Agenda
Public Policy Committee
November 15, 2023 – 10:30 a.m. to 12:00 p.m.
Via Zoom Meetings

Public Policy Committee……Joseph P. McGill, Chairperson

A. Reports

1. Approval of September 18, 2023 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2020-08: Proposed Rescission of Administrative Order No. 2020-17 and Proposed Amendment of MCR 4.201

The proposed rescission of AO 2020-17 reflects the Court's review of the public comments received in this same ADM File regarding additional amendments of MCR 4.201. The proposed amendment of MCR 4.201 would ensure that courts with a local court rule under MCL 600.5735(4) implement their local court rule in accordance with the other provisions of MCR 4.201.

Status:	01/01/24 Comment Period Expires.
Referrals:	09/12/23 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Justice Initiatives Committee.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Justice Initiatives Committee.
Liaison:	Aaron V. Burrell

2. ADM File No. 2022-19: Proposed Amendments of MRPC 1.15 and 1.15A and Proposed Additions of MRPC 1.15B and 1.15C

The proposed amendments of MRPC 1.15 and 1.15A and proposed additions of MRPC 1.15B and 1.15C would amend the rules governing IOLTA accounts to: modernize the rules, address gaps in the existing rules, and clarify attorneys' ethical duties related to safekeeping client or third-party property and managing trust accounts.

Status:	01/01/24 Comment Period Expires.
Referrals:	09/13/23 Professional Ethics Committee.
Comments:	None at this time.
Liaison:	John W. Reiser, III

3. ADM File No. 2023-24: Proposed Amendment of MCR 3.701 and Proposed Additions of MCR 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722

The proposed amendments would offer procedural guidance to trial courts for implementing the Extreme Risk Protection Order (ERPO) Act, MCL 691.1801 et seq.

Status:	12/01/23 Comment Period Expires.
Referrals:	09/25/23 Civil Procedure & Courts Committee; Family Law Section; Judicial Section.
Comments:	Civil Procedure & Courts Committee; Family Law Section. Comment provided to the Court is included in the materials.
Liaison:	Takura N. Nyamfukudza

4. ADM File No. 2022-33: Proposed Amendment of MCR 4.303

The proposed amendment of MCR 4.303 would allow courts to dismiss small claims cases for lack of progress.

Status:	01/01/24 Comment Period Expires.
Referrals:	09/13/23 Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison:	Judge Cynthia D. Stephens (ret'd)

5. ADM File No. 2022-24: Proposed Amendments of MCR 6.907, 6.909, and 6.933

As a condition for the State's receipt of federal funds under the Prison Rape Elimination Act, 34 USC 30301 et seq., the conditions of confinement for juveniles must comply with federal regulations promulgated under that act, including the requirement that best efforts be made to avoid placing incarcerated youthful inmates in isolation. See 28 CFR 115.14. The proposed amendments clarify that youthful inmates should not be placed in isolation in order to keep them separate from adults.

Status:	01/01/24 Comment Period Expires.
Referrals:	09/25/23 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section; Prisons & Corrections Section.
Comments:	Access to Justice Policy Committee; Children's Law Section; Criminal Law Section.
Liaison:	Takura N. Nyamfukudza

C. Legislation

1. Fees for Transcripts

HB 5046 (Shannon) Civil procedure: costs and fees; fees for transcripts; increase. Amends sec. 2543 of 1961 PA 236 (MCL 600.2543).

SB 0514 (Irwin) Civil procedure: costs and fees; fees for transcripts; increase. Amends sec. 2543 of 1961 PA 236 (MCL 600.2543).

Status:	HB 5046 – 11/02/23 Referred to the Senate Committee on Civil Rights, Judiciary & Public Safety after passing the House 104 to 6. SB 0514 -
Referrals:	09/25/23 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Civil Procedure & Courts Committee; Justice Initiatives Committee; All Sections.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Justice Initiatives Committee; Children's Law Section; Criminal Law Section; Family Law Section; Negligence Law Section.
Liaison:	Suzanne C. Larsen

2. HB 5131 (Skaggs) Legislature: apportionment; redistricting of court of appeals; provide for. Amends secs. 301, 302 & 303d of 1961 PA 236 (MCL 600.301 et seq.); adds sec. 303e & repeals secs. 303a, 303b & 303c of 1961 PA 236 (MCL 600 et seq).

Status:	09/20/23 Referred to Senate Committee on Civil Rights, Judiciary & Public Safety.
Referrals:	10/16/23 Civil Procedure & Courts Committee; All Sections.
Comments:	No comments at this time.
Liaison:	Thomas P. Murray, Jr.

3. HB 5271 (Hope) Criminal procedure: DNA; post-conviction DNA testing; modify. Amends sec. 16, ch. X of 1927 PA 175 (MCL 770.16).

