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May 2023

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Bar Briefs

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IN THIS ISSUE:

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In The Home Stretch…

By Lori K. Smith, President of the Macomb Bar Association

My time as President of this wonderful organization will conclude at the end of June. I am excited to pass the proverbial torch to the President-Elect Magistrate Ryan Zemke as I am confident that he will accomplish great things.

I am also absolutely elated to pass along the undertaking of writing the President's article each month. This is a task that I have struggled with since the onset and I appreciate all of you who have made it through my ramblings over the past several months.

Although we are in the home stretch of my term, it is not over yet, and the Macomb Bar Board of Directors are still hard at work. The Macomb Bar and Macomb Bar Foundation will be co-hosting our Annual Meeting on Thursday May 25th at Freedom Hill Banquet Center.

This event is free to Macomb Bar Sustaining Members and Foundation Trustees. The cost for members and Young Lawyers is $25.00, and non-members are $50.00. Registration is required for this event and can be accomplished through the Macomb Bar website or by calling the bar office.

We are also changing things up a bit this year for our Annual Golf outing which will be held on Monday June 19, 2023 at Gowanie Golf & Country Club in Harrison Township.

This is always a fun event that bolsters great competition among some fantastic golfers as they compete for the top spot. It is also a great time for those who are not competitive golfers (or those of us that even utilizing the term "golfer" might be a bit of a stretch). I hope that the new location entices some of our members who have not participated in the past few years to return and join us for this event.

The Macomb Bar Family Law Section will also be hosting "An Evening with the Referees – Do's and Dont's of Motion Practice & Evidentiary Hearings" the evening of Thursday, June 29th at Simple Palate in Warren.

This is a wonderful opportunity to further the dialogue that started at the Bench Bar conference and to provide valuable information and insights to our family law practitioners.

I can speak from personal experience that I have met some amazing people through Bar events, some of which are my dearest friends now.

I truly hope that you will consider joining us for one, or all, of these events. If the cost for any of the events is a concern, especially to any of our Young Lawyers, please reach out to me. I can speak from personal experience that I have met some amazing people through Bar events, some of which are my dearest friends now, and learned so much from these people when I was just starting out and continue to learn from to this day.

In this semi-virtual legal world that we are living in, I cannot encourage you enough to try to attend these events so that you can get to know your colleagues and other members of the legal community.

As always, if you have any questions or suggestions, you are welcome to email me at lsmith@orlaw.com.

Find event information and get registered at MacombBar.org

SEO for Lawyers

By Joe Pernicano, Pernicano Law, PLLC and Young Lawyers Section Director

Search Engine Optimization, more commonly referred to as SEO in the tech industry, is a strategy for improving your law firm's website position on search engines like Google or Bing.

When a potential client pulls out their phone, gets on the internet, and searches for "DUI lawyer or divorce lawyer," Google or Bing provides them with a list of the most relevant websites. The list that is generated usually has paid advertisements at the top, followed by the organic search results. Organic search results are the lawyers or law firms that did not pay to appear at the top but have been determined to be relevant to the search.

Search engines determine what websites are relevant by scanning websites regularly and use that information in their algorithms to calculate what results are relevant to a query. If your website has information and key words related to divorce law in Macomb County, Michigan, that information is known and used in the search engine algorithm when someone searches for a divorce lawyer in Macomb County, Michigan.

Three general elements optimize your website, 1) configuration, 2) content, and 3) traffic. Your websites configuration is how the website is designed, formatted, and viewed by the public. You can effectively configure your website by having a professional web developer create your website, or by having a marketer review your website after you have developed it. The goal of having an optimized configuration is for individuals to easily navigate, stay, and return to your website.

Your websites content is the words, page titles, images, and blog post articles, that make up your website. The content is arguably one of the biggest factors for improving your SEO. It's critical that the information on your website is relevant to your practice area, and that you have an appropriate amount of, and relevant content. When utilizing a company to build or market your website, its important they have worked with attorneys before and are familiar with your area of practice.

Website traffic is simply how many people are visiting your website. You can improve your websites traffic by putting a link on social media accounts, in your emails, and listing it on all marketing materials. The search engines use this information in the algorithms to determine the most relevant results. As your website traffic increases, your websites relevancy in the search results also increases.

Implementing SEO on your website is a relatively low cost. Most website developers implement SEO when designing and building a website. If you developed your own website, you can lookup related key words for your practice area and place those throughout your website or even hire a marketer to improve your websites SEO.

By placing these elements on your website, the search engines will scan and store that information to be used in their algorithms. If your website has a good configuration, appropriate content, and is highly trafficked, the more relevant the algorithm will determine your website is.

As society shifts to being more "online," many leads come from potential clients searching the type of lawyer they need through internet search engines. Most potential clients are going to pick a lawyer in the first few search results.

