BAR BRIEFS

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Time Management Tips

By Dana Freers, President of the Macomb Bar Association

It's tough being a lawyer. Even tougher when you're a solo practitioner like so many of us in Macomb County. I look at my schedule the beginning of every week and tell myself, "I just have to make it through this week!" And then I make it through and tell myself the same thing the next week. We have so many demands on our time that it can be overwhelming and leave us wondering how we're going to handle everything that needs to be done. That's where time management tips can be helpful. I recently discovered this article on LinkedIn and found it interesting I thought it may be helpful for some of you as well.

"The 5 P's of Time Management" by Hellen Ndirangu (Published 6/18/24 on LinkedIn)

The "5 P's of Time Management" – Prioritize, Plan, Prepare, Pace, and Persist; provide a comprehensive framework for mastering crucial aspects of personal and professional growth. Let's delve into each of these pillars and explore their significance:

1.Prioritize: The first and most crucial step in effective time management is prioritizing your tasks and responsibilities. Not all tasks are created equal, and it's essential to differentiate between the urgent and the important. It involves identifying and focusing on the tasks that hold the highest importance and aligning them with your goals and values. Start by making a list of all your tasks and categorize them based on their level of importance and urgency. This process is commonly referred to as the Eisenhower Matrix, where you identify the tasks that are urgent and important, important but not urgent, urgent but not important, and neither urgent nor important.

Example: Imagine you have a project deadline looming, several emails to respond to, and a meeting to prepare for. Prioritizing would involve identifying the project deadline as the most urgent and important task, followed by preparing for the meeting, and then addressing the emails based on their level of importance.

Tip: Use the "ABCDE" method to prioritize your tasks, where "A" tasks are the most important, "B" tasks are important but less urgent, and so on.

2. Plan: Once you've prioritized your tasks, it's time to plan your day, week, or month. Planning involves allocating time slots for each task, factoring in breaks, and ensuring that you're not overcommitting yourself. Create a timeline with specific deadlines for each task, considering any dependencies or potential roadblocks. A well-structured plan can provide a clear roadmap for your day, reducing the risk of procrastination and increasing your overall productivity.

Example: Let's say you have a major presentation to prepare for next week. Planning would involve breaking down the preparation process into smaller tasks, such as researching the topic, creating slides, and rehearsing the presentation. You would then allocate specific time slots in your calendar for each of these tasks, ensuring that you have enough time to complete them without feeling overwhelmed.

Tip: Use a calendar or a task management app to schedule your tasks and set reminders or notifications to stay on track.

3. Prepare: Preparation is key to ensuring that you can tackle your tasks efficiently and effectively. This involves gathering all the necessary resources, materials, and information required to complete the task at hand efficiently. Proper preparation can save you time and prevent unnecessary delays, wasted motion or interruptions during the execution phase.

Example: If you have a client meeting scheduled, preparation would involve reviewing the client's background, gathering relevant documents or presentations, and ensuring that any necessary equipment or technology is set up and functioning properly.

Tip: Create a checklist of the items or information you need to complete a task, and ensure that you have everything ready before you begin.

4. Pace: Pacing yourself is crucial to maintaining productivity and avoiding burnout. It's essential to strike a balance between intense focus and taking breaks to recharge. Pacing involves understanding your personal productivity cycles and adjusting your work accordingly. It also means being mindful of your energy levels and taking breaks when needed to maintain optimal performance.

Example: If you're working on a lengthy report or a coding project, pacing would involve breaking the task into manageable chunks and alternating periods of intense focus with short breaks. During these breaks, you could engage in activities that help you recharge, such as taking a short walk, practicing deep breathing exercises, or listening to music.

** If you tend to be most productive in the morning, schedule your most demanding tasks during that time. Conversely, if you experience an afternoon slump, plan lighter tasks or breaks during that period to recharge.

Tip: Use the Pomodoro technique, which involves working in 25-minute intervals followed by a 5-minute break, or time blocking or find a work-break rhythm that suits your personal preferences.