Status:	10/26/23 Referred to the House Committee on Judiciary.
Referrals:	11/02/23 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Valerie R. Newman

4. HB 5300 (Pohutsky) Probate: other; name change proceedings; modify.

Status:	11/03/23 Referred to the House Committee on Judiciary.
Referrals:	11/03/23 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section; Probate & Estate Planning Section.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison:	Valerie R. Newman

D. Consent Agenda

To allow the Criminal Jurisprudence & Practice Committee and Criminal Law Section to submit their positions on each of the following items:

1. M Cim JI 5.16

The Committee proposes the following new model criminal jury instruction, M Crim JI 5.16, directing the jury to consider testimony provided through videoconferencing technology. MCR 6.006(A)(2), (B)(4), and (C)(4) authorize the use of videoconferencing technology to take trial testimony in criminal proceedings "in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology." The language in the new instruction is based M Crim JI 2.13 (Notifying Court of Inability to Hear or See Witness or Evidence), M Crim JI 4.10 (Preliminary Examination Transcript), and M Civ JI 4.11 (Consideration of Deposition Evidence). This instruction is entirely new.

2. M Crim JI 16.5

The Committee proposes the following amendment to M Crim JI 16.5, for second-degree murder. In light of the Court of Appeals opinion in *People v Spears* (Docket No. 357848), holding that "without justification or excuse" is not an element of the offense of second-degree murder, it is proposed that paragraph (4) be deleted. Deletions are in strike-through. No new language was added.

3. M Crim JI 23.10a

The Committee proposes a new jury instruction, M Crim JI 23.10a (failure to return rental property), for the crime found at MCL 750.362a. This instruction is entirely new.

4. M Crim JI 25.8

The Committee proposes the following new model criminal jury instruction, M Crim JI 25.8, to cover criminal activity for trespassing at a key facility under MCL 750.552c. This instruction it entirely new.

5. M Crim JI 38.5

The Committee proposes the following new model criminal jury instruction, M Crim JI 38.5, to cover the crime of Using the Internet to Disrupt Government or Public Institutions under MCL 750.543p. This instruction is entirely new.

6. M Crim JI 40.12

The Committee proposes the following new model criminal jury instruction, M Crim JI 40.12, to address the crime of failing to report a dead body under MCL 333.2841. This instruction is entirely new.

MINUTES
Public Policy Committee
September 18, 2023 – 12:00 p.m. to 1:30 p.m.

Committee Members: David C. Anderson, Lori A. Buiteweg, Aaron V. Burrell, Kim Warren Eddie, Suzanne C. Larsen, Valerie R. Newman, Nicholas M. Ohanesian, Daniel D. Quick, Brian D. Shekell, Judge Cynthia D. Stephens, Danielle Walton
SBM Staff: Nathan A. Triplett, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Reports

1. Approval of July 20, 2023 minutes – The minutes were unanimously approved.
2. Public Policy Report – Nathan A. Triplett offered a verbal report.

B. Court Rule Amendments

1. ADM File No. 2017-28: Proposed Amendments of MCR 1.109, 5.302, and 8.108

The proposed amendments of MCR 1.109, 5.302, and 8.108 would provide clear direction on the process for protecting personal identifying information in transcripts, wills, and death certificates.
The following recommendations were received and considered: Civil Procedure & Courts Committee.
The committee voted unanimously (9) to adopt the Civil Procedure & Courts Committee, which is to support the proposed amendments of MCR 1.109, 5.302, and 8.108 and recommend that MCR 5.302(A)(1) be amended to require that both a redacted and unredacted version of a death certificate or alternative documentation be filed and that unredacted version be maintained as a nonpublic record accessible to the parties.

2. ADM File No. 2022-34: Proposed Amendments of MCR 3.993 and 6.428

The proposed amendment of MCR 3.993 would provide for the restoration of appellate rights in juvenile cases, similarly to that of criminal cases under MCR 6.428, and the proposed amendments would further ask parties to provide the Court of Appeals with a copy of the order when filing the appeal.
The following recommendations were received and considered: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section.
The committee voted unanimously (9) to support ADM File No. 2022-34.

C. Consent Agenda

The committee supported the consent agenda to authorize the Criminal Jurisprudence & Practice Committee to submit its comments on the Model Criminal Jury Instructions below:

M Crim JI 7.25a

The Committee proposes a model criminal jury instruction, M Crim JI 7.25a (Self-Defense as Defense to Brandishing a Firearm), for the defense found in the brandishing a firearm in public statute found at MCL 750.234e(2)(b). The instruction is entirely new.

M Crim JI 12.10 12.10a 12.10b 12.10c 12.10d 12.10e

The Committee proposes the following new model criminal jury instructions to cover the various provisions of Section 8 of the Tobacco Products Tax Act found at MCL 205.428, including M Crim JI 12.10 (Illegal Sale or Disposition of Untaxed Cigarettes), M Crim JI 12.10a (Illegal Possession or Transportation of Untaxed Cigarettes), M Crim JI 12.10b (Making, Possessing or Using an Unauthorized Department of Treasury Tobacco Tax Stamp), M Crim JI 12.10c (Illegally Purchasing or Obtaining a Department of Treasury Tobacco Tax Stamp), M Crim JI 12.10d (Falsifying a Tobacco Manufacturer's

Label), and M Crim JI 12.10e (Making or Possessing a False License to Purchase or Sell Tobacco Products as a Retailer or Wholesaler) . These instructions are entirely new.

