result of careful preparation, deep thinking, and meticulous editing. Unfortunately, there is a plethora of bad writing floating around Michigan courts. However, spending the time to hone your writing process can yield real persuasive gains for your clients and provides the tangential benefit of making the judiciary's life easier. This article is not an exhaustive how-to for writing like a pro but, rather, a few helpful tips I've learned in my career that you can use right now to improve your writing.

TIP #1: DARE TO PREPARE

The process

It is called the writing "process" for a reason. The best legal writers I know approach each project in the same way. The method is unique to the individual, so the trick is to find what works best for you. For example, maybe you prefer writing during a certain time of day that you feel most productive, or listening to a specific genre of music helps you feel creative, or perhaps you write best after 10 espressos. Fine-tune this method and stick with it.

Distraction-free is the way to be

A related point — limit your distractions. Once you enter into what is often referred to as a writing "flow state," i.e., your writing becomes fluid and your thoughts cogent, then an email or text notification, knock on your office door, or telephone call are disastrous. Some believe that "task-grazing" or focusing deeply on a project but taking momentary diversions away from that project to do things like check email will not affect productivity. Dead wrong. That creates a phenomenon known as "attention residue" in which the brain has difficulty switching from thoughts about your email (or text message, social media feed, etc.) back to your legal writing project. This can disrupt your writing flow and reduce productivity greatly.

Knowing your facts cold

Before you even type the case caption, you need to know the facts of your case cold. Personally, I make a provisional statement of facts while I review the case documents, noting carefully where in the record each fact appears. I've found that this approach streamlines the process of writing the statement of facts. Remember, even your statement of facts should be persuasive. A quick way to bore your judicial audience is to reference testimony chronologically based upon the order of witnesses (Officer X testified to blah, then Officer Y testified to blah). It's a story, so weave disparate parts of the record together to make a compelling one. A word of caution, however: The statement of facts is not the place for argument, so do not interject argumentation here, lest your brief be nonconforming.

Effective legal research

Once you know your story and the record below, you begin your legal research. Remember, aside from the obvious sources of precedent (published decisions of the Court of Appeals and decisions and orders of the Supreme Court), there is a wealth of other sources you can incorporate into your briefing. If you are unfamiliar with the area of law you are briefing, consult secondary sources first to get a primer on the basic legal rules. Oftentimes, those sources contain citations to relevant authorities from various jurisdictions. Likewise, I have routinely consulted law review articles for specific niche issues and have been rewarded time and time again. Law review articles are great sources of precedent from various juris-

dictions. For issues of first impression, this type of analysis is extremely helpful as you can compare the approaches taken by other states and advocate for the application of the approach which is most beneficial to your client. Recall, authorities from our sister states and the federal system can be very persuasive with the court. Lastly, quoting law review commentary can lend instant credibility to your argument.

TIP #2: WRITE FOR THE EAR, NOT THE EYE

A simple way to improve your writing and give your work a quick edit is to read it aloud. If you do so, you may notice grammatically clunky sentences, poor word choice, repetition of transitions, and disjointed argument. Highlight those portions and consciously rewrite them. Reading your work aloud also helps you spot scrivener errors.

TIP #3: TRIM THE FAT — LEAN BRIEFS MAKE THE COURT HAPPY

Shorter sentences, please!

Distilling your argument down, making it easily digestible, is your goal. If you can express the same rationale in 10 words or 30 words, opt for 10 words. Limit your use of complex syntax and try using short, punchy sentences to emphasize points. I used one such sentence earlier in this article by writing "Dead wrong" in response to the suggestion that task-grazing won't affect productivity. Another one of my favorites is "Not so." Writing in simple, plain-English sentences helps the court understand and apply your argument for the benefit of your client.

Editing away pretentiousness

Why do we edit? We edit because we care about our audience, an overworked appellate court. It is a mistake to try to prove the brilliance of the speaker rather than the argument. Avoid multisyllable words and verbose, flowery diction. At best, this type of language is unnecessary to the resolution of the ultimate legal issue. At worst, this language can confuse or detract from your argument. In other words, trying to sound erudite in legal writing can damage your persuasive power. Another negative byproduct of using this verbose language is the perception of insecurity.

Law school writing is for law school

If your case is fact-specific and you plan to compare and contrast precedent, don't use the law school IRAC model. I've seen this mistake made by younger attorneys in particular. The danger is that your argument section begins to resemble a legal memorandum more than a persuasive brief. Get to the point.

No strings attached

Get in the habit of eliminating string and parallel citations. Both conventions are unnecessary. For example, using a string of three citations all standing for the same proposition of law is repetitive and does not bolster your argument. Where string citations can be appropriate, however, is if you intend to highlight factual nuances in each case dealing with your legal issue.

TIP #4: FORMATTING LENDS CREDIBILITY TO YOUR ARGUMENT AND ENHANCES YOUR PERSUASIVE POWER

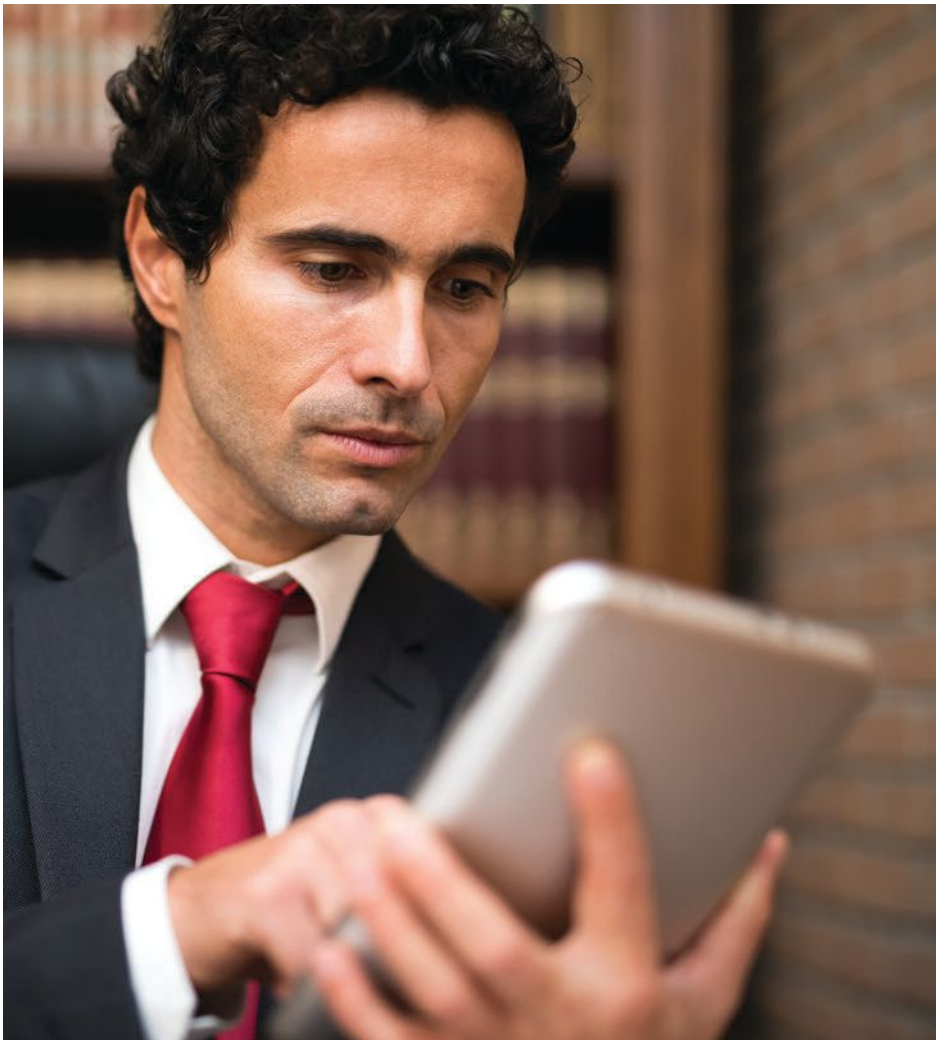
Unfortunately, I've read many appellate briefs that ignored proper formatting conventions. Do so at your own peril. Failing to follow formatting best practices gives your reader the impression you either don't know what you're doing or were too lazy to try to improve your brief's appearance. Poor formatting runs the risk of negatively impacting your credibility with the court. The goal should always be professional and attractive briefing.