5. Persist: Time management is an ongoing process, and persistence is essential to maintaining your productivity over the long term. It's important to regularly review your progress, celebrate your achievements, and adjust your strategies as needed. Persistence also involves staying motivated and overcoming obstacles or setbacks that may arise along the way.

Example: Let's say you've set a goal to learn a new programming language, but you're finding it challenging to stick to your study schedule. Persistence would involve identifying the reasons behind your struggle (e.g., lack of motivation, competing priorities), adjusting your study plan accordingly, and finding ways to stay motivated, such as setting smaller milestones or rewarding yourself for achieving them.

Tip: Celebrate your wins, no matter how small, and use them as motivation to keep pushing forward. Additionally, don't be afraid to seek support or accountability partners to help you stay on track.

Time management is a continuous process which calls for one to remain flexible and adapt to different strategies as circumstances change. Consistent practice and adaptation are key to mastering this essential skill.

Your Elderlaw Tool Box: Financial Power of Attorneys

By Patrick M. Simasko and Kelsey M. Simasko

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A few years ago, my daughter graduated from law school and moved into her first apartment. What was my house warming present: A toolbox. One that contained all the basic tools she would need to cover her household dilemmas: a hammer, a tape measure, pliers, and so many types of screw drivers you couldn't possibly use them all.

An estate plan is just that – toolbox. A financial Power of Attorney is just another tool in your estate planning toolbox, just like all of those screw drivers you think you will never use.

A Durable Power of Attorney is one of the most important tools in the entire toolbox, and each and every paragraph of the Durable Power of Attorney matter. However, it is the paragraphs that the Durable Power of Attorney does not include that matter even more. Each paragraph in your DPOA is just like a different kind of screw driver, and when someone asks what the most important screw driver is, the only acceptable answer is: THE ONE YOU NEED! If your toolbox does not contain the correct kind of screw driver to get the job done, you have a one-way ticket back to the hardware store. If that paragraph that you need is not in your Durable Power of Attorney, then just like the missing screw driver, you cannot get the job done and you have a one-way ticket to Probate court. One size does not fit all.

Back in the good ole' days a Durable Power of Attorney just needed to say that my agent has 100% authority to do anything allowed by law, and financial institutions and third parties would accept that. This is no longer the case. Today the financial institution will send the Power of Attorney to their legal department, and legal can and often will reject the document for various internal reasons. When this happens all the client hears is that their lawyer messed up. Really???

To help alleviate some of these issues, Michigan joined 30 other states and adopted the Uniform Power of Attorney Act (UPOAA), which took effect on July 1, 2024. This gives individuals a fill in the blank template that they can sign and utilize. MCL 556.410 is the cite for the statute and the fill in the blank form. The new law is designed to increase uniformity, accessibility, and coherence of Power of Attorney documents across the state lines. But it is important to note that the UPOAA does not invalidate a current, validly executed POA. The uniformed POA is designed to be durable which means it remains in full force if you become mentally incapacitated, which is when you need it most.

With the new law in place many practitioners will be revising their POA forms, making this an excellent time to have past clients come in to revisit their entire estate plan.

The purpose of this article is to discuss the various paragraphs that you might want to add or remove from your POA's. Special attention will be on those sections that affect a family that may need to become qualified for various governmental benefits such as Medicaid or Veterans Benefits.

I begin with the premise that I trust my wife and my kids 100% as my agents, so I want to give them all of the tools necessary to protect me in as many scenarios as possible. If the client does not trust their agent, they may not want to reconsider their choice of agent, or create the POA that has as many safety measures as possible.

Springing Language

The Springing Durable Power of Attorney includes a section that requires two doctors to certify that the principal is mentally incompetent and cannot manage their financial affairs. This allows the individual to maintain 100% control over their estate. The POA "springs into effect" after the principal becomes declared mentally incapacitated by two doctors. This clause sounds reasonable because who wants to give up authority now? However, the reality is that often times the principal needs financial assistance but is never declared medically incompetent.