M Crim JI 13.15
The Committee proposes the following amended model criminal jury instruction, M Crim JI 13.15 (Assaulting a prison employee) under MCL 750.197c to match the statutory language as observed by the Court of Appeals panel in People v Nixon, unpublished opinion (COA #353438) issued 4/21/22. The statute forbids an assault "through the use of violence, threats of violence or dangerous weapons," while the instruction as currently written only requires proof of an assault, not mentioning violence, threats of violence or dangerous weapons. Deletions are in strike-through, and new language is underlined.

M Crim JI 13.17
The Committee proposes the following amended model criminal jury instruction, M Crim JI 13.17 (Absconding on a Bond) under MCL 750.199a to add an element involving notice to the defendant concerning conditions of bond consistent with People v Rorke, 80 Mich App 476; 264 NW2d 30 (1978). Deletions are in strike-through, and new language is underlined.

M Crim JI 27. 6
The Committee proposes the following new model criminal jury instruction, M Crim JI 27.6, for dumping refuse on the property of another to cover criminal activity under MCL 750.552a. This instruction is entirely new.

M Crim JI 27. 7
The Committee proposes the following new model criminal jury instruction, M Crim JI 27.7, for trespassing on state correctional facility property to cover criminal activity under MCL 750.552b. This instruction is entirely new.

M Crim JI 35.13b
The Committee proposes the following new model criminal jury instruction, M Crim JI 35.13b (Using a Computer to Commit a Crime), for offenses found in MCL 752.796 of the "Fraudulent Access to Computers" chapter of the penal code.

M Crim JI 40.6
The Committee proposes the following new model criminal jury instruction, M Crim JI 40.6 (Indecent or Obscene Conduct) for offenses found in MCL 750.167(f), a subsection of the "disorderly persons" statute.

Order

Michigan Supreme Court
Lansing, Michigan

September 7, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2020-08

Proposed Rescission of Administrative Order No. 2020-17 and Proposed Amendment of Rule 4.201 of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering a rescission of Administrative Order No. 2020-17 and amendment of Rule 4.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

~~Administrative Order No. 2020-17 – Continuation of Alternative Procedures for Landlord/Tenant Cases~~

~~Many people believe that our state is finally at the end of the pandemic. Still, the court system will long be dealing with the effects brought about by the greatest health crisis in our generation.~~

~~Throughout the pandemic, federal response to this problem has taken two forms: eviction moratoria and direct state aid. Several eviction moratoria were imposed, both by Congress (Pub L. 116-136) and by the CDC (published at 85 FR 55292 and extended by Order dated March 28, 2021), prohibiting evictions for tenants in certain types of government-supported housing or who meet certain income restrictions. Those moratoria have since been lifted.~~

~~The second type of federal response – direct aid to states to provide for rental assistance programs is also coming to an end. However, the need for that programming continues, even assuming the health risks associated with the typical manner of processing eviction proceedings has eased.~~

~~The use of remote technology to the greatest extent possible is as important today as it was three years ago. Now is the appropriate time to consider what changes in procedure, adopted with as much speed and thought as possible in the midst of a pandemic, should be retained or changed before becoming permanent practices in our state courts. This effort has been based on input from state court stakeholders, but even early data showed us that expanded use of technology has improved rates of participation and been a boon to issues related to access to justice.~~

~~Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing that all local court rules created pursuant to MCL 600.5735(4), that in their implementation require a written answer are temporarily suspended.[1] Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.~~

~~This order is effective immediately until further order of the Court.~~

Rule 4.201 Summary Proceedings to Recover Possession of Premises

(A)-(B) [Unchanged.]

(C) Summons.

(1) The summons must comply with MCR 2.102, except that it must command the defendant to appear for trial in accord with MCL 600.5735(2), unless by local court rule the provisions of MCL 600.5735(4) have been made applicable. If a court adopts a local court rule under MCL 600.5735(4), both of the following apply:

(a) Pursuant to subrule (F)(1)(b), the defendant must be allowed to appear and orally answer the complaint on the date and time indicated by the summons.

(b) The court must abide by the remaining requirements of this rule.

~~[1] The courts with local court rules include: 1st District Court (Monroe County); 2A District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District Court (Ogemaw County); and 95B District Court (Dickinson and Iron Counties).~~

(2)-(3) [Unchanged.]

(D)-(O) [Unchanged.]