That means if you aren't paying to appear at the top, you need to appear as high up on the list as possible. Utilizing an SEO strategy can be a cost-effective way to generate new leads for your law firm.

***Joe Pernicano** is a solo practitioner who represents Michiganders that have been seriously injured or are facing criminal charges. You can reach him by visiting pernicanolaw.com, (313) 618-5914 or joe@pernicanolaw.com*

Claiming Surplus Proceeds From Tax Foreclosure Sales

By Frank Krycia, Macomb County Assistant Corporation Counsel

On July 17, 2020, the Michigan Supreme Court issued its opinion in *Rafaeli, LLC v Oakland Co,* 505 Mich 429; 952 NW2d 434 (2020) finding that the holders of an interest in property have the right to claim the surplus proceeds from a tax foreclosure auction. In response to *Rafaeli,* the Legislature passed amendments to the tax foreclosure statute, MCL 211.78t, to provide a mechanism for persons to obtain surplus proceeds after a tax foreclosure sale.

The best solution is to avoid foreclosure. The County Treasurer has a robust program to help people avoid tax foreclosure. Several options for payment plans that should work with most clients are available. Contact the Treasurer's Office as soon as possible to work something out. Even after March 31st, the statutory redemption date, it is possible to extend the redemption period with a post-judgment stipulation. However, the longer one waits the less likely this will be successful. The owner also has the right to sell the property through the redemption date.

If these options do not work, and the property is not redeemed, the statutory procedure to claim surplus from the tax sale is available. The first step in the statutory procedure is to file a notice of intent to claim an interest in the surplus proceeds with the County Treasurer by the July 1st immediately after the effective date of foreclosure. The form is on the Macomb County Treasurer's website at https://treasurer.macombgov.org/Treasurer-AuctionAndClaims.

The current Macomb County tax foreclosure judgment was entered in case number 2022-2098-CH on February 3, 2023, so a notice of intent to claim an interest in surplus proceeds on the sale of properties included in that judgment must be filed by July 1, 2023. A copy of that judgment and related foreclosure pleadings can be found on the Macomb County Treasurer's website, https://treasurer.macombgov.org/Treasurer-ForeclosurePleadings-2022For2020Priors. The judgment provides that the properties listed with 2020 and prior forfeited taxes must be redeemed by March 31, 2023, unless the parties have an agreement to extend the redemption date. There are several hundred agreements to extend the redemption date to June 1, 2023.

The notice of intent to file a claim form must be filled out by the holder of the property interest and must be notarized. Claims for surplus may not be assigned. MCL 211.78t(11). The claimant is required to indicate the nature of their interest and if there are other interests in the property such as a mortgage or other lien and their amounts. The form is then sent by certified mail or personally served on the Treasurer's Office.

The tax sales is held between July and October. Macomb County has an online auction and information will be on the Treasurer's website. After the sale, the Treasurer notifies the person that filed the notice of intent to claim surplus by the following January 31st if the property is sold and if there is a surplus. If the property is sold to a municipality under the first right of refusal, the municipality will be required to pay the fair market value for the property if a notice of intent to file a claim is filed. MCL 211.78m(1). If the property is sold at auction, the surplus will be the sale price minus the taxes, fees, interest and cost of sale.

The claimant then must file a post-judgment motion in the tax foreclosure action between the following February 1st through May 15th to claim their portion of the surplus. MCL 211.78t(4). The requirements for the motion are in MCL 211.78t(8). The Court then sets the hearing date after the County responds providing at least 21 days' notice. MCL 211.78t(9). The Court then determines the claimant's interest in the surplus and deducts all public obligations such as nuisance fines and tax liens and orders the County to pay the balance to the claimant. While not specified, there is no indication this will be a final order so an appeal from the Court's ruling would be by application for leave.

While timely filing a notice of intent to claim surplus may be the best way to preserve a client's interests in any proceeds from a tax sale there are other options. In addition to this statutory claims procedure, Macomb County is named in a pending class action, *Fox v. County of Saginaw,* U. S. District Court, Eastern District of Michigan, Case no. 1:19-cv-11887. There currently is an appeal pending on the class certification but this case may provide for recovery if the statutory procedure to make a claim is not followed.

Also, the Michigan Court of Appeals has recently granted leave to appeal from the denial of a motion for surplus on whether the provisions in MCL 211.78t requiring the timely filing of a notice of intent to claim surplus and other conditions in the statute are constitutional. In re Petition of Kent County Treasurer for Foreclosure, Court of Appeals No. 363463. If you have any questions or need help in a particular matter you can email the treasurer's attorney at frank.krycia@macombgov.org. Please include the twelve digit parcel number.