During COVID this became abundantly clear when Mom was mentally competent but was unable to leave assisted living facility to manage her legal affairs. As a result, no one had authority to act on her behalf even though she needed the help. The only way to remedy the situation would be to have Mom sign a new Durable Power of Attorney with the Springing requirement. The other common scenario is the Dad is mentally incompetent, but he are too sick, fragile, or combative to go see the doctors to get evaluated. After discussing these scenarios with my clients, most ask that this section not be included.

Co-Agents

Technically, a principal may name two individuals who must act in tandem as co-agents. This usually occurs when the principal has multiple children and does not want to choose one over the other or they want both agents to work together for checks and balances. However, in practice having co-agents that must act together can be very impractical. Both agents must sign every document, be on every phone call, and be present at every meeting. Other financial institutions will not accept a POA that appoints co-agents with the requirement that they must act together. The institution does not want to be held liable if funds are released with only one agent's signature. They require that either agent has independent authority to act.

Multiple Successor Agents

The best thing a principal can do is name multiple successor agents in a Durable Power of Attorney. This is when the principal chooses a primary agent, but also chooses other individuals who will serve as an agent if the primary agent is unable to act because of an illness, disability, incapacity, or conflict of interest. If the primary agent is unable to act, and a successor agent is not named, the Power of Attorney document is effectively useless which will require the appointment of a Conservator by the Probate Court.

Self-Dealing

There are many scenarios that principal is asking the agent to act in a way that is a conflict of interest. For example, the son needs to use his authority as his father's POA to sign a Ladybird deed that names himself as the owner of the home after Dad dies. This is considered a conflict of interest and many title insurance companies will not accept the deed. The POA needs to include language in it that allows for self-dealing and conflicts of interest. Or, as previously discussed, if there was another individual named as a successor agent, the child agent may temporarily step down and allow the successor agent to sign the deed.

Gifting

Power of Attorney documents commonly restrict gifting in some form or another. While this is meant to protect the principal from unauthorized gifts, it severely restricts the ability to plan for Medicaid and Veterans Benefits. Strategic gifting is a very common strategy to get an individual asset qualified for government benefits, and if that authority is restricted it can impact an attorney's ability to property protect assets. This can also become an issue if the Federal Estate Tax limit is reduced, as the principal may want to begin gifting assets to beneficiaries before they pass away. An agent's ability to gift should not be restricted if you trust your agents.

Changing Beneficiaries

Many standardized POAs prevent the agent's ability to change a beneficiary designation or it is left out entirely. This power is extremely important in protecting a family's assets to help them get qualified for Medicaid or Veterans Benefits. Mom's in the nursing home on Medicaid and Dad's term life insurance policy lists mom as beneficiary. He has stage 4 cancer and is in hospice. If he dies and Mom receives the life insurance benefit, she will be cut off Medicaid. The agent must have the ability to change the beneficiary on that life insurance/401k/annuity etc. to protect her government benefit.

Ability to Create or Amend Revocable or Irrevocable Trusts

Just like changing a beneficiary designation most standardized POAs prevent the agent's ability to amend or create Revocable or Irrevocable Trust Agreements. This power is extremely important in protecting a family's assets. Mom is in hospice and her child has MS and is receiving SSI and Medicaid benefits. The problem is that Mom listed her daughter as direct beneficiary of her Revocable Trust as well as her 401k and annuity. To protect the daughter's benefits, we need to amend Mom's Trust and change the beneficiary designations so that the daughter's share can be held in a Special Needs Trust. This is extremely easy if the agent has these express powers listed in the POA and next to impossible if we don't. But time is critical, it must be done before Mom passes away which is made much more difficult if the family has to get Mom declared legally incapacitated by 2 doctors.