Staff Comment (ADM File No. 2020-08): The proposed rescission of AO 2020-17 reflects the Court's review of the public comments received in this same ADM File regarding additional amendments of MCR 4.201. The proposed amendment of MCR 4.201 would ensure that courts with a local court rule under MCL 600.5735(4) implement their local court rule in accordance with the other provisions of MCR 4.201.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2020-08. Your comments and the comments of others will be posted under the chapter affected by this proposal.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 7, 2023

Clerk

Public Policy Position
ADM File No. 2020-08: Proposed Rescission of Administrative Order No. 2020-17 and Proposed Amendment of MCR 4.201

Support while Expressing Concerns

Explanation

The Committee voted unanimously (18) to support ADM File No. 2020-08. The Committee agreed that the proposed amendment of MCR 4.201 would promote procedural fairness and access to justice, particularly for tenants with less resources or without legal representation. The existing, statutory 5-day rule functionally strips many tenants of their opportunity to appear and defend themselves in court and may lead to higher rates of default judgements. The proposed amendment will help ameliorate these consequences.

Additionally, requiring a written response within a very short time limits tenants' ability to access legal and financial resources. Most tenants appear at their first hearing without legal representation. In recent years, an increasing number of courts have created or expanded Eviction Diversion Programs ("EDP") where legal aid attorneys are available in-person at the courthouse on housing docket days to provide advice and potentially full representation for eligible tenants (or available to speak with tenants in breakout rooms where the docket is conducted over Zoom). Even in those jurisdictions without robust EDP services, when a tenant appears for their first hearing, the judge will typically explain certain rights to the tenant and will often allow the hearing to be adjourned for the tenant to seek legal assistance. However, tenants in 5-day rule jurisdictions are not provided the opportunity to appear in court and access those resources prior to filing an answer. Tenants who may want legal advice or assistance with writing their answer are significantly limited in time to do so. This may cause a tenant to submit an answer that does not adequately describe their legal defenses.

The proposed amendment will result in a more consistent reading and application of the Court Rules. The Committee believes that this proposal will help ensure that all courts adhere to the provisions of the summary proceedings Court Rules. It will also help ensure that tenants, regardless of jurisdiction, will have substantially the same rights and ability to defend themselves in a more accessible manner.

The Committee did wish to express its concern about the underlying statute—MCL 600.5735(4)—and believes that the Legislature should repeal the 5-day rule. However, until such time as the 5-day rule is repealed, the proposed amendment of MCR 4.201 will improve access to justice for tenants.

Position Vote:

Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Persons:
Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2020-08: Proposed Rescission of Administrative Order No. 2020-17 and Proposed Amendment of MCR 4.201

Support

Explanation
The Committee voted to support ADM File No. 2020-08.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 3
Did not vote (absence): 10

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
ADM File No. 2020-08: Proposed Rescission of Administrative Order No. 2020-17 and Proposed Amendment of MCR 4.201

Support

Explanation
The Committee voted to support ADM File No. 2020-08.

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Person:
Ashley E. Lowe alowe@lakeshorelegalaid.org

Order

Michigan Supreme Court
Lansing, Michigan

September 13, 2023

ADM File No. 2022-19

Proposed Amendments of Rules 1.15 and 1.15A and Proposed Additions of Rules 1.15B and 1.15C of the Michigan Rules of Professional Conduct

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On order of the Court, this is to advise that the Court is considering amendments of Rules 1.15 and 1.15A and proposed additions of Rules 1.15B and 1.15C of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.15 Safekeeping Property.

~~(a) Definitions.~~

~~(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.~~

~~(2) An "eligible institution" for IOLTA accounts is a bank, credit union, or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal~~

~~government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.~~

~~(3) "IOLTA account" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, at an eligible institution from which funds may be withdrawn upon request as soon as permitted by law. An IOLTA account shall include only client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.~~

~~(4) "Non-IOLTA account" refers to an interest- or dividend-bearing account from which funds may be withdrawn upon request as soon as permitted by law in banks, savings and loan associations, and credit unions authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government. Such an account shall be established as:~~

~~(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or~~

~~(B) a pooled client trust account with subaccounting by the bank or savings and loan association or by the lawyer, which will provide for computation of net interest or dividend earned by each client or third person's funds and the payment thereof to the client or third person.~~

~~(5) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.~~

~~(b) A lawyer shall:~~

~~(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;~~

~~(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and~~

~~(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.~~

~~(c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.~~

(a~~d~~) A lawyer must~~shall~~ hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All client or third person funds must~~shall~~ be kept in a trust account in accordance with MRPC 1.15A~~deposited in an IOLTA or non-IOLTA account~~. Other property must~~shall~~ be identified as such and appropriately safeguarded. Complete records of such account funds and other property must be kept by the lawyer and must be preserved in accordance with MRPC 1.15B.

~~(e) In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:~~

~~(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;~~

~~(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;~~

~~(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and~~

~~(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.~~

(b~~f~~) Except as otherwise provided in these rules, only client or third-party funds may be held in a trust account. A lawyer may deposit or retain the lawyer's own funds in a

client trust account for the sole purpose of paying or avoiding a financial institution's~~only in an amount reasonably necessary to pay financial institution or fees or to obtain a waiver of~~ service charges on that account, but only for an amount reasonably necessary for that purpose~~or fees~~.