Evaluating The Sufficiency Of Objections To Referee Recommendations

Prepared By Liisa R. Speaker, Speaker Law Firm

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This paper is the third in a trilogy pertaining to referee decisions and de novo hearings. The first paper was *"A Proper Analysis of MCR 3.215(G) and Interim Effect of a Referee's Recommended Order"* and the second was *"What happens when the trial court rejects an objection to referee recommendation?"*. The trial courts and Court of Appeals are all over the board as to what is – and what is not – a sufficient objection to a referee recommendation. This paper explores the cases addressing this issues with a variety of outcomes.

MCR 3.215(E)(4)

MCR 3.215(E)(4) is the court rule that governs objections to referee recommendations, and states the following:

> A party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing within 21 days after the referee's recommendation for an order is served on the attorneys for the parties, or the parties if they are not represented by counsel. The objection must include a clear and concise statement of the specific findings or application of law to which an objection is made. Objections regarding the accuracy or completeness of the recommendation must state with specificity the inaccuracy or omission.

Emphasis added. There has only been a single published case addressing the specificity of an objection – *Kostreva v. Kostreva,* 337 Mich. App. 648 (2021). The *Kostreva* case only briefly discusses this issue. The parties in *Kostreva* shared legal and physical custody of their child LKK, but Defendant-Father retained control of LKK's passport. Plaintiff-Mother's mother died, and she sought to take LKK to Poland for the funeral.

Defendant-Father delayed in handing over the passport resulting in court action. A referee recommended that Defendant-Father retain control of the passport but should pay Plaintiff-Mother's attorney fees. Defendant-Father objected to the recommendation as to fees only, while Plaintiff-Mother did not object as to the passport issue. The trial court reviewed the case de novo – and determined that Defendant-Father needed to relinquish control of the passport to Plaintiff-Mother. Defendant-Father appealed.

During the de novo review of the referee's recommendations, the trial court only heard specific arguments as to the fees issue. Defendant-Father argued that this meant that the trial court violated the specificity and notice requirements of MCR 3.215(E)(4) because no party had objected to the referee recommendation on the passport. The Court of Appeals held that while the court did not separately address the specificity issue, the trial court was not held to the same specificity and notice requirements as the parties.

The decision in favor of the Plaintiff-Mother was affirmed.

Objection Denied: Lack of Specificity

In *Snead v. Snead,* No. 351069 (Mich. Ct. App. Nov. 24, 2020), Defendant-Father moved for an award of attorney fees on the grounds that Plaintiff-Mother's objections and motions throughout the case had been frivolous. As part of his argument, Defendant-Father cited the court's determination that several of Plaintiff-Mother's objections earlier in the case had not been specific enough. The court denied his motion, and Defendant-Father objected. The objection was also denied, and Defendant-Father appealed.

The trial court's decision to deny Defendant-Father's objection was affirmed. The Court of Appeals reasoned that since some of Plaintiff-Mother's earlier objections had been sustained, they were not frivolous. *Snead v. Snead's* appeal does not address the issue of specificity in the appeal, since Defendant-Father was the one who made the appeal, and it was Plaintiff-Mother's earlier, separate objections that were deemed not specific enough. However, it may be of note that in denying Defendant-Father's objecting, the trial court seems to have implicitly - if not explicitly - drawn a line between specificity and frivolousness.

In *Barjas v. Mills,* No. 360348 (Mich. Ct. App. Aug. 11, 2022), Defendant-Father requested a redetermination of custodial rights that had previously been granted exclusively to Plaintiff-Mother. The trial court – heeding a referee's recommendations – granted a new custody arrangement, to which Plaintiff-Mother objected. The trial court denied Plaintiff-Mother's objection, citing a lack of specificity.

The Court of Appeals affirmed the trial court's denial of Plaintiff-Mother's objection. The Court of Appeals determined that Plaintiff-Mother did not specify what error the referee had made, but rather reasserted her arguments without presenting any facts the referee improperly considered or omitted. Essentially, Plaintiff-Mother had used an objection as an attempted means of appealing the decision for de novo review rather than citing an error whose correction would lead to a different outcome.

Salmon v. Smith, No. 277752 (Mich. Ct. App. July 30, 2009), concerns attorney fees that were awarded to Defendant-Father based on Plaintiff-Mother's frivolous objections. Plaintiff-Mother appealed.

The Court of Appeals determined that Plaintiff-Mother's objections did not comply with MCR 3.215(E)(4), stating that she did not state "with specificity the inaccuracy or omission regarding the referee's conclusion." Although the court did concede that she had objected to 24 specific findings of fact or conclusions of law, she did not provide any refuting facts or arguments, but simply stated that the findings and conclusions were incorrect. The court indicated that this puts the issues of specificity and frivolousness close to one another, at least in this particular case, since the lack of refuting facts or arguments meant that her argument was not well-grounded in facts or supporting law.