Choose your font

Choose a font that is easy on the eyes, remembering that your judges are reading multiple briefs each week. Personally, I use Garamond because I find my own eyes tire far less quickly than when I'm reading my own work set in Arial or Times New Roman.

Tablet-friendly, always

Additionally, remember that a large number of judges are reading your work on tablets. Make sure you follow the court's PDF bookmarking rules for all appendices and briefs. Your judge may want to skip around the record you've provided or between your argument section and statement of facts, so make it easy to do this. In an effort to make briefs more reader-friendly on tablets, the Supreme Court issued Administrative Order 2019-6. As I understand it, this pilot program format was meant to make briefs more closely resemble online articles, rather than holdovers from the typewriter days.



Don't be a blockhead — limit block quotes
I always like to limit my use of block quotations. I do not believe you should eliminate block quotes, merely limit their use. I tend to use block quotes when the rationale as written directly applies to my case. Otherwise, consider paraphrasing the less pertinent portions. Unfortunately, the reality is that the eye tends to skip over lengthy block quotes, so don't bury the lead, as they say, in a long quotation.

Heading my way, Judge?
Your headings are more important than you think. Headings are your brief's guideposts that, if used properly, can lead the court seamlessly through your argument. To this end, consider using subheadings within your statement of facts to walk the reader through your story rather than having a lengthy, undivided text. You may also want to divide your argument into sub-arguments, particularly if you have a multifactor or multipronged legal test. Headings are one area where few devote serious time during drafting, but they can make all the difference. Take time to craft persuasive headings that grab the reader's attention. Each subheading in the statement of facts and sub-argument should be listed in the table of contents as well. One workshop I recently attended stressed that an appellate judge should be able to understand the fundamentals of your argument by simply reading your table of contents.

Don't forget to warm up and cool down from mental gymnastics
In a similar vein, consider using introductions and conclusions in your briefing. Think of your argument in exercise terms: You are asking the appellate court to do the heavy lifting in the body of your brief, but you want to give them a warm-up to, and a cooldown from, that heavy lifting; that's your introduction and conclusion. Aside from that, introductions are a great place to frame your argument both in legal and equitable terms. If you are the appellant, what injustice is being worked by allowing the trial court's decision to stand? If you are the appellee, highlight the considered analysis of the trial court. Summarizing key points from your argument (not reiterating the entirety of it) in the introduction and conclusion sections helps cement that argument in the reader's mind. Psychologically, these are known as "primacy" and "recency" effects. In other words, readers tend to remember best the first and last things they read. I usually limit these sections to a few paragraphs; otherwise, a brief can seem repetitive.

Footnotes, do as I say ...
Lastly, and I hesitate to mention this because I hold a minority opinion on the subject, are footnotes. I unabashedly adore footnotes for citations to the record in my statement of facts. I find it distracting to continually have the eye skip over record citations in a line of text. In my defense, my footnotes are the same size font as other areas of text and spaced so as to aid readability. However, I have been told by numerous appellate judges that they would prefer to see citations in the body of the text. So, this is one of those "do as I say, not as I do" situations.

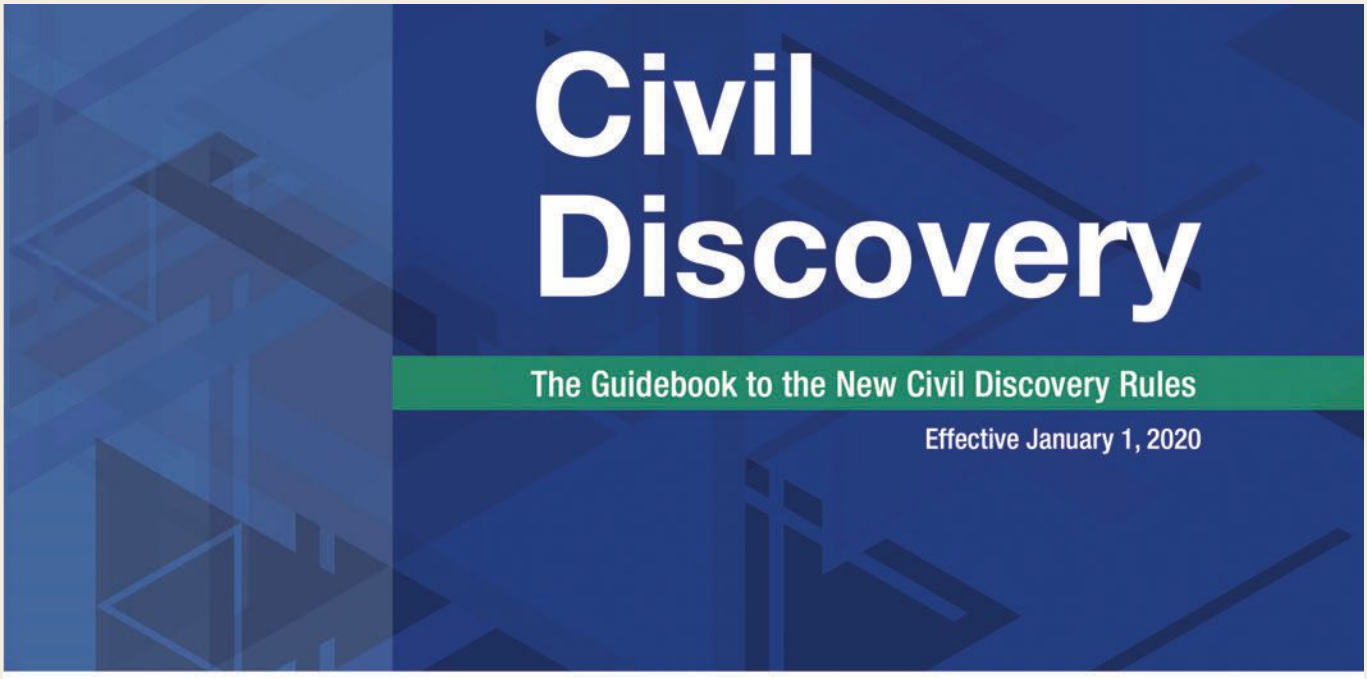
Wrapping up
Hopefully, after reading through this article, you have a few more tricks in your bag when writing legal briefs. These are simple tweaks that can make a huge difference in your writing, lending credibility to yourself and your arguments in the process. My hope is that you will consider using some of these tricks not only in appellate brief writing, but in regular motion practice as well (just in a scaled-down version bearing in mind your audience). Happy writing!

Stephen Cooley is an attorney in private practice in Rochester, Michigan. His practice includes appeals, estate planning, and probate/trust administration. He currently serves as a MAACS roster attorney and offers freelance legal research and writing services to fellow attorneys on a project basis. He can be reached at stephencooleylaw@gmail.com or at (248) 266-1166.

Civil Discovery in the Age of COVID-19: HOW HAVE THE RULES FARED?

By Daniel D. Quick

When the Michigan Supreme Court adopted sweeping changes to the civil discovery rules effective January 1, 2020, none of us could have foreseen what would happen only a few months later as COVID-19 affected every aspect of the judicial system. But with more than a year under our belts, how have the rules fared? How have lawyers and courts been able to use the rules to advance cases despite the challenges?



James L. Liggins, Scott A. Petz, Daniel D. Quick, Alma Sobo, Kenneth J. Treece, and B. Jay Yelton III

f) Filing and Service of Disclosure and Discovery Materials – 2.302(H)

Subrule MCR 2.302(H) does not have a federal rule counterpart. Except for the stated exceptions in subrule MCR 2.302(H)(1)(a)-(c), parties may not file discovery materials delineated in this subrule with the court.

ADJUSTING SCHEDULING ORDER DATES

When the pandemic first hit and courthouses shut down, the system was by and large completely frozen. An initial challenge was dealing with impending dates on scheduling orders. MCR 2.302(F) was changed to allow parties to stipulate to changes in the discovery process, but not contrary to a court order. Thus, parties technically needed court approval to adjust scheduling order deadlines. While this was an angst-filled process in the early days, eventually courts either broadly extended dates in every case or were liberal in granting parties' stipulated extensions of time. The experience did suggest that perhaps a more efficient process is needed to ask permission to move dates when the parties stipulate to it other than filing a motion, brief, and notice of hearing. Not every court will just enter an order stipulated to by counsel and submitted to chambers. Practices vary greatly between courts and even between chambers, with some being more "user friendly" than others. Would a court rule change be useful to allow for communications with the court other than by formal motion?