(c) A lawyer must deposit into a client trust account legal fees and expenses that have been paid in advance of services rendered, to be withdrawn by the lawyer only as fees are earned or expenses incurred. Funds belonging to the lawyer must be disbursed to the lawyer within a reasonable time after the fee is earned and the client has been billed, has had an opportunity to dispute the disbursement, or otherwise has agreed to the disbursement.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer must promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer must promptly render a full accounting regarding such property.

(e) When in the course of representation, a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim interests, the property must be kept separate by the lawyer until the dispute is resolved. The lawyer must promptly distribute all portions of the property of which the interests are not in dispute.

~~(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred.~~

~~(h) No interest or dividends from the client trust account shall be available to the lawyer.~~

~~(i) The lawyer shall direct the eligible institution to:~~

~~(1) remit the interest and dividends from an IOLTA account, less allowable reasonable fees, if any, to the Michigan State Bar Foundation at least quarterly;~~

~~(2) transmit with each remittance a report that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and~~

~~(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.~~

~~(j) A lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA account is not reviewable by a disciplinary body. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA account.~~

Comment:

Fiduciary Capacity. The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

Fiduciary Obligation. A lawyer must hold property of others with the care required of a professional fiduciary. All property belonging to a client or a third person must be kept separate from the lawyer's business and personal property and, if funds, must be kept in one or more trust accounts. See MRPC 1.15A(a).

Reasonable Time for Disbursing Earned Fees. Disbursement of earned fees from the trust account within a period of 30 days after the client has been billed is presumed to be reasonable under subrule (c). Disbursements after 30 days may be reasonable if the client disputes the disbursement or if other good cause exists.

Minimum Balance. A lawyer may deposit or retain the lawyer's own funds in the account in accordance with this rule. Accurate records must be kept regarding which part of the funds are the lawyer's funds.

Disputed Funds. A third person, such as a client's creditors, may have a just claim against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such a third-party claim against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person. The disputed portion of the funds must be held in the trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds or other property must be promptly distributed.

Disputed Other Property. The lawyer should keep separate all other property held in safekeeping for which the ownership is in dispute and suggest means for prompt resolution of the dispute.

Fees Paid in Advance. Whether titled a flat fee, fixed fee, retainer, or other title, if the funds are not yet earned, the funds must be deposited into an IOLTA or non-IOLTA. If a lawyer-client relationship is terminated before all services are rendered but after payment of a fixed fee, the lawyer must refund any portion of the fee which has not been earned. An agreement for delivery of legal services for a fixed fee may provide that certain portions of the fee are earned by the lawyer based upon the passage of time, the completion of certain tasks, or any other basis mutually agreed upon by the lawyer and client.

Inability to Locate Rightful Owner. If the lawyer is unable to locate the rightful owner of property held for safekeeping or funds held in the lawyer's trust account after making reasonable efforts to locate the owner, the lawyer must comply with the Michigan Uniform Unclaimed Property Act, MCL 567.221, *et seq.*

~~A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of a client or a third person should be kept separate from the lawyer's business and personal property and, if funds, should be kept in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.~~

~~Lawyers often receive from third persons funds from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed. A third person, such as a client's creditors, may have a just claim against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such a third party claim against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person.~~

~~The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.~~

Rule 1.15A Lawyer Trust Accounts ~~Overdraft Notification~~.

(a) Type of Account. All client or third person funds in connection with a representation must be deposited in a client trust account, which is either an Interest on Lawyer Trust Account (IOLTA) or non-IOLTA.

(1) "IOLTA" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, held at an eligible and approved financial institution, from which funds may be withdrawn upon request as soon as permitted by law, and interest is paid to the Michigan State Bar Foundation. An IOLTA may only hold client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.

(2) "Non-IOLTA" refers to an interest- or dividend-bearing account held at an approved financial institution, from which funds may be withdrawn upon request as soon as permitted by law. A non-IOLTA must be:

(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or

(B) a pooled client trust account with subaccounting by the financial institution or by the lawyer, which provides for computation of net interest or dividend earned by each client or third person's funds and the payment of interest or dividend to the client or third person.

(b) In determining whether client or third person funds should be deposited in an IOLTA or a non-IOLTA, a lawyer must consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of

(A) the amount of the funds to be deposited;

(B) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and

(C) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTAs for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of the financial institution or lawyer to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

(c) After considering the factors in subrule (b), a lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA or non-IOLTA is not reviewable by a disciplinary body.

(d) Interest or dividends from any client trust account cannot be available to the lawyer.