Court Language

Dad has been diagnosed with severe dementia and Mom can no longer care for him so he has to be placed into a nursing home. It is very important that Dad's POA has every paragraph that will allow the family to protect the marital estate so that Mom is properly cared for. One of these paragraphs is the authority to go to court.

In conclusion, it is important to ensure your client's estate planning toolbox is stocked with the proper tools to ensure that your client and their family are properly protected in their times of need. With the adoption of the UPOAA, now is the perfect time to re-visit prior clients' estate plans to make sure that their tool box is in tip top shape.

If anyone would like to take a look at the language that our firm uses in our Durable Power of Attorneys, please feel free to email with myself at Pat@Simaskolaw.com or Kelsey Simasko at Kelsey@Simaskolaw.com.

The Enduring Technology Debates in Our Courtrooms Part One: The Zoom Debates

By Bill Barnwell, Barnwell Law, PLLC

Barnwell LAW, PLLC

We are now in the fifth, and about to be in the sixth, calendar year of the Courtroom Zoom Debates. Much ink has been spilled in bar journals across the country and in the broader media about whether or not Zoom belongs in the courtrooms. Since November 2022, an emerging debate and discussion has taken place regarding the use of AI in the practice of law. While there are some loud and influential voices raising concerns about the dire consequences of these tools, it is this writer's contention that there is no real going back and pretending as if the advancements of the past several years never happened. Business as usual pre-March 2020 is simply not going to happen.

The Zoom debate has been ongoing since the earliest days of the pandemic. Initially courtrooms had no choice but to use Zoom. People loved or hated it. Those opinions have remained mostly static. Once public health emergencies related to COVID receded, many jurisdictions slowly tried to return to the status quo.

Zoom for civil cases has mostly not been controversial, though it does have some critics. Far more contentious is Zoom's place in criminal law. Through public debate, and curiously crafted court rules and split Supreme Court opinions, what exists now is no real uniform standard. On paper, the Court rules are actually more permissive of Zoom for felony cases than a low-level misdemeanor, minus Probable Cause Conferences.

Yet what exists in practice is basically every courtroom being left to its own preferences. And there exists no uniform standard within a given District or Circuit Court, even courtrooms within a single District or Circuit Court. Hence, those that do not approve of Zoom will make attorneys appear in person for everything, including Probable Cause Conferences simply to make the parties say "We will proceed to exam". On the other end are Judges who will do felony sentencings even over Zoom.

Recently, several leading legal voices, including Supreme Court Justices, wrote an op-ed warning of the dire consequences of continuing to use Zoom and arguing that it essentially erodes respect for the Court system. Respectfully to these figures and those who share their concerns, the concerns raised continue a long cultural tradition of overreaction to technological change.

This isn't unique to the legal profession. Whether it was radio, TV, video games, the Internet, smartphones, etc, through every era, society was warned how these devices and advancements would somehow lead to the downfall of society. Every time they were proven wrong.

Most legal practitioners and judges hold a nuanced approach: That Zoom has its place for certain hearings and not others. While we have all seen numerous people doing absurd things while waiting for a Zoom hearing, let's not pretend that everybody showing up in-person is well-dressed, well-mannered, and acting appropriately. Admittedly, Zoom has given far more colorful examples of misbehavior, but it does not speak for the average litigant any more than individuals acting, dressing, (or smelling of marijuana), badly inside courtrooms speak for other in-person members of the public.

The op-ed also somehow tried to make the case that compulsory in-person attendance is somehow helping access to the Courts. Of course, for low-income people on a suspended license, or with unreliable transportation, as just some examples, Zoom has been an extreme help accessing the Courts. For those juggling jobs, childcare, transportation issues and so on, Zoom has been and will continue to be the single best advancement in everyday people having access to the courts.

There also seems to be a "protectionist" undercurrent in some counties. By that I mean, there appears to be an admirable desire to protect local attorneys from "city" attorneys moving in our their client base. Yet this should just be left to legal consumers. Some clients will explicitly want a lawyer who is "local". Others won't care.