ZOOM DEPOSITIONS

In the early days, I actually had a party object to presenting his witness via Zoom, instead insisting that it be live once such a thing was allowed again. This was an obvious stall tactic, and counsel eventually relented. While clearly not envisioned, MCR 2.315 is broad enough to deal with Zoom depositions as a manner of video deposition, and nothing in MCR 2.306 conflicts. (The Supreme Court issued Administrative Order 2020-09 on April 17, 2020, which expressly permitted Zoom depositions under MCR 2.305, but not under MCR 2.306.)

Zoom depositions do, of course, raise a host of other issues. What rules govern any communication (verbal or nonverbal) between a witness and his or her lawyer during the deposition? There are obvious concerns about off-camera coaching or communication via text. MCR 2.306(C)(5) addresses the issue (and prohibits it while a question is pending), but lawyers and witnesses will be extraordinarily tempted to violate the rule given that they cannot be seen. What about exhibits? MCR 2.306(E) addresses exhibits "produced for inspection during the examination," language which is broad enough to capture the practice of "producing" exhibits via the "share screen" function of most video platforms. While the rules seem to cover the bases, most counsel informally agree to protocols dealing with witness communication and the presentation of exhibits. Subject to the foibles of technology and internet connectivity, at least anecdotally I have heard of few problems. One might suggest that, where appropriate, the seven-hour time limit of MCR 2.306(A)(3) should be relaxed as Zoom depositions, especially those with significant exhibits, tend to take longer.

E. MCR 2.306 DEPOSITIONS ON ORAL EXAMINATION OF A PARTY

1. TEXT OF AMENDMENT

(A) When Depositions May be Taken; Limits.

(1) Subject to MCR 2.301(A) and these rules, after~~After~~ commencement of the action, a party may take the testimony of a ~~person, including a~~ party~~,~~ by deposition on oral examination. Leave of court, granted with or without notice, must be obtained ~~only~~ if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney. A reasonable time is deemed to have elapsed if:

(a)-(e) [Unchanged.]

(2) [Unchanged.]

(3) A deposition may not exceed one day of seven hours.

(B) Notice of Examination; ~~Subpoena;~~ Production of Documents and Things.

(1) A party desiring to take the deposition of a ~~person~~party on oral examination must give reasonable notice in writing to every other party to the action. The notice must state:

(a)-(b) [Unchanged.]

EARLY CASE MANAGEMENT

One of the key aspects of the new rules was greater judicial involvement in a case early on. To some extent, this has been sacrificed by the pandemic. Some business court judges still hold early case management conferences via Zoom, but others do not. Of course, the parties always have the option of bringing matters to the attention of the court via motion, but hopefully the contemplated value of early case management will be fully realized as things return to normal.

One effect of less early case management is that attorneys are getting away with a laissez-faire approach to mandatory initial disclosures. The rules timed the conference after initial disclosures were made. This provided the court an opportunity to assess the fullness of those disclosures before — as MCR 2.301(A)(1) envisioned — the parties launched off into other discovery. Without that conference, complaining about another party's lackluster disclosures would require a motion, and most forgo raising the issue.

MOTION HEARINGS

Many courts have used the pandemic to wholeheartedly embrace MCR 2.119(E)(3) and do away with oral argument on a majority of motions. This is somewhat puzzling as, at least in theory, attendance at hearings is easier for attorneys via Zoom (rather than driving to the courthouse). Other courts have maintained open "cattle call" motion hearings on a regular basis. The trend of eliminating oral argument, while understandable perhaps in a pandemic where scheduling and arrangement of hearing times might tax court staff, is somewhat troubling.

Sure, there are the most routine of motions where oral argument truly holds no potential of elucidating the issues. But what has happened as a result is that parties are taking advantage of the lack of oral argument. Imagine a discovery dispute: A motion and brief are filed, and the non-

c) ESI Conference, Plan and Order – 2.401(J)(1)-(4)

This subrule is new to Michigan law. It has no counterpart in the Federal Rules. However, many federal district courts have, as part of their local rules, adopted model or standing orders related to ESI discovery. These local orders provide a framework for discussion of ESI-related discovery issues similar to subparagraph 2.401(J)(1). See, e.g., Eastern District of Michigan's Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI, which can be found at https://www.mieb.uscourts.gov/court-info/local-rules-and-orders. See also Oakland County Case Management Protocol for Business Court Cases, at https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf; Macomb County Business Court Discovery Protocols at https://circuitcourt.macombgov.org/CircuitCourt-SpecializedBusinessDocket. Many state court rules provide for ESI conferences. Unlike Michigan's rule, several states, including Arizona, Arkansas and Kansas, require mandatory ESI conferences.

Subparagraph 2.401(J)(1), as noted, does not require the parties or the court to participate in an ESI conference. The permissive nature of the rule recognizes that not all cases will require a specialized conference solely to address ESI discovery. But, in any case "reasonably likely to include the discovery of ESI," the parties may agree to, the court may order, or a party may request an ESI conference via motion.

movant files a response. No reply is permitted. The response might contain all sorts of half-truths or outright misrepresentations as to what was produced, etc. But with no reply and no oral argument, the movant does not have the opportunity to present that view to the court. The result is that the court rules based on a "he said, she said" without an opportunity to test the claims. Moreover, we all know that attorney credibility before a tribunal is important; indeed, it is a critical check-and-balance built in to the system which (attorneys hope) in the long run disincentivizes attorneys from playing fast and loose with discovery or claims to the court. Now that balance is gone, or at least it is far more opaque for the court, which tries to evaluate based just upon the briefs. I hope there is a restoration of oral argument more broadly as we move forward.

AFFIDAVITS AND NOTARIZATION

Michigan did not go as far as the federal rules in allowing a sworn declaration to take the place of an affidavit in all instances. While the new rules adopt the declaration, MCR 1.109(D)(3)(b) specifically excludes "affidavits," and it is affidavits which are required, for example, to respond to a dispositive motion under MCR 2.116(G). The Michigan Legislature eased the process somewhat by adopting remote notarization in MCL 55.286c, and the governor issued executive orders on the subject, but the process is cumbersome and, in any event, the statute sunsets on July 1, 2021. Should the court rules be reformed to accept sworn declarations across the board?

ZOOM DECORUM

While such things ought not need a rule, litigants and attorneys continue to inexplicably treat court hearings like a friendly chat with Aunt Suzie. Walking around, taking hearings on a phone instead of a fixed tablet or PC, the inexplicable inability to mute and unmute, and questionable fashion choices are regular occurrences. Many judges have gone so far as to issue edicts on expected behavior of lawyers and parties. MCR 8.115 does not address these things, but does it really need to? I hope not. Attorneys, at least, should recall the mandate of MRPC 3.5(d), which precludes "undignified or discourteous conduct toward the tribunal." See also MRPC 6.5.

DISCOVERY PLANNING AND ESI CONFERENCES

MCR 2.401(C) and (J) adopted novel provisions allowing the parties to try and work discovery matters out amongst themselves and then involve the court as necessary. Particularly where case management conferences and even motion hearings are being held with less frequency, these devices may be of greater utility to litigants.

DISCOVERY MEDIATORS

Anecdotally, parties and courts seem more willing to use the new procedure under MCR 2.411(H) for appointment of discovery mediators. Especially when courts are canceling oral argument and are otherwise strained, discovery mediation can be a much faster and comprehensive approach to addressing discovery disputes without involving the court.

REMOTE EVIDENTIARY HEARINGS (AND TRIALS)

I will not attempt to summarize here the administrative orders and other official guidance provided to courts with regard to remote hearings and the resumption of trials.[1] MCR 2.407 broadly allows for such proceedings, subject to guidance from the State Court Administrative Office. Several of us have participated in contested evidentiary hearings and even bench trials conducted by Zoom. My personal feelings about the value and pitfalls of such proceedings aside, the court rules present no obstacles. As for exhibits, MCR 2.518 is broad enough to cover the remote handling of exhibits; parties regularly work out protocols for marking and exchanging exhibits ahead of the hearing (whether electronically or hard copy) and procedures for reference to stipulated and contested exhibits during the hearing, although making sure that finally admitted exhibits are preserved for purposes of appeal will require extra vigilance.