~~(a) Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.~~

~~(1) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.~~

~~(2) For any trust account which is an IOLTA account pursuant to Rule 1.15, the "Notice to Eligible Financial Institution" shall constitute notice to the depository institution that such account is subject to this rule. Lawyers shall clearly identify any other accounts in which funds are held in trust as "trust" or "escrow" accounts, and lawyers must inform the depository institution in writing that such other accounts are trust accounts for the purposes of this rule.~~

~~(b) Overdraft Notification Agreement Required. In addition to meeting the requirements of Rule 1.15, each bank, credit union, savings and loan association, savings bank, or open-end investment company registered with the Securities and Exchange Commission (hereinafter "financial institution") referred to in Rule 1.15 must be approved by the State Bar of Michigan in order to serve as a depository for lawyer trust accounts. To apply for approval, financial institutions must file with the State Bar of Michigan a signed agreement, in a form provided by the State Bar of Michigan, that it will submit the reports required in paragraph (d) of this rule to the Grievance Administrator and the trust account holder when any properly payable instrument is presented against a lawyer trust account containing insufficient funds or when any other debit to such account would create a negative balance in the~~

~~account, whether or not the instrument or other debit is honored and irrespective of any overdraft protection or other similar privileges that may attach to such account. The agreement shall apply to the financial institution for all of its locations in Michigan and cannot be canceled except on 120 days notice in writing to the State Bar of Michigan. Upon notice of cancellation or termination of the agreement, the financial institution must notify all holders of trust accounts subject to the provisions of this rule at least 90 days before termination of approved status that the financial institution will no longer be approved to hold such trust accounts.~~

~~(c) The State Bar of Michigan shall establish guidelines regarding the process of approving and terminating "approved status" for financial institutions, and for other operational procedures to effectuate this rule in consultation with the Grievance Administrator. The State Bar of Michigan shall periodically publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that has not been so approved. Approved status under this rule does not substitute for "eligible financial institution" status under Rule 1.15.~~

~~(d) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the State Bar of Michigan:~~

~~(1) The identity of the financial institution~~

~~(2) The identity of the account holder~~

~~(3) The account number~~

~~(4) Information identifying the transaction item~~

~~(5) The amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid.~~

~~The financial institution must provide the information required by the notification agreement within five banking days after the date the item was paid or returned unpaid.~~

~~(e) Costs. The overdraft notification agreement must provide that a financial institution is not prohibited from charging the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTA accounts payable to the Michigan State Bar Foundation under Rule 1.15. Such costs, if charged, shall not be borne by clients.~~

~~(f) Notification by Lawyers. Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit was honored, shall, upon receipt of a request for investigation from the Grievance Administrator, provide the Grievance Administrator, in writing, within 21 days after issuance of such request, a full and fair explanation of the cause of the overdraft and how it was corrected.~~

~~(g) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the requirements mandated by this rule and shall be deemed to have consented under applicable privacy laws, including but not limited to those of the Gramm-Leach-Bliley Act, 15 USC 6801, to the reporting of information required by this rule.~~

Comment:

Review of Accounts. A lawyer must review the IOLTA at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively into a non-IOLTA.

Electronic Transfers. A lawyer may accept the electronic transfer of money for services if appropriate safeguards to protect confidentiality and client property are employed.

Approved Financial Institution. A bank, credit union, or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government or an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The State Bar of Michigan is authorized to approve financial institutions that have agreed to the Overdraft Notification Agreement and requirements of MRPC 1.15C. The State Bar of Michigan has established guidelines regarding the process of approving and terminating "approved status" for financial institutions, and for other operational procedures to effectuate this rule in consultation with the Grievance Administrator. The State Bar of Michigan must periodically publish a list of approved financial institutions. A lawyer may not maintain a trust account at a financial institution that has not been approved.

Eligible Institution. An approved financial institution that is deemed eligible to hold IOLTAs by the Michigan State Bar Foundation. Eligibility is determined based upon factors, including reporting requirements, remittance requirements, and comparable rate requirements, set forth in the Michigan State Bar Foundation IOLTA Handbook, as adopted by the Michigan Supreme Court. The financial institution may charge reasonable fees on IOLTA, including per transaction charges, per deposit charges, a fee in lieu of a

minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA administrative or maintenance fee. All other fees are the responsibility of the lawyer maintaining the IOLTA and cannot be charged to the client. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter must not be taken from interest or dividends earned on other IOLTA or from the principal of the account.

The Michigan State Bar Foundation must periodically publish a list of eligible institutions. A lawyer may not maintain an IOLTA at a financial institution that is not eligible.

[NEW] Rule 1.15B Lawyer Trust Account Records

(a) A lawyer has a duty to maintain ongoing and complete records of client trust accounts, for a period of five years after termination of representation, including

(1) a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, as well as the date, the payee, and purpose of each disbursement.

(2) for each separate trust client or third party,

(A) the source of all funds deposited;

(B) the date of each deposit;

(C) the names of all persons for whom the funds are or were held;

(D) the amount of such funds;

(E) the dates, descriptions, and amounts of charges or withdrawals; and

(F) the names of all persons or entities to whom funds were disbursed.