Yet the primary issue simply seems to be Courtroom preferences. For myself, even when I have the opportunity to

Zoom in, 90% of the time I will appear in-person anyway on local matters. I can advocate better in person on anything of substance and socially I enjoy seeing my colleagues.

But when caught between several courts, Zoom is excellent for practitioners. For the "No-Zoom" courtrooms, being restrictive is actually worse for clogging dockets. Now instead of just letting an attorney present by Zoom, matters that could have been otherwise handled get adjourned and pushed out. And while there absolutely should be weight placed on the preferences of judges and their courtroom's abilities with adequate staffing, there should be just as much, or more weight placed on the practitioners who also make these courtrooms function, many of whom are bouncing between multiple courts per morning or afternoon.

A simple compromise for courtrooms that have a general no-Zoom policy for criminal matters would be to give allowances to attorneys who inform the court ahead of time of legitimate scheduling issues. Or yes, attorneys whom are traveling a far distance to generally more rural areas for clients who exercised their right to counsel by hiring somebody from "out of town." And even for those cases, only certain criminal matters by Zoom that are largely procedural or otherwise supported by the Court rules.

For Part II next month, let's delve into to what extent, if any, AI is going to harm or enhance the legal profession.

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Cider Mill Outing

Blake's Orchard & Cider Mill | October 13, 2024

Question Presented: When A Prosecutor Seeks To Admit Prior Testimony For An Unavailable Witness, What Can Defense Do To Stop Its Admission At Trial?

By Josh Jones, Macomb County Public Defender Office

Generally, when the prosecution seeks to admit a prior statement, it is considered hearsay, and thus will be excluded from a trial unless there is an applicable exception that applies to statement being offered. See MRE 801(c); MRE 802; & MRE 804(b). One of those exceptions, as you may be aware, applies when a witness refuses to testify at trial *[there are numerous exceptions that allow a witness to be considered unavailable for trial]*. *See* MRE (804)(b)(1). If the witness has previously testified at a similar hearing and they become unavailable for trial, then their prior testimony may be used in lieu of his or her live in-person testimony during the trial.

Unavailability

Michigan Courts have continuously held that the threshold for finding an individual unavailable is rather simple. In *People v Adams*, the court determined that a witness who arrived at court, but decided just before testifying that she did not want to go through with her testimony was enough to make her unavailable. *See* 233 Mich App 652 (1999). The court noted that the exception did not require more, and thus her apparent refusal or not wanting to testify was sufficient for the hearsay rule. *Id*.

However, there is the possibility that Defense can argue or show that the Prosecution has not done their due diligence in determining or showing that the witness (who is now unavailable) is truly unavailable for application of the hearsay exception. *See* MRE 804(a)(5). "[T]he prosecution... [or whomever is identifying a witness as unavailable] must prove that it exercised diligent good-faith efforts to obtain the witness' presence at trial." *People v Conner*, 182 Mich App 674, 681 (1990) (*citing Barber v Page,* 390 US 719 (1986); *People v McIntosh,* 389 Mich 82, 86 (1973)). The Michigan Supreme Court indicated that where a prosecutor has leads about a location of a witness, they must pursue them, and if they have no leads, then they must seek out the last known persons who might reasonably be expected to have such information that would assist in locating the individual witness. *See McIntosh,* 389 Mich at 87. The determination of whether there was a good-faith effort made is based on the particular facts of each given case. *People v Dye,* 431 Mich 58, 67 (1988). "The test does not require a determination that more stringent efforts would have procured the [witness];" the party seeing admission will not have to exhaust all avenues of locating or finding an individual witness. *People v Briseno,* 211 Mich App 11 (1995).

Former Testimony

MRE 804 specifically states that "'former testimony' is excluded from the hearsay rule if the witness's testimony was 'given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.'" *People v Farquharson,* 274 Mich App 268 (2007). Courts have found that the same or different proceeding (when compared to a trial) has been found in situations such as grand jury proceedings, investigative proceedings, and preliminary exams. *See id.* at 273; *see also, Adams, 233* Mich App at 652.