The trial court's decision was affirmed in part, since the lack of specificity and other issues indicated that an award of attorney fees was proper, and vacated in part, since the amount of fees awarded was chosen arbitrarily.

Objection Granted: Acceptably Specific

In *Feole v. Kremkow,* No. 357121 (Mich. Ct. App. Dec. 21, 2021), a referee recommended that Plaintiff-Mother and Defendant-Father operate on a standard parenting-time schedule. When Plaintiff-

Mother objected, the trial court denied the objection on the grounds that it lacked specificity.

The Court of Appeals reversed the denial and remanded for further proceedings. They found that Plaintiff-Mother had specified which findings and applications of law she was challenging, particularly: an omission of testimony from the referee's recommendation; a false overstatement of COVID-19's effects on the case; and two improper determinations on best-interest factors, for which arguments she provided a specific fact each.

In *Atkinson v. Knapp,* No. 316510 (Mich. Ct. App. Dec. 17, 2013), Defendant-Mother filed a motion to change schools and parenting time. A referee recommended against this, and Defendant-Mother objected. Plaintiff-Father responded in part that the objection was not specific enough, but the trial court held a hearing anyway. Plaintiff-Father appealed.

The Court of Appeals found that the objection was specific enough to meet requirements. Defendant-Mother clearly objected to a particular finding, and although her arguments are similar to her objection against the conciliator's finding, so too was the referee's finding similar to the conciliator's finding. Thus, Plaintiff-Father was not denied the opportunity to tailor his defense to the matters at issue.

The trial court's decision was reversed and remanded on a separate issue.

Objection Granted: Lack of Specificity, But No Prejudice

In *Schneider-Penning v. Adams,* No. 307034 (Mich. Ct. App. July 30, 2013), Defendant-Father sought a new determination of child support based on his substantially lowered income. After the referee recommended lowered child support payments, Plaintiff-Mother filed an objection and sought a de novo hearing. Defendant-Father responded by saying that the objection wasn't specific enough. Although the trial court agreed, they went ahead with the de novo hearing anyway.

The Court of Appeals determined that although Plaintiff-Mother's argument wasn't specific enough, the sanction for Plaintiff-Mother's failure is not necessarily dismissal. Specificity in an objection is meant to guarantee that the other party has a chance to properly respond, and since there was only one possible matter at issue, Defendant-Father's substantial rights were not affected by the lack of specificity in Plaintiff-Mother's objections. Thus, the objection was allowed.

The trial court's decision was vacated on a separate issue and remanded for further proceedings.

In *Mansfield v. Mansfield,* No. 347408 (Mich. Ct. App. Aug. 22, 2019), a change of circumstances prompted Defendant-Father to file for a change in custody. Although the motion was denied, Defendant-Father was granted additional parenting time, and so Plaintiff-Mother appealed.

One of Plaintiff-Mother's arguments was that Defendant-Father's objection lacked specificity. The trial court even agreed that specificity was lacking and instructed Defendant-Father to amend his filing, which he did not do. However, the Court of Appeals determined that because Plaintiff-Mother offered no new evidence, testimony, or argument at the hearing, and because Plaintiff-Mother was aware of the nature of Defendant-Father's objection before the hearing, there was no prejudice and thus the court could not find a lack of specificity.

The trial court's decision to grant the Defendant-Father's motion to change custody was affirmed.

Conclusion

The cases to date do not provide clear guidance on what is, and what is not, a sufficiently specific objection to a referee recommendation. These cases are very fact-intensive. The more detail you can include in your client's objection, the greater the chances you will have at getting your objection heard by the trial court (or reversed on appeal, such as in *Feole v. Kremkow* and *Atkinson v Knapp*).


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Legal Insights from Warner Norcross + Judd

Dodging Defamation Dilemmas

Six Hurdles to Know Under Michigan Law

By Charles C. Kadado, Associate

For plaintiffs, defamation cases are often an uphill battle to prove and win. For defendants, they can be a slam dunk, or a fact-intensive battle over defamation defenses. But knowing the hurdles, and how to avoid them, can improve your chances on either side.

1. Retraction Demand Letter

Failure to send a retraction demand letter prior to filing suit can significantly limit a plaintiff's damages. Michigan law makes exemplary damages available only if the plaintiff demands a retraction and gives the defendant a reasonable time to retract. MCL 600.2911(2)(b). The amount of time considered "reasonable" is a question of fact. *Hope-Jackson v Washington,* 311 Mich App 602, 629; 877 NW2d 736 (2015).

Generally, a retraction must be published or communicated in "substantially the same manner" as the original statement. MCL 600.2911(2)(b). While issuing such a retraction does not preclude an award of exemplary damages, it can reduce a plaintiff's damages as evidence of mitigation. See P*eisner v Detroit Free Press, Inc,* 421 Mich 125, 130; 364 NW2d 600 (1984) (a published retraction is admissible on question of defendant's good faith and in reducing damages).