(3) copies of all accountings provided to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of client files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them.

(4) where applicable, all client trust account checkbook registers, check stubs, account statements, records of deposit, electronic transfer documents, and checks or other records of debits.

(5) all retainer and compensation agreements with clients.

(6) all bills rendered to clients for legal fees and expenses.

(7) appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

(b) Records required by this rule may be maintained by electronic, photographic, or other media provided that copies can be produced and the records are readily accessible to the lawyer.

Comment:

Recordkeeping. A lawyer must maintain books and records in accordance with this rule.

[NEW] Rule 1.15C Trust Account Overdraft Notification

(a) Scope. Lawyers who practice law in this jurisdiction must deposit all funds held in connection with a representation in trust, IOLTA or non-IOLTA, in accordance with Rule 1.15 and 1.15A.

(b) Requirements. Lawyers must only hold trust accounts, IOLTA or non-IOLTA, in an approved financial institution and comply with the following:

(1) For any trust account, the lawyer must complete and submit the applicable notice to financial institution form drafted and published by the Michigan State Bar Foundation or State Bar of Michigan, which constitutes notice to the depository institution that the account is subject to this rule.

(2) Lawyers must clearly identify any accounts in which funds are held in trust as “trust account,” “escrow account,” or “IOLTA”.

(c) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the Attorney Grievance Commission:

(1) the identity of the financial institution;

(2) the identity of the account holder;

(3) the account number;

(4) information identifying the transaction item; and

(5) the amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid. The financial institution must provide the information required by the notification agreement within five business days after the date the item was paid or returned unpaid.

(d) Costs. The overdraft notification agreement must provide that a financial institution may charge the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTAs payable to the Michigan State Bar Foundation under Rule 1.15A. Such costs, if charged, must not be borne by clients.

(e) Notification by Lawyers. Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account (overdraft notification), whether or not the instrument or other debit was honored, must, upon receipt of a request for investigation from the Grievance Administrator, provide the Grievance Administrator, in writing, within 21 days after issuance of such request, a full and fair explanation of the cause of the overdraft and how it was corrected.

(f) Every lawyer practicing or admitted to practice in this jurisdiction will be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

Staff Comment (ADM File No. 2022-19): The proposed amendments of MRPC 1.15 and 1.15A and proposed additions of MRPC 1.15B and 1.15C would amend the rules governing IOLTA accounts to: modernize the rules, address gaps in the existing rules, and clarify attorneys' ethical duties related to safekeeping client or third-party property and managing trust accounts.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted

Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-19. Your comments and the comments of others will be posted under the chapter affected by this proposal.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 13, 2023

Clerk

SBM STATE BAR OF MICHIGAN
p (517) 346-6300 Michael Franck Building www.michbar.org
p (800) 968-1442 306 Townsend Street
f (517) 482-6248 Lansing, MI 48933-2012

April 20, 2022

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of Rule 1.15 and 1.15A of the Michigan Rules of Professional Conduct Regarding Safekeeping of Client/Third Party Property and Managing Client Trust Accounts

Dear Clerk Royster:

The State Bar of Michigan ("SBM") recommends amending Rules 1.15 and 1.15A of the Michigan Rules of Professional Conduct ("MRPC") to modernize the rules, address gaps in the existing rules, and clarify attorneys' ethical duties related to safekeeping client or third-party property and managing client trust accounts.

Currently, Rules 1.15 and 1.15A are confusing, vague, and do not provide lawyers with adequate guidance regarding their ethical obligations. This has led to frequent questions from lawyers to the SBM Ethics Helpline, the Michigan Bar Foundation, and in numerous ethics seminars. In response, the SBM Standing Committee on Professional Ethics established a subcommittee to conduct a comprehensive review of these Rules. Ultimately, this subcommittee prepared a series of proposed amendments to Rules 1.15 and 1.15A and the associated commentary, and the addition of Rules 1.15B and 1.15C, which were supported unanimously by the full Professional Ethics Committee and overwhelmingly by the Representative Assembly at its April 9, 2022 meeting. The proposed amendments, fully set forth in Attachment A, reorganize the existing rules, clarify the language, and also propose a number of substantive changes, including:

Rule 1.15(c) and Comments: Unearned Fees and Disbursing Earned Fees

The current rules provide inadequate guidance to attorneys on the treatment of unearned fees and the ethical disbursement of earned fees. Rule 1.15(f) provides that a "lawyer may deposit the lawyer's own funds in a client trust account only in an amount reasonably necessary to pay financial institution service charges or fees or obtain a waiver of service charges or fees," and Rule 1.15(g) provides that "[l]egal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred." The SBM Client Protection Fund has received several complaints concerning attorneys misappropriating unearned fees. Ethics Opinion RI-69[1] provides that unearned fees, regardless of how titled, must remain in a trust account until earned. Despite this, many lawyers believe that if a fee is titled a "fixed" or "flat" fee, it need not be deposited into a trust account.