The crux of MRE 804(b)(1) is usually found within the second portion of the rule, which looks to see if "the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony." *Farquharson,* 274 Mich App at 275. The focus for this analysis will be on the similarity of issues presented at the various proceedings. *See People v Vera,* 153 Mich App 411, 415 (1986). In determining whether there was a similar motive courts have adopted the following non-exhaustive list:

> (1) Whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of substantially similar issue": (2) the nature of the two proceedings-both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and available but forgone opportunities). *Farquharson,* 274 Mich App 268 (2007) (quoting *United States v DiNapoli,* 8 F3d 909, 912 (2nd Cir 1993)).

In *People v Meredith,* the court reasoned that testimony provided during a preliminary exam for the same offense could later be used against the Defendant in his trial once the witness became unavailable. *See* 459 Mich 62, 67 (1998). This was true even though defense counsel (and client) elected not to cross-examine the witness at that time. *See id.* The court reasoned the attorney had the opportunity and similar motive to develop the testimony through cross-examination, but he chose to forego questioning. *See id.* Moreover, in *People v Sardy,* the Court rejected the notion that there is not a similar motive to develop testimony during a preliminary examination even if the purpose of the exam is different than found within trial. *See* 318 Mich 558 (2017). "[T]he only guarantee is that counsel receive an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the [attorney] might wish." *United States v Owens,* 484 US 554, 559 (1988).

In *People v Wood,* the Court again found that during preliminary exam, defense counsel had "ample opportunity" to cross-examine the witness in question, indicating further that the court did not limit either party during their questioning. *See* 307 Mich App 485, 517-18 (2014). The Court in *People v Woodhall* rationalized the same as in *Wood,* indicating that defense counsel had ample opportunity to examine and question the witness during the preliminary exam. *See* Mich App No. 2020-273517-FH (Sept 12, 2024 Unpublished). The Court even considered the argument that the examination did not involve cross examination of specific text messages related to the incident. *See id.* The court noted that it did not matter if the reasoning to forego the questioning of the text messages was related to strategy, oversight, or lack of access at the time. *See id.* The only consideration was whether defendant was unconstitutionally denied the opportunity to effectively cross the witness. *See id.*

To finalize the analysis, if the circumstances align with the requirements found within MRE 804, the statements will not violate a defendant's right against Confrontation. *See Adams,* 233 Mich App at 659. This hearsay exception is deeply rooted within American jurisprudence, satisfying the requirements in the Federal and State Confrontation Clauses that the testimony bears satisfactory indicia of reliability. *See id.* at 659-660 (*citing Meredith,* 459 Mich at 67-71). Therefore, without more, if the testimony qualifies under the hearsay exception, there will be a presumption that the testimony is reliable and satisfying any violation found within the Confrontation Clause. *See Meredith*, 459 Mich at 70-71 (citing *People v Poole,* 444 Mich 151, 162 (1993); *Ohio v Roberts,* 448 US 56, 66 (1980)); see also *People v Lee,* 243 Mich App 163 (2000) [providing a detailed analysis on why there is a presumption of reliability on prior testimony and when there is a possibility of it not being admissible due to the testimony being unreliable].

Madison's Mt. Clemens Lawyers Softball League

By Charles Trickey III, Commissioner

The fourteen season of the Madison's Mt. Clemens Lawyers Softball League wrapped up on September 4th with the Macomb Prosecutors team, managed by Dan DeBruin, winning its third straight championship.

The league is comprised of five teams. The other four teams are managed by Amber Cervantez, Erich Goetz, Justin VandeVrede, and Charles Trickey III.

Pictured left to right are: Dan DeBruin, Carmen DeFranco, Mich Albert, Jim O'Doherty, Ben Griffen, Greg Walker, Rich Nelson, Tony Servitto, Nich Pasque, Dale VandeVrede and Adam Kroll.

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