2. One Year Statute of Limitations

Watching the clock is particularly important in defamation cases. That's because defamation cases are the only civil actions in Michigan with a one-year statute of limitations. MCL 600.5805(11). Generally, the statute begins to run when a defamatory statement is "published," meaning the date the statement was communicated to a third party. Even if the person defamed had no knowledge of the statement at the time of publication, the statute still begins to run at publication. *Grist v Upjohn Co,* 1 Mich App 72, 81; 134 NW2d 358 (1965).

Importantly, each "publication" constitutes a separate cause of action. Id. For example, two statements made on different dates—even if they concern the same topic—are two separate causes of action for purposes of the one-year statute of limitations. Therefore, joining separate acts in the same pleading only works if each act is distinctly within the statute of limitations.

3. Claims Based on Statements Made in a Police Report

Statements made in a police report are absolutely privileged in defamation cases, meaning plaintiffs can't use such statements as the basis of a defamation claim no matter how malicious they may be. Michigan courts have consistently held that even if police reports contain information that are completely untrue or are written with reckless disregard for the truth, the statements are subject to the absolute privilege. See *Eddington v Torrez,* 311 Mich App 198, 199; 874 NW2d 394 (2015) (gasoline company's report to police that a suspect stole gas on four occasions was subject to an absolute privilege). In fact, the privilege even attaches if a person makes the report with malicious intent. See, e.g., *Simpson v Burton,* 328 Mich 557, 562; 44 NW2d 178 (1950).

The purpose of this privilege is to encourage crime victims or those with knowledge of crimes to freely report what they know about suspected crimes without facing the risk of a defamation suit. Eddington, 311 Mich App at 202.

4. Assuming the Defamation is "Per Se"

Typically, a plaintiff must prove they were injured; however, in defamation per se cases, the plaintiff's injury is presumed. Michigan recognizes defamation per se only where the defamatory statement (1) imputes a criminal offense or (2) implicates a lack of chastity. See, e.g., *Lawrence v Burdi,* 314 Mich App 203, 216–17; 886 NW2d 748 (2016) (requests for admission that a plaintiff had prior drug convictions was defamatory per se); *Linebaugh v Sheraton Michigan Corp,* 198 Mich App 335, 337–39; 497 NW2d 585 (1993) (cartoon depicting plaintiff and co-worker in sexually compromising position was actionable per se).

However, not every false accusation of a crime constitutes defamation per se. For instance, accusing someone of battery is not defamation per se because it is not a crime of "moral turpitude," nor does it subject a plaintiff to "infamous punishment." *Lakin v Rund,* 318 Mich App 127, 130; 896 NW2d 76 (2016) (holding that an "infamous" crime is a felony punishable by a prison sentence, while misdemeanors punishable by a prison sentence of one year or less are not "infamous" crimes).

Furthermore, unlike some states, Michigan does not recognize defamation per se for false and defamatory statements made about a business. A recent Court of Appeals case clarified that unless a defamatory statement accuses the business of committing a criminal offense, only actual damages are recoverable. *Cetera v Mileto,* No 356868, ___ Mich App ___, ___ NW2d ___ (July 28, 2022). The court reasoned that the plain meaning of MCL 600.2911(1) limits defamation per se actions to cases involving accusations of criminal conduct or a lack of chastity. Id.

5. Assuming a Statement is False When It's Merely a Rhetorical Hyperbole

Even statements that can be objectively proven false may be protected where they cannot "reasonably be interpreted as stating actual facts." *Milkovich v Lorain Journal Co,* 497 US 1, 2; 110 S Ct 2695; 111 L Ed 2d 1 (1990). This is often a fact-based inquiry that looks to the greater context of the words and their meaning. For example, a newspaper's description of a real estate developer's negotiation position as "blackmail" is nothing more than rhetorical hyperbole, even though blackmail can be

a criminal offense. *Greenbelt Co-op Pub Ass'n v Bresler,* 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970).

Michigan courts similarly acknowledge that terms such as "blackmailer," "traitor," "crook," "steal," and "criminal activities" must be read in their full context to determine whether they are mere exaggerations. *Ghanam v Does,* 303 Mich App 522, 546; 845 NW2d 128 (2014). See also *Hodgins v Times Herald Co,* 169 Mich App 245, 254; 425 NW2d 522 (1988) (exaggerated language is not actionable merely because it can be taken out of context as accusing someone of committing a criminal act).

In another example, the Michigan Court of Appeals found that a statement that a mother "never" spent time with her daughter amounted to rhetorical hyperbole. *Ireland v Edwards,* 230 Mich App 607, 618–19; 584 NW2d 632 (1998). Even though the statement was patently false when taken literally, the court determined that any reasonable person hearing the remarks would have understood the intent. *Id.* at 619.