Daniel D. Quick of Dickinson Wright PLLC is a recognized trial lawyer and leader in the legal community. His broad commercial litigation experience includes all aspects of UCC and automotive industry litigation, shareholder and family business disputes, trade secret and noncompete litigation, domestic and international arbitration, and intellectual property cases. He is the co-author of several works, including Michigan Business Torts *(ICLE) and* Michigan Court Rules Practice *(Thomson Reuters). He is the past president of the Oakland County Bar Association, an officer of the State Bar of Michigan, and a member of the governing council of the Litigation Section of the ABA.*

Footnote:

1. A good reference, regularly updated: *icle.org/updates/COVID19/courtchanges.aspx.*

RULE INTERPLEADER: A Developing Federal Circuit Split on Diversity?

By Moheeb H. Murray

One of the first lessons law students learn in Civil Procedure is that complete diversity exists when no party on the left side of the "V" is from the same state as any party on the right side of the "V." Straightforward enough, right? Maybe not, when it comes to interpleader actions in the Sixth Circuit.

INTERPLEADER AND ITS JURISDICTIONAL REQUIREMENTS IN FEDERAL COURTS

Interpleader cases can be unfamiliar to many lawyers, and they likely do not rank highly on most judges' lists of favorite cases. Interpleader is a means for a disinterested stakeholder to seek leave to deposit funds with the court and then be dismissed from the case, leaving it to claimants to litigate their dispute and ultimately to the court to decide how to divide the funds among them. A classic example is a life insurance policy where, upon the insured's death, the insurer doesn't dispute its obligation to pay the benefits but various people claim that they are the rightful beneficiary. It places the disinterested stakeholder as the plaintiff and all of the other claimants as defendants who then litigate their respective positions.

In Michigan state courts, MCR 3.603 governs interpleader actions. But in federal cases, there are two vehicles to bring interpleader actions — "statutory interpleader" and "rule interpleader." Statutory interpleader falls under 28 U.S.C. § 1335, which establishes its own basis for diversity: (1) "minimal diversity" among the competing claimants and (2) the property at issue must be worth $500 or more. Minimal diversity exists if any two of the competing claimants are citizens of different states. It is irrelevant if any of them share common citizenship with the stakeholder. But 28 U.S.C. § 1332 governs diversity for a rule-interpleader case in federal court, requiring either federal-question jurisdiction or complete diversity between the stakeholder and every claimant and an amount in controversy exceeding $75,000.

THE DEVELOPMENT OF A POTENTIAL CIRCUIT SPLIT

Trial courts in the Sixth Circuit have chipped away at the avenues to federal court by adopting a narrow view of diversity jurisdiction when it comes to rule-interpleader actions. The first court to adopt such a view was the Western District of Kentucky. There, UBS Financial Services filed an interpleader action against Cornerstone Industries on the one hand and Louis and Debra Kaufman on the other hand. *UBS Fin. Servs., Inc. v. Kaufman*, No. 3:15-CV-00887-CRS, 2016 WL 3199535, at *2 (W.D. Ky. June 8, 2016). UBS was a citizen of Delaware and New Jersey; the Kaufmans and Cornerstone Industries were both citizens of Kentucky. *Id.* at 3. Therefore, stakeholder could not establish a jurisdictional basis for statutory interpleader under 28 U.S.C. § 1335. *Id.*

The court then turned to Rule 22 and whether diversity jurisdiction existed under 28 U.S.C. § 1332. The court framed the critical question as "whether an out-of-state plaintiff may file a federal interpleader complaint against claimants who are all citizens of the forum state" under rule interpleader. *Id.* The court acknowledged that UBS had demonstrated complete diversity under the traditional analysis because UBS did not share citizenship with any defendant. *Id.* Nevertheless, the court determined that it *lacked* subject-matter jurisdiction because there was not complete diversity between the two defendants, which the court deemed to be the truly adverse parties. *Id.* ("[T]he nature of interpleader compels the Court to look beyond the labels of 'plaintiff' and 'defendant' in determining *whether diversity exists between the adverse parties* in an interpleader action: the claimants.") *Id.* (emphasis in original). According to the court, it made "little sense" to find diversity by considering the stakeholder's citizenship and that "[t]here is no principled reason to disregard the disinterested stakeholder's citizenship in statutory interpleader and then rely on the same disinterested stake-

28 U.S.C. § 1335

Section 1335 - Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

28 U.S.C. § 1335

June 25, 1948, ch. 646, 62 Stat. 931; Pub. L. 109-2, §4(b)(1), Feb. 18, 2005, 119 Stat. 12.

HISTORICAL AND REVISION NOTES *Based on title 28, U.S.C., 1940 ed., §41(26) (Mar. 3, 1911, ch. 231, §24, par. 26, as added Jan. 20, 1936, ch. 13, §1, 49 Stat. 1096). Words "civil action" were substituted for "suits in equity"; word "plaintiff" was substituted for "complainant"; and word "judgment" was substituted for "decree," in order to make the language of this section conform with the Federal Rules of Civil Procedure.The words "duly verified" following "in the nature of interpleader," near the beginning of the section, were omitted. Under Rule 11 of the Federal Rules of Civil Procedure pleadings are no longer required to be verified or accompanied by affidavi unless specially required by statute. Although verification was specially required by section 41(26) of title 28, U.S.C., 1940 ed., the need therefor is not apparent. Provisions of section 41(26)(b) of title 28, U.S.C., 1940 ed., relating to venue are the basis of section 1397 of this title. (See, also, reviser's note under said section.) Subsections (c) and (d) of said section 41(26) relating to issuance of injunctions constitute section 2361 of this title. (See reviser's note under said section.) Subsection (e) of such section 41(26), relating to defense in nature of interpleader and joinder of additional parties, was omitted as unnecessary, such matters being governed by the Federal Rules of Civil Procedure.Changes were made in phraseology.*

EDITORIAL NOTES

AMENDMENTS2005-*Subsec. (a)(1). Pub. L. 109-2 inserted "subsection (a) or (d) of" before "section 1332".*

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2005 AMENDMENT *Amendment by Pub. L. 109-2 applicable to any civil action commenced on or after Feb. 1 2005, see section 9 of Pub. L. 109-2 set out as a note under section 1332 of this title.*

Rule 22. Interpleader

(a) Grounds.

(1) *By a Plaintiff.* Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) *By a Defendant.* A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements—and does not limit—the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to—and does not supersede or limit—the remedy provided by 28 U.S.C. §§1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

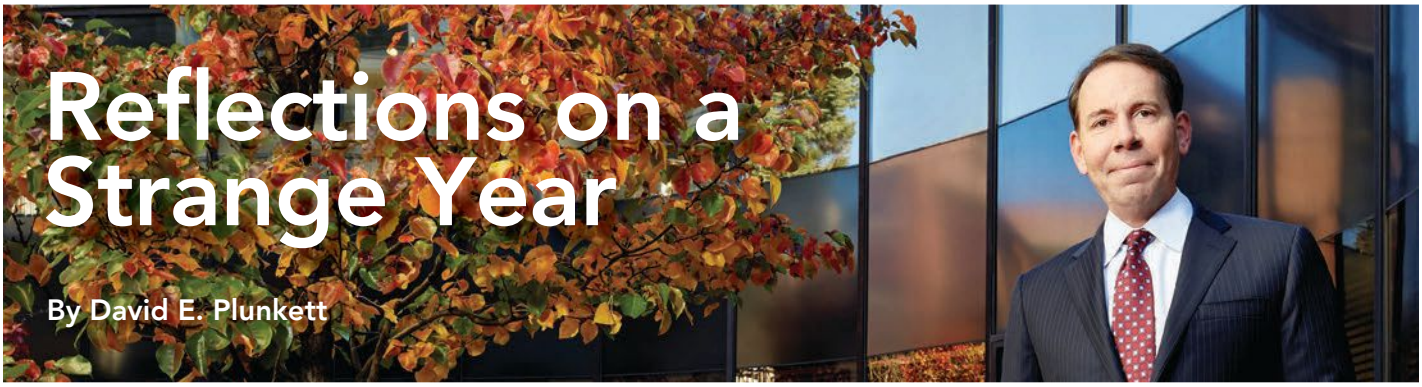
holder's citizenship in rule interpleader." *Id.* at 5. The court concluded by noting that other federal circuits held under similar circumstances that diversity jurisdiction did exist because the stakeholder has an interest in avoiding future litigation expenses and the risk of multiple liability. *Id.* at 6. But because the cases are not binding, the court chose not to follow their reasoning in favor of its own.

At least one judge in the Eastern District of Michigan has embraced the *Kaufman* decision. *Crestmark Bank v. CIBC Bank USA*, No. 18-11616, 2018 WL 5077165 (E.D. Mich. Oct. 17, 2018). In *Crestmark*, the plaintiff was a citizen of Michigan while all of the defendants held Illinois citizenships. *Id.* The court noted that the plaintiff asserted only Rule 22 interpleader and therefore had to establish diversity under 28 U.S.C. § 1332 (it is noteworthy that although the facts would have supported statutory interpleader, the court did not consider that jurisdictional analysis because the plaintiff specifically invoked Rule 22). *Id.* at *3. The court stated that "[d]etermining diversity in Rule 22 is distinct from the manner in which courts assess diversity in most other contexts," and then cited only *Kaufman* for the proposition that "[c]ourts within the Sixth Circuit have held that in interpleader actions involving disinterested stakeholders, courts should only consider the diversity among the adverse parties." *Id.* at *4. The court then held that it lacked subject-matter jurisdiction because the defendants were not diverse from one another. *Id.*

The Sixth Circuit has not weighed in on this recent interpretation of diversity jurisdiction in rule interpleader. As *Kaufman* noted, other circuits have held that complete diversity exists where the plaintiff is diverse from the defendants, regardless of whether the defendants are diverse from one another. See, e.g., *Arnold v. KJD Real Estate, LLC*, 752 F.3d 700, 703 (7th Cir. 2014); *Franceskin v. Credit Suisse*, 214 F.3d 253, 259 (2d Cir. 2000); *Comm'l Union Ins. Co. v. United States*, 999 F.3d 581, 584 (D.C. Cir. 1993); *Leimbach v. Allen*, 976 F.2d 912, 916 (4th Cir. 1992); *CNA Ins. Cos. v. Waters*, 926 F.2d 247, 249 n.5 (3d Cir. 1991); *Aetna Life & Cas. Co. v. Spain*, 556, F.2d 747, 749 (5th Cir. 1977); *Hunter v. Federal Life Ins.* Co., 111 F.3d 553 (8th Cir. 1940).

Although *Kaufman* and *Crestmark Bank* are not precedential, they inject uncertainty into a stakeholder's decision about whether to file in federal or state court in Michigan or any other state in the Sixth Circuit. Attorneys filing interpleaders should monitor the continued development of this potential circuit split. But considering that the disinterested stakeholders' goal is typically to exit the litigation as quickly and cheaply as possible, it could be a while before trial-court decision dismissing for lack of subject-matter jurisdiction gets appealed to the Sixth Circuit.

Moheeb H. Murray is a member at Bush Seyferth PLLC (BSP Law) in Troy. He is also a member of the OCBA's board of directors and its Business Court and Counsel, Membership, and Circuit Court committees. Murray represents clients in complex commercial disputes and leads BSP's insurance coverage, commercial OEM, and construction litigation practice groups. He is a graduate of the University of Michigan Law School and the University of Michigan Ross School of Business.



Reflections on a Strange Year

By David E. Plunkett

As I write what will be my final *LACHES* article during my term as president of the Oakland County Bar Foundation, I am fittingly at home in quarantine because of my family's exposure to COVID-19. I find that concentrating on work is no small feat when stuck inside with two middle schoolers getting on and off Zoom calls, snacking, turning on TVs and music, and generally roaming about the house. My wife, of course, only enriches my work at home, just as she does every other aspect of my life (make sure you tell her I said so if you see her).

It certainly has been a strange year. A postponed and then canceled Signature Event. No Fellows Reception or Holiday Gala. No OCBA golf outing. Like so many people locally and elsewhere, we have missed out on a lot of events and camaraderie in the Oakland County legal community over the past 12-plus months.

Thankfully, something the OCBF has not missed out on is the continuing support of the Oakland County legal community and the broader community of sponsors and donors who make what we do possible. Despite not holding the Signature Event in 2020, we still were able to raise approximately $160,000 because of the generosity of our sponsors, nearly all of whom converted their sponsorship dollars into donations. Although we obviously would have preferred to have held the actual event and to have enjoyed each other's company, raising almost as much as we have in pre-COVID years (maybe a phrase I will need to get used to) made it possible for the foundation to maintain its grant levels and its financial health.

Despite Michigan's recent worrisome numbers, we are hopeful that we will be able to have a Signature Event this year, although likely a scaled-down version. We are

currently planning to hold what will likely be a sponsor-only event in September at a new venue that can better accommodate an outside event. We will keep you informed about what I am sure will be a fluid situation. Maybe I will still be able to bring my wife and you can all tell her what nice things I say about her. I would appreciate it.

What I truly appreciate is all the people who have made my tenure as president easier and more rewarding, including all of the trustees who make time in their busy schedules for this worthy endeavor. In particular, I want to thank Lynn Capp Sirich, the immediate past president, and Victoria King, the vice president and incoming president. Lynn handed over the reins of a well-run foundation in excellent financial health and is always good for a laugh at meetings. Vicki's organization and timeliness were a nice balance to my somewhat looser approach. She also continued to co-chair the Projects Committee, which is tasked with the critical and time-consuming task of vetting the many worthy funding applications we receive. The foundation is in good hands.

I know I have mentioned them in prior articles, but it truly cannot be overstated how critical the OCBA staff is to the functioning of the OCBF. I particularly want to thank Katie Tillinger and Jennifer Roosenberg. Keeping a bunch of mostly lawyers with varied practices and personalities organized and on point is no easy task, and they manage it with just the right amount of cajoling and tact. I know that just getting me to write these articles has aged both of them more than I am proud to admit.

Thank you to everyone who supports the OCBF and who helped make my year as president a success. Remember, though, if next year is better in any way for the OCBF, it will be because I had to deal with COVID, not because Vicki is better at the job (although she probably will be).

David E. Plunkett is president of the Oakland County Bar Foundation. He can be reached at (248) 642-0333 or by email at dep@wwrplaw.com.

John D. Gifford & Associates, Inc.

Private Investigations by Former FBI Special Agents

- Confidential Private Investigations
- Surveillance/Counter Surveillance
- Comprehensive Background Investigations
- Forensic Examination of Computers, Telephones and Cameras

P.O. Box 7501, Bloomfield Hills, MI 48302
248.921.3456
www.exfedinvestigations.com

ATTORNEY
RALPH K. MAYERS

CERTIFIED FAMILY LAW MEDIATOR

- Specializing in Family Law mediation for over 20 years
- Over 90% settlement success rate
- Guest speaker at multiple Family Law and Bar Association seminars, including I.C.L.E.
- Free transcript for all recorded settlements

PHONE: (248) 821-2270 · FAX: (248) 932-3881
5725 FOX HUNT LN. WEST BLOOMFIELD, MI 48322
Email: ralphmayers@aol.com

LAW OFFICES OF BARBARA B. SMITH, PLLC

SMITH MEDIATION CENTER

- Attorney Grievance Commissioner 2010-2016 – Chairperson 2013-2016
- Certified Mediator
- Former Administrative Law Judge, Magistrate
- Current Member of the Michigan Gaming Control Board

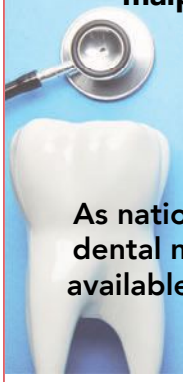
dbusiness Top Lawyers

Attorney Discipline Defense
Mediation/Arbitration
Family Law: Representation, Guardian Ad Litem, Parenting Time Coordinator

Law Offices of Barbara B. Smith, PLLC
Bloomfield Hills, Michigan
Tel. (248) 646-8000
www.smithmediationcenter.com

DENTAL MALPRACTICE CASES CALL FOR *SPECIAL EXPERTISE*

When a client comes to you with a dental malpractice problem, you can:



- turn down the case
- acquire the expertise
- refer the case

As nationally recognized*, experienced dental malpractice trial lawyers, we are available for consultations and referrals.

ROBERT GITTLEMAN LAW FIRM, PLC

TRIAL LAWYERS

31731 Northwestern Highway, Suite 101E
Farmington Hills, MI 48334
248.737.3600 | fax 248.737.0084
info@gittlemanlawfirm.com | www.dentallawyers.com

**invited presenter at nationally attended dental conferences*
**practiced or pro hac vice admission in over 35 jurisdictions*

Circuit Court Virtual Counter

By James Paterson

Necessity is the mother of invention. The COVID-19 pandemic has driven the Oakland County Circuit Court to evolve to meet some of the challenges presented during these trying times. The solution may also have the ancillary benefit of providing some small degree of relief for that sense of social isolation we are all experiencing.