6. Assuming a Statement is an Opinion Because It's Phrased as One

Just because a statement is an opinion, does not mean it is totally immune from a defamation suit. Courts often look to the greater context of the opinion to determine whether a reasonable reader or listener could understand it as an assertion of fact. For example, there are key differences between "I think Jane is annoying" and "I think Jane murdered the man." The first statement is an opinion that cannot necessarily be verified as true or false. The second statement is still an opinion; however, if untrue, it can also be defamatory.

Practitioners should also be on the lookout for statements that are merely couched as an opinion. The United States Supreme Court has warned that merely couching a statement as an opinion—such as "in my opinion, Jane murdered the man," does not dispel the factual implications contained in that statement. *Milkovich,* 497 US at 19. The Court holds that there is no separate constitutional privilege for statements of opinion. *Id.* at 21.

Warner's Privacy, Defamation, Media and First Amendment Litigation attorneys regularly assist clients in filing and defending defamation suits. If we can be of assistance to you or your business, please contact us.

Charlie Kadado *is a litigation attorney focused on family law, divorce, child custody, general commercial litigation and media law. He calmly guides clients through some of the most challenging days of their lives, providing hope and assurance during the various stages of conflict resolution.*

Foundation Reading Program

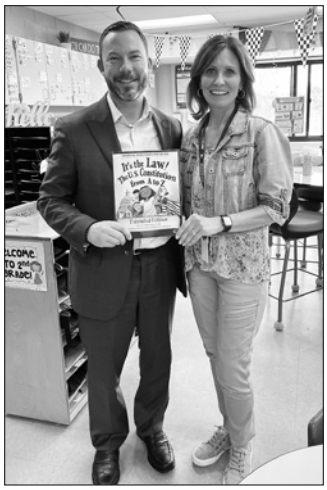
By Sherriee L. Detzler
SMB Commissioner—District D

"The more that you read, the more things you will know. The more you learn, the more places you'll go."

— DR. SEUSS

Did you know that reading reduces stress and helps you relax – improves your concentration and memory – enhances your knowledge and increases your imagination and creativity? Just to name a few!

Macomb County Bar Foundation has launched its Elementary Reading Program. If you missed out on this very worthwhile experience, fear not as we are just beginning. Throughout the National Reading Month of March, several bar members enjoyed the company of a group of second and fourth graders across our county, for a reading of *"It's the Law! The U.S. Constitution from A to Z"* authored by Joseline Jean-Louis Hardrick – Law Professor, lawyer, and former elementary school teacher.



Foundation Secretary Brian Grant at Salk Elementary

Professor Hardrick partnered with the Foundation to bring her book to 11 classrooms across 6 school districts during the month of March at only the cost of printing. For that we are eternally grateful for her support and the children were thrilled and found pride in learning American history, heritage, and all the ways the U.S. Constitution protects us all, just as Professor Hardrick said they would. Oh, the questions and stories the little children shared were priceless.

We started at Miami Elementary with Mrs. Braun's class (Chippawa Valley Schools); next to Mrs. Gazdick's class at Belleview Elementary School in Eastpointe. Then we traveled to Michigan Collegiate Elementary in Roseville (Ms. Kiser and her teaching partners 2nd graders); Tenniswood Elementary (L'Anse Cruse) with Mrs. Shepherd's class; Salk Elementary with Mrs. Sutter's class and her teaching partner's 2nd graders in the Fraser School District; then wrapped up the month at Violet Elementary School in Lake Shore Public School District reading to all four 2nd grade classes organized by Mrs. Todd in the Inspiration Center.

Thank you teachers, readers and especially our Author. We have shared what we know with over 250 children and I can only imagine the places they will go.

Association President Lori Smith reading at Violet Elementary School.

"Today a reader, tomorrow a leader."

— MARGARET FULLER

Hon. Kathy Galen visiting Forest Park Elementary School.

"Why Do I Feel Like… Somebody's Watching Me… And I Have No Privacy?"

A Look At PII One Year Later

By Rebekah L.T. Sellers

"I'm just an average man with an average life… I work from nine to five… Hey! Hell, I pay the price… All I want is to be left alone in my average home… But why do I always feel like I'm in the Twilight Zone?"

Anyone who listened to native Detroiter Casey Kasem's American Top 40 Countdown each week in the 80's[1] should recognize this 1984 track by one-hit-wonder—and also native Detroiter—Rockwell bemoaning his loss of privacy to the point where he questions his own sanity.[2] Rockwell describes feeling like his privacy is being invaded by the television, the telephone, his neighbors and even the mailman. The movie *Psycho* even made him uneasy about taking showers. The song is a satirical comment on the increased presence of media and marketing in people's lives in the 1980's driven by the advent and expansion of cable television, telemarketing, and infomercials. More than ever before, everything was for sale 24-7 – including our personal information.