The global influenza pandemic of 1918 spurred many technological innovations. There was a complete lack of vaccinations and pharmaceutical interventions at the time, which led to new methods of detection and patient care. The non-pharmaceutical interventions like quarantining and social distancing were the only effective ways to address the 1918 pandemic. Over 100 years later, we found ourselves in a similar predicament at the outset of the COVID-19 pandemic. While technology provided a number of medical interventions, we still found ourselves imposing the very same social distancing and quarantining that were implemented in 1918. Avoiding gatherings large and small was taking a toll in 1918 as it has since the beginning of the COVID-19 pandemic. Social distancing presents the dangers of increasing social rejection and growing impersonality and individualism, along with the loss of a sense of community. This was true in 1918 and is true today. In 1918, the use of the telephone was encouraged to place orders at stores, allow students to communicate with teachers, and to reduce social isolation.

Although telephones are pervasive today, a great many of us still find ourselves drawn to the use of videoconferencing to communicate with others, oftentimes as a need for more social interaction. Sometimes it is compulsory as part of our employment, but often it is a voluntary choice as we have seen during the holidays when connecting with family members or friends.

For the convenience of court users,

to improve access to the court and communication with its staff, and to provide resources to help court users navigate the court system, the Circuit Court implemented a virtual counter where callers can speak with the Case Management Office. The use of Zoom conferencing provides a number of efficiencies for the court and the caller. The court can now share documents or website locations without needing to talk the caller through the answer to their questions when limited to a phone conversation. Henrik Ibsen's quote "A thousand words leave not the same deep impression as does a single deed" has been paraphrased as "One picture is worth a thousand words." The Zoom conferencing ability will help share and save thousands of words while helping the consumer both more quickly and more efficiently.

The court has titled the Zoom conferencing our "virtual counter." Callers can access the Case Management Office in a fashion that closely resembles the experience they would receive were they to physically walk into that office with their questions. This has the obvious benefits of maintaining social distancing and significantly reducing the inconvenience attendant to driving to the courthouse, passing through security, and locating the Case Management Office, which many experienced prior to the COVID-19 pandemic. We trust that the virtual counter will prove to be a valuable resource during these challenging times.

The virtual counter is available by video or phone Monday through Friday from 9 a.m. to noon and 1 to 4 p.m. Instructions to access the virtual counter are provided below and are also available on the court's website:

zoom.us/j/2488580350
Select 'Join' using the Zoom app or website (zoom.us)
Meeting ID: 248 858 350
OR
Phone (no video): (646) 876-9923
Meeting ID: 248 858 0350#

James Paterson is manager of the Oakland County Circuit Court's Civil/Criminal Division.

COLA Amounts, Jury Trial Updates, and Some Court History

By Edward A. Hutton, III

Pursuant to MCL 700.1210, exemptions, allowances, small estate, small estate affidavit, and intestate share amounts are adjusted yearly for inflation, rounded to the nearest $1,000. Be sure to use the correct amount, which depends on the year the decedent died. According to the publication titled "Estates and Protected Individuals Code Cost-of-Living Adjustments to Specific Dollar Amounts" from the Michigan Department of Treasury, these are the amounts to use for decedents with dates of death in 2020 or 2021.

	Amount for 2021	Amount for 2020
Intestate (surviving spouse's share)	$242,000	$239,000
Intestate (surviving spouse's share — no children with decedent)	$161,000	$159,000
Homestead Allowance	$24,000	$24,000
Exempt Property Allowance	$16,000	$16,000
Family Allowance*	$29,000	$29,000
Small Estate	$24,000	$24,000
Small Estate Affidavit Procedure	$24,000	$24,000

*Amount that a personal representative can determine automatically without prior approval

JURY TRIAL STATUS

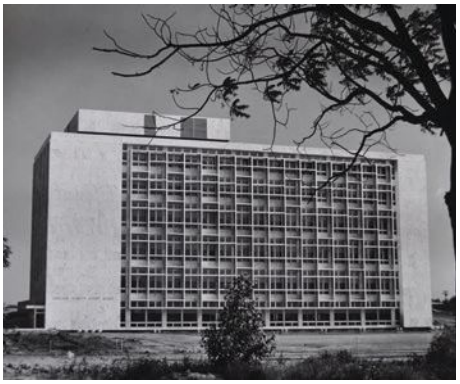
A huge amount of time and effort by an untold number of people has gone into planning the return of jury trials during the pandemic. Circuit Court jury trials were scheduled to resume March 22, and Probate Court had its first jury trial since the pandemic started scheduled for April 22. You may have picked up on the past tense nature of my last sentence. Unfortunately, Oakland County COVID-19 numbers began to climb at the end of February and are increasing at the time I am writing this article. Current levels are above those predetermined by the State Court Administrative Office (SCAO) that would allow courts to safely conduct in-person jury trials. The obvious question is when will trials resume? The answer is that nobody can say at this time with any degree of certainty; it depends on the numbers. Hopefully, now that individuals are receiving vaccinations, this influx will subside faster than past rate spikes.

MIFILE UPDATE

The Oakland County Probate Court has received confirmation from SCAO that it will begin the implementation of MiFILE early in 2021. I've written on this in the past, so I won't go into a lot of detail, but once it is implemented and running smoothly, we anticipate it will be very helpful for the court and filers alike and improve efficiency across the board.

OAKLAND COUNTY PROBATE COURT HISTORY

Maya Angelou, who was an American poet, memoirist, and civil rights activist, said, "If you don't know where you've come from, you don't know where you're going." With that said, I'll leave you with some Oakland County Probate Court history. We have had 37 probate judges since the court's inception in 1821. Four of those judges sat for 25 years or more: Hon. Arthur E. Moore (1938-1963), Hon. Norman R. Barnard (1963-1988), Hon. Eugene Arthur Moore (1966-2010), and Hon Barry M. Grant (1977-2008).



Here's a snippet of an article from the 1997 Annual Report for the Oakland County Probate Court:

> The Probate Court found its home on Telegraph Road in the Courthouse Tower in 1962, the Juvenile Court being the first to move to the Oakland County Service Center. Prior to that, the courthouse was located at West Huron and Saginaw Streets, in the City of Pontiac. The first Probate Court operated in the village of Pontiac in 1823.

Happy spring, everybody! Enjoy the sunshine, stay healthy, and hopefully we will get to see you in the court in the near future.

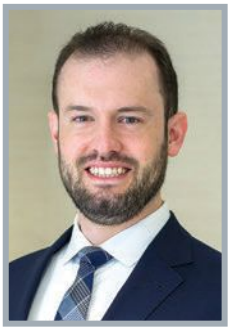
Edward A. Hutton, III, is Oakland County Probate Court administrator.

Howard & Howard is pleased to announce that longtime attorney **Lisa S. Gretchko** has been appointed to serve as a judge for the **U.S. Bankruptcy Court, Eastern District of Michigan**, in Detroit. On March 30, 2021, the Sixth Circuit Court of Appeals made the announcement, and Judge Gretchko was sworn in during a private ceremony and assumed her judicial duties on April 5, 2021.

Throughout Judge Gretchko's career, she has represented nearly every constituency in bankruptcy courts both locally and around the country, including business debtors, trustees, unsecured creditors' committees, secured creditors, unsecured creditors, landlords, licensors of intellectual property, customers, and suppliers.

She received her law degree from the University of Detroit Law School and her undergraduate degree from the University of Michigan.

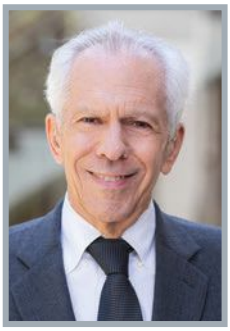
Judge Gretchko succeeds Judge Phillip J. Shefferly, who retired in January of this year.



Plunkett Cooney recently "accelerated" the growth of its Transportation Law Practice Group with the addition of associate attorney **John M. Kuzmich**. A member of the firm's Detroit office, Kuzmich focuses his practice primarily on first-party and provider personal injury protection (PIP) litigation under Michigan's No-Fault Act. He also has experience litigating premises liability and general negligence matters.

Admitted to practice law in the state and federal courts in Michigan, Kuzmich received his law degree from Western Michigan University Cooley Law School in 2014 and his undergraduate degree in 2009 from the University of Michigan.

Kuzmich, who serves as vice president of the Hellenic Bar Association, is also a member of the Oakland County and American bar associations and the State Bar of Michigan.



Lipson Neilson PC takes great pleasure in welcoming nationally recognized attorney **Henry S. Gornbein** as Of Counsel. Gornbein is a specialist in all areas of family law. He is a former chair of the Family Law Section of the State Bar of Michigan, a former president of the Michigan chapter of the American Academy of Matrimonial Lawyers, and a former chair of the Long Range Planning Committee of the national American Academy of Matrimonial Lawyers.

Sought after as an expert on divorce-related topics by media outlets, Gornbein is known for being at the forefront of understanding social media and its role in divorces today. Articles written by Gornbein appear in national legal publications, and his monthly column, "Case of the Issue," runs in the Family Law Section journal of the State Bar of Michigan. He is a frequent speaker at national conferences and has been a featured presenter at the national convention of the American Academy of Matrimonial Lawyers. Gornbein also currently has two books available on Amazon.

The **Secrest Wardle** Executive Committee is pleased to announce that effective January 1, 2021, **John L. Weston** was promoted to executive partner. Located in Secrest Wardle's Troy office, Weston is a member of the firm's Motor Vehicle Litigation, Premises Liability, Product Liability, Property, Fire and Casualty, and Trucking/Commercial Vehicle Litigation practice groups.

Committees at Work

OCBA committees help our members stay informed on significant developments in their areas of practice, suggest and help shape improvements to the legal profession, and serve the public. Below are just a few examples of our OCBA committees at work.

PARALEGAL COMMITTEE

Chair: Sara Brish
Vice Chair: Grace Dersa

The Paralegal Committee welcomed Tom Stephenson, RP, director of marketing of the National Federation of Paralegal Associations, at their March committee meeting. Tom shared valuable information and trends on membership, education, CLE, alternative networks, volunteering, professional associations, and events.

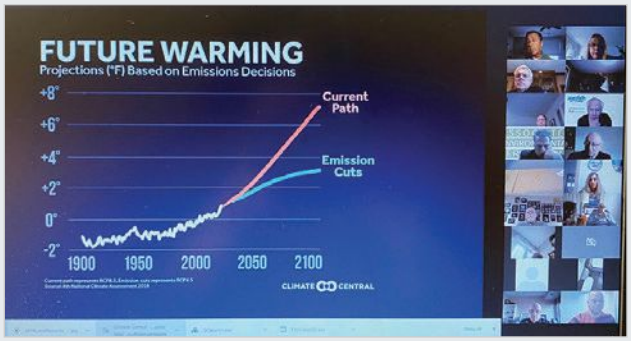
LAWYERS OF A CERTAIN AGE (LOCA) COMMITTEE

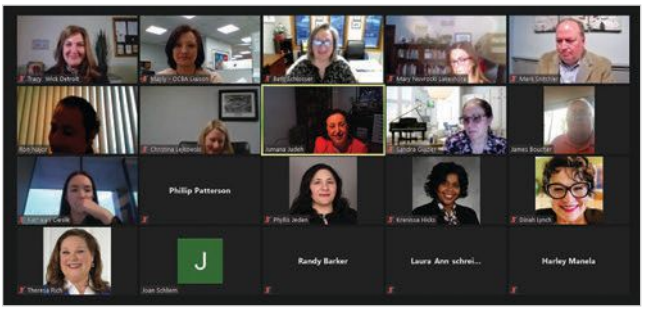
Co-Chair: Judith Cunningham
Co-Chair: Hon. Edward Sosnick (ret.)

The LOCA Committee welcomed meteorologist Chris Edwards from WXYZ to discuss climate issues, breaking his presentation into three parts — simple, serious, and solvable. Members of the Energy, Sustainability and Environmental Law (ESEL) Committee joined in as Chris presented the history and pace of temperature changes to date and noted that the world must make quick changes now. He then discussed the effects of climate change such as hurricanes, fires, warming seawater, drought, and extreme cold. 2020 was the worst year in history for some of these events, such as hurricanes and fires.

The seriousness of change was the most eye-opening part of the presentation. He concluded with what is being done to resolve the climate change, the biggest initiative being electric vehicles, trains, and buses, with one of the largest contributors of EV technology being General Motors.

Chris then shared that one of the best things we can do that is so beneficial to preserving our climate is to plant trees. He urged everyone to start now and plant a tree.





PROBATE, ESTATE AND TRUST COMMITTEE

Chair: Ron Najor
Vice Chair: Beth Schlosser

In February 2021, the Probate, Estate and Trust Committee invited Tracy Wick, real estate consultant, Keller Williams Advantage, and Jumana Judeh, chief appraiser, Judeh & Associates, to present "Estate Settlement Secrets," a virtual workshop on the best practices for overcoming the complexities and obstacles related to preparing and selling inherited homes.

Inherited homes are typically unique in the marketplace given that they are not necessarily upgraded, have not been well maintained, and possibly require some needed repairs. Attendees learned how to avoid the top five mistakes that can waste time, cost money, and lead to frustrating estate settlement delays by considering the following aspects: What is the best way to liquidate furnishings, valuables, and household contents? How can simple maintenance add thousands to the property value? Which home improvements are worthwhile and have the highest paybacks? How do you manage a vacant property? How do appraisers assign market value for inherited homes?

NEW MEMBERS
in March

David A. Bergh
Caroline Bermudez Jomaa
Karina Bihar
Tala E. Dahbour
Ashley F. Eckerly
Monique S. Eubanks
Jocelyn Flemons
Julia Gazulli
Nicolas Guibert de Bruet
Anna Hansen
Amanda Kalaj
Paulina R. Kennedy
Christopher Lagoe
Karen C. Liddle
Joshua S. Parmely
Kwame Rowe
Kimberly M. Schon
Kristin M. Smith
Christopher Tower
Markeisha D. Washington
Betty R. Widgeon
Courtney Williams

ASSOCIATION STAFF

Executive Director
Jennifer Roosenberg (jroosenberg@ocba.org)
Deputy Director of Membership and Foundation
Katie Tillinger (ktillinger@ocba.org)
Finance Director
Susan Maczko (smaczko@ocba.org)
Professional Development Director
Merri Lee Jones (mjones@ocba.org)
Sales and Marketing Director
Michelle Kryska (mkryska@ocba.org)
District Court Case Evaluation Administrator
Kari Ross (kross@ocba.org)
Bookkeeper
Mayly McRae (mmcrae@ocba.org)
Programs Coordinator
Nehita Burnett (nburnett@ocba.org)
Administrative Assistant
Lori Dec (ldec@ocba.org)
Receptionist
Mary Kuhn (mkuhn@ocba.org)
Lawyer Referral Service Clerk
Ann Neilson (aneilson@ocba.org)

Unless otherwise indicated, please call (248) 334-3400 for assistance.

Address Changes ..... Mayly McRae
Billing..... Susan Maczko
Board of Directors ..... Jennifer Roosenberg
Case Evaluator Applications..... Kari Ross
Committees.....Katie Tillinger
District Court Case Evaluation..... Kari Ross
Event Photos .....Michelle Kryska
Finance ..... Susan Maczko
Judicial Candidate Fora..... Merri Lee Jones
LACHES Magazine ..... Jennifer Roosenberg
Lawyer Referral Service – (248) 338-2100..... Ann Neilson
Member Illness & Death Notification .....Katie Tillinger
Membership .....Katie Tillinger
New Lawyer Admissions.....Katie Tillinger
Oakland County Bar Foundation.....Katie Tillinger
OCBA Policies ..... Jennifer Roosenberg
News Releases.....Michelle Kryska
Pro Bono Mentor Match Program ..... Merri Lee Jones
Professional Development/CLE..... Merri Lee Jones
Room Rental Reservations..... Mary Kuhn
Speakers Bureau..... Merri Lee Jones
Website .....Michelle Kryska

ANNOUNCEMENTS

Deneweth, Dugan & Parfitt, PC is pleased to announce the hiring of Jacob Kahn and Alex Choi as new associate attorneys with the Firm. Mr. Kahn is a 2017 graduate of the University of Detroit Mercy School of Law and has gained valuable experience as counsel with prior law firms in their litigation departments. Mr. Choi is a 2020 graduate of University of Detroit Mercy School of Law and recently passed the bar exam. The Firm is very pleased and excited to welcome them.