Ever since then, we've been trying to get that cat back into the bag with mixed success. No sooner do we pass privacy legislation about things like robocalls and personal health data with the Telephone Consumer Protection Act in 1991 and The Health Insurance Portability and Accountability Act of 1996, respectively, do we get widespread public internet access.[3] With that, new and exciting (and surreptitious ways) to monetize personal data have sprouted up faster than we can regulate it.

The internet has not only created new ways to share and sell otherwise private personal data, it has also made it easier to discover and exploit personal data that has always been considered a matter of public record.

Back then, when I needed a little boost at the kitchen table to eat my Cookie Crisp,[4] I had a 3" thick yellow book of advertisements that was periodically delivered to my house – for *free!* – to sit on. And, at least 1" of that book, known as "the white pages," contained the names, address, and phone numbers of everyone in my area unless they specifically requested – and paid – to have their information omitted. If I was invited to a sleepover at a new friend's home and my parents wanted to speak to the friend's parents before they decided if I could go, they just asked me the kid's last name and looked the parents up in the white pages. The version of the Yellow Pages that I used to sit on died a slow and unceremonious death in 2009 when the company filed bankruptcy, although an online version remains.[5] Inasmuch as video killed the radio star, the internet killed the Yellow Pages.

Things like property records and court records have also traditionally been available to the general public. As we know, these records contain much of the same personal information that was contained in the white pages, and then some. Anyone who wanted to see a given record could go to the respective public record keeper's office and ask to see said record for any reason or no reason at all. They still can. No one much considered this a privacy issue before because random people were generally just too lazy to put forth the time and effort needed seek out the records of random other people. The internet has removed a great deal of the time and effort previously required. Now, random (and not so random) people are a lot more curious about other random (and not so random) people because the internet rewards the inquisitor with virtually instant gratification.

Enter MCR 1.109(D)(9), which first took effect January 1, 2021 and was most recently amended effective September 1, 2022. According to the staff comment to the relevant amendment, the purpose of MCR 1.109(D)(9) was to "make certain personal information" (now referred to as protected personal information, or "PII") non-public.

MCR 1.109(D)(9)(a) identifies the five types of PII that "shall not be included in any public document or attachment filed with the court" except as provided by the rules:

(i) date of birth,
(ii) social security number or national identification number,
(iii) driver's license number or state-issued personal identification card number,
(iv) passport number, and
(v) financial account numbers.

The rule goes on to describe how such information shall be redacted, who's responsibility it is to redact [hint: not the clerk's, MCR 1.109(D)(10)(a)] and what happens if the responsible party fails to redact [hint: that party waives their waive their right to keep their own PII nonpublic, MCR 1.109(D)(9)(d)(i)]. For more questions and answers about how to properly redact PII using MC 97 or how to request redaction using MC 97r, and other topics beyond the scope of this article, visit SCAO's FAQ about PII.[6]

These five items seem very obviously private. Of course one's birth date, social security, passport, and driver's license numbers ought not to be made public; disclosure invites identity fraud risk. Of course one's financial account numbers ought not to be made public; disclosure invites financial exploitation risk. It seems like a "no-brainer" to keep this information out of the public eye, particularly when the public eye can see a lot farther through the internet.

Even then, though, sometimes it is necessary to include unredacted PII in an order for it to have effect. In cases where a party seeks to have entered a proposed order that is required to contain PII (e.g., an order for the disposition of financial assets), then the proposed order should be submitted directly to the court and not attached to another document. MCR 1.109(D)(9)(b)(ii). That order containing unredacted PII will then become part of the public record unless the court has also granted a motion to file the order under seal. MCR 1.09(D)(8).

But, as much as this article aims to highlight what is PII, it also aims to highlight what is not PII, and, also, what PII is not.

Notice what is missing from the list of five: full names, addresses, phone numbers, e-mail addresses and personal health information[7] are missing. None of these things are PII. In fact, full names and address of the parties are required in case initiation documents, and, in the case of

[1]As I faithfully did on my pink Sharp QT-50 cassette player/radio "boombox":

[2]My childhood self particularly liked this song because of the guest vocals by Michael Jackson who had bumped Blondie and Billy Idol down to my second and third favorite artists, respectively, and who was featured on my top Trapper Keeper and taped to my bedroom wall. In my elementary school, long before there was Team Edward and Team Jacob, there was Team Jackson and Team Duran Duran. There was no in between.

[3]If remembering the dawn of public internet access doesn't immediately cause you to hear the sound of a dial tone followed by scratchy white noise in your ear then you may have already had to Google, "Who is Rockwell?" and possibly also, "What is a dial tone?" It's alright, there's no judgment here. I recently had to Google how to turn off my new smart TV because I had misplaced the remote, and sometime between 2007 when I bought my last TV and 2022 when we got this new one, the Powers That Be in Silicon Valley decided buttons were unsightly, superfluous equipment.

[4]I jest. I was not allowed to eat that "dessert for breakfast" as it was called in my house. It was Corn Flakes or Raisin Bran unless it was my birthday. Then, and only then, it was a cheese Danish.

[5]Linked In, "Death of the Yellow Page Directories," Harari, J., May 29, 2019 < https://www.linkedin.com/pulse/death-yellow-page-directories-jon-harari#:~:text=Do%20you%20remember%20the%20yellow,directories%20circulated%20across%20the%20country> (accessed March 26, 2023).

[6] FAQ Personal Identifying Information in Court Filling, < https://www.courts.michigan.gov/49a2c8/siteassets/offices/public-information/biweekly-brief-court-communications/pii-faq_final_(051222).pdf > (accessed March 26, 2023). Note that this is the most recently updated FAQ on this topic and it does not include the minor September 1, 2022 amendments.

pro per litigants, in the caption. See MCR 1.109(D)(1)(b)(vi), MCR 2.102(B) and MCR 3.206(A)(2). In cases affecting minors, the children's full names must also be stated in the complaint. MCR 3.206(A)(2). There has been a growing trend among some family law practitioners to omit the children's names and replace them with the children's initials in court documents out of concern for the children's privacy, perhaps due to the Court of Appeals' practice of doing so in its case opinions. But, children's names are not PII.[8] Phone numbers and email addresses are not required in the complaint, per se, however, party phone numbers are required in the Summons, MC 01, and email addresses are required for mandatory electronic service of all non-case initiating documents under MCR 1.109(G)(6)(a)(ii). Phone numbers, street addresses, and email addresses are exactly the types of things that parties who are at odds with each other do not want to share, but the changes to MCR 1.109(D) offer no new shelter for them.

Which leads me to the final point about what PII is not. PII is not confidential – at least, not by virtue of designation as PII. Of course, if the information is already made confidential by some other law or order, it remains so. For instance, social security numbers are protected under the Social Security Number Privacy Act, MCL 445.81. As such, MCR 1.109(D)(9)(b)(ii) provides, "Where a social security number is required to be filed with the court, it shall be the last four digits only." But, note that "[t]his requirement does not apply to documents required to be filed with the friend of the court that are not placed in the court's legal file under MCR 8.119(D)." The friend of the court must be provided with the full social security numbers for all involved persons. This is because the friend of the court file is distinct from the circuit court file, and has its own rules for accessing that information as well as its own definition for "confidential information," which, among other things, encompasses "all information classified as confidential by the laws and regulations of title IV, part D of the Social Security Act, 42 USC 651 et seq." MCR 3.218(A)(3).

Notably, addresses are not confidential information under 42 USC 653(a)-(c), either. For the purposes of locating the child, parents are "authorized persons" to whom party addresses can be disclosed. The exception to this is when there is evidence of domestic violence under 42 USC 653(b)(2). In such cases, a court order such as a Personal Protection Order or other order under MCR 1.109(D)(9)(vii) and MCR 1.109(D)(10)(c)(ii) can make a party's address confidential to the other litigant(s). Even in such cases, though, the party seeking protection must provide an alternate address and/or phone number for contact or service.

Likewise, the court may order any other information – whether protected or unprotected under the rules – to be redacted or made confidential for good cause either by party motion or on its own motion for good cause found. MCR 1.109(D)(9)(vii) & MCR 1.109(D)(10)(c)(ii). Otherwise, nonpublic, non-redacted PII is available "as required... to the parties to the case; interested persons as defined in these court rules; and other persons, entities, or agencies entitled by law or these court rules to access nonpublic records filed with the court," and non-public documents containing PII that have been filed with the court must be served on the other parties in the case. MCR 1.109(D)(9)(b)(iv), (vi).

So, what would Rockwell think of PII now? Would it go far enough to quell his fear of being spied on? It's hard to say. From the looks of his Instagram page @Rockwell_Artist, he's not as worried about his privacy as he used to be.

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[7] Contrary to misperceptions held by some, HIPAA prevents the unlawful disclosure of personal health information by a covered entity, which is primarily a health care provider or health care plan or related "business associate." 5 CFR 160.103. It does not preclude relevant party disclosures in litigation.

[8] Now, there is no rule that prohibits them from being omitted from motion documents, but if you are representing one of Tia and Tamara Mowry's parents in their divorce, you know how much confusion that can cause when dealing alliterative names, especially (ahem) for the judge or referee hearing the motion.

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