Deneweth, Dugan & Parfitt, PC is a law firm that specializes and advocates on behalf of all tiers of participants in the construction and real estate industry. The Firm maintains vast experience and success in resolving disputes and winning cases at trial or arbitration involving a variety of construction related matters such as scheduling, inefficiencies, concealed conditions, delay, acceleration, liens, design defects, surety bond claims, default, scope disputes, and termination. The Firm regularly implements effective Alternative Dispute Resolution for the situation at hand while recognizing the unsuitability of a "one-size-fits-all" approach. Clients regularly consult and seek guidance from the Firm with respect to any and all corporate-related issues including employment law.

OFFICE SPACE

SOUTHFIELD – Attorney shared-office space available. 20411 W. 12 Mile Road. Private office starting at $350 per month. Includes wireless internet, mail service, conference room scheduling, 24-hour access. Services available on an a la carte basis: phone line, receptionist, secretarial/administration. Call Eric Holmes 248-872-5777.

Private law offices available in West Bloomfield suite, room for an employee. Semi-private entrance and parking. Two offices to choose from starting at $500 & $700 per month. Overflow and income opportunities. Call (248) 231-6200.

SERVICES

IMMIGRATION LAW – ANTONE, CASAGRANDE & ADWERS, P.C. – AV-rated immigration law firm provides consultation and assistance in all business and family immigration matters including temporary and permanent employment of foreign professionals and skilled workers, corporate transferees, NAFTA visas, outstanding professors and researchers, foreign students, green card work, adjustment of status, visa processing, citizenship, work permits, and other related matters. 31555 W. 14 Mile Road, Suite 100, Farmington Hills, MI 48334; Phone 248-406-4100; Fax 248-406-4101. Email *law@antone.com* or visit us at *www.antone.com*.

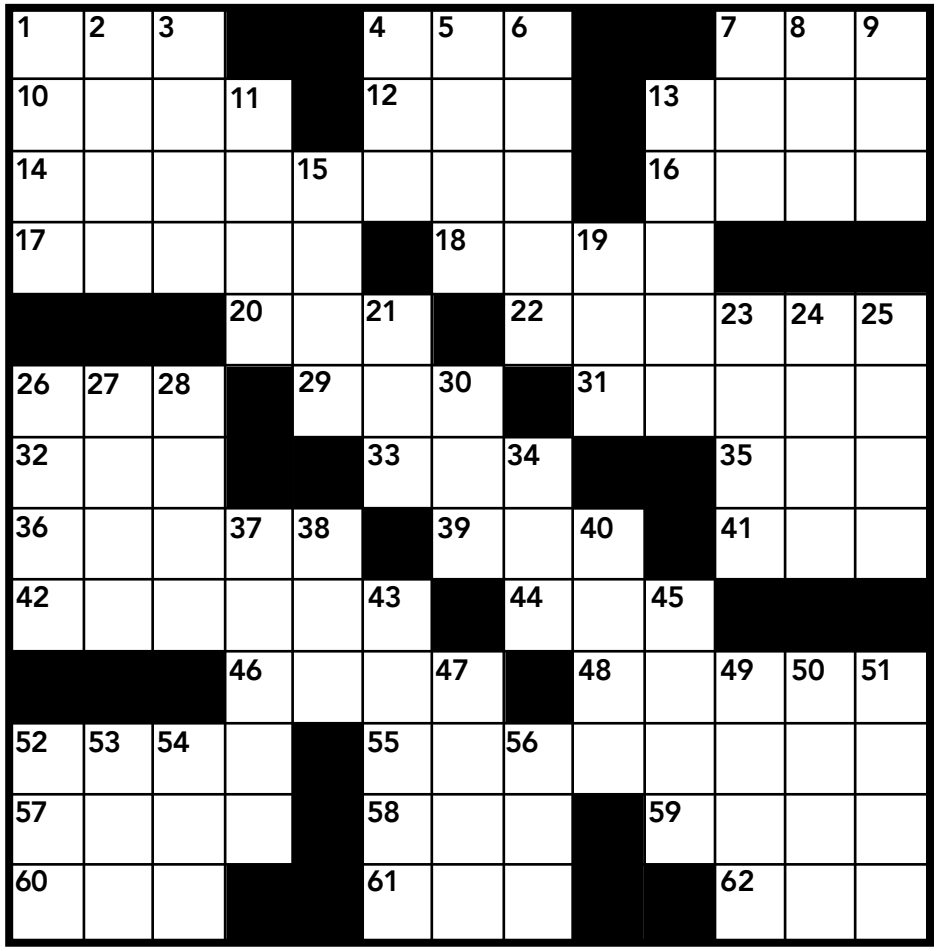
SERVICES

APPRAISER with more than 25 years of experience with all property types. Commercial services throughout the entire state of Michigan and residential services in the tri-county area. Qualified as professional witness in several courts. Jumana Judeh, MAI, CCIM, MCAO. 313-801-2603. *JumanaJ@JudehOnLine.com.*

ADVERTISING INDEX

GOING TO COURT

By Lisa R. Bremus



ACROSS

1. Law exam
4. Method of transmitting some ESI
7. "Bono" or "se"
10. Woodwind
12. "Was the burden of proof __?"
13. Within a reasonable time
14. Written command to testify in court
16. Custody
17. Guide
18. Reverse or annul
20. Auricle
22. Take sworn out-of-court testimony from a witness
26. __ percent bond
29. MI labor dept.
31. 22 Across is not to exceed 1 day of __ hours
32. Environmental control system, briefly
33. Arbitration or mediation, e.g.
35. Flight stat
36. Use "I __" cards for language help
39. Flop
41. "Gestae" or "judicata"
42. Strategy
44. Also
46. "Welcome, come __ __" (2 wds.)
48. Injunction
52. Rip
55. Jury selection process (2 wds.)
57. __ of habeas corpus
58. U.N. labour org.
59. Testify under __
60. Ordinary (abbr.)
61. Actor __ Diamond Phillips
62. "Dancing with the Stars" judge

DOWN

1. Employer
2. Border
3. Judicial garment
4. Madame, briefly
5. Bill of fare
6. "All rise" directive
7. Written authorization to act on another's behalf in legal matters (abbr.)
8. Pretrial release type (abbr).
9. "__ Court of Justice"
11. Sword
13. New rule amendment limits the __ of discovery
15. Argument type
19. Iowa capital: __ Moines
21. Mens __
23. Jurisdiction __ the case
24. Commune in southern France
25. Concludes
26. LSAT
27. 1986 U.S. wiretap Act
28. Time measurement (abbr.)
30. Unusual
34. Boring routine
37. An injury or wrongful act (2 wds.)
38. Related by blood
40. Entrance
43. Noncriminal case
45. 48 Across in Latin
47. __ contendere
49. Knob
50. French artist and designer
51. First "Bachelorette"
52. Contract: agreement between __ or more parties
53. Make a mistake
54. Legal __ provides assistance
56. Informal debtor's doc

Answers can be found at *ocba.org/laches*.

Life comes at you fast.

Is your life insurance keeping up?

Limited-time offer for Michigan lawyers 45 or under: Level Term Life Insurance with no paramedical exam.*

Marriage, home, children, college—seems like they're all upon you at once. Now, balance that with your growing career and there's a lot to take care of. Today, more than ever, you want to safeguard what you've got and be ready for the unexpected. We can help you be sure you have enough protection now, and through life's changes, with quality Level Term Life Insurance you can easily add to boost your current coverage.

Get up to $300,000 in coverage now.

- Limited-time offer
- Affordable group rates for Michigan lawyers
- 10-year level term plan
- Premiums never go up during the initial term
- Simplified online application
- One of the nation's leading providers

Apply for Level Term Life Insurance in minutes at

Paulgoebel.com/MILaw

Paul Goebel Group

ACRISURE Agency Partner

*This special offer applies to the Select rate only. You may apply for higher coverage amounts, a Preferred health rating or 20-year level term with full underwriting, including a paramedical exam.

Number 639 | June/July 2021

LACHES

Oakland County Bar Association
1760 S. Telegraph, Suite 100
Bloomfield Hills, Michigan 48302-0181

If you are receiving duplicates of this magazine, please call the OCBA at (248) 334-3400.