[1] https://www.michbar.org/opinions/ethics/numbered_opinions/RI-069.

This is not accurate; only nonrefundable fees are exempted from this requirement. See Ethics Opinions RI-10,[2] R-7,[3] and R-21.[4] In addition, attorneys often have questions about when they should disburse earned fees out of a trust account. As an example, an attorney was recently found to commit professional misconduct by leaving funds in her IOLTA for a period longer than permitted by the rules. *Grievance Administrator v Lisa Jeanne Peterson*, 20-51-GA (ADB 2021).

SBM believes that additional guidance is needed for lawyers to clearly understand their ethical obligations regarding unearned fees and disbursing fees from trust accounts, and therefore proposes amending section Rule 1.15(g)—section (c) under the proposed amendments—to allow lawyers a reasonable time to disburse earned fees and expenses. The proposed comments further clarify that, regardless of how the funds are titled, "a flat fee, fixed fee, retainer, or other title, if the funds are not yet earned, the funds must be deposited into an IOLTA or non-IOLTA." The proposed comments also clarify that 30 days is presumed reasonable for a lawyer to disburse earned fees.

Rule 1.15(d) and Comments: Safekeeping of Property

The SBM Ethics Helpline has received numerous questions from attorneys about what client property must be held in a trust account. Rule 1.15(d) currently provides that

> A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

SBM believes that "in connection with a representation" is unnecessarily vague and can be misinterpreted to cover matters completely unrelated to the practice of law. Therefore, SBM proposes that the comments be amended to clarify that "[t]he obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services."

Rule 1.15 Comments: Inability to Locate Rightful Owner

Frequently, lawyers are uncertain what to do with property when unable to locate the rightful owner. SBM's proposed comments to Rule 1.15 incorporate the language in RI-38[5] and explain that "[i]f the lawyer is unable to locate the rightful owner of funds held in the lawyer's trust account after making reasonable efforts to locate the owner, the lawyer must comply with the Michigan Uniform Unclaimed Property Act, MCL 567.221, *et seq*."

[2] https://www.michbar.org/opinions/ethics/numbered_opinions/RI-010.
[3] https://www.michbar.org/opinions/ethics/numbered_opinions/R-007.
[4] https://www.michbar.org/opinions/ethics/numbered_opinions/R-021.
[5] https://www.michbar.org/opinions/ethics/numbered_opinions/ri-038.

Rule 1.15A Comments: Electronic Transfers

SBM proposes modernizing Rule 1.15A to provide that a "lawyer may accept the electronic transfer of money for services if appropriate safeguards to protect confidentiality and client property are employed."

Proposed Rule 1.15B: Lawyer Trust Account Records

SBM proposes the addition of a new Rule 1.15B to provide needed guidance on trust account records—consistent with the ethical guidance already provided in Ethics Opinion R-7[6]—to help lawyers understand what is expected to avoid discipline and to be prepared in the event of a request for production of records in a grievance proceeding.

Proposed Rule 1.15C: Trust Account Overdraft Notification

SBM proposes the addition of Rule 1.15C to clarify and reorganize provisions currently located in Rule 1.15A concerning trust account overdraft notifications.

We appreciate your consideration of this proposal. It is our hope that the Court will publish the proposed amendments to the Michigan Rules of Professional Conduct for comment and ultimate adoption.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Nicholas M. Ohanesian, Representative Assembly Chair

[6] https://www.michbar.org/opinions/ethics/numbered_opinions/R-007.

ATTACHMENT A

Rule 1.15. Safekeeping Property.

~~(a) Definitions.~~

~~(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.~~

~~(2) An "eligible institution" for IOLTA accounts is a bank, credit union, or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.~~

~~(3) "IOLTA account" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, at an eligible institution from which funds may be withdrawn upon request as soon as permitted by law. An IOLTA account shall include only client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.~~

~~(4) "Non-IOLTA account" refers to an interest- or dividend-bearing account from which funds may be withdrawn upon request as soon as permitted by law in banks, savings and loan associations, and credit unions authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government. Such an account shall be established as:~~

~~(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or~~

~~(B) a pooled client trust account with subaccounting by the bank or savings and loan association or by the lawyer, which will provide for computation of net interest or dividend earned by each client or third person's funds and the payment thereof to the client or third person.~~

~~(5) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.~~

~~(b) A lawyer shall:~~

~~(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;~~

~~(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and~~

~~(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.~~

~~(c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.~~

(~~d~~a) A lawyer ~~shall~~must hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All client or third person funds ~~shall~~must be ~~deposited in an IOLTA or non-IOLTA account~~kept in a trust account in accordance with MRPC 1.15A. Other property ~~shall~~must be identified as such and appropriately safeguarded. Complete records of such account funds and other property must be kept by the lawyer and must be preserved in accordance with MRPC 1.15B.

~~(e) In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:~~

~~(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of~~

~~(a) the amount of the funds to be deposited;~~

~~(b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and~~

~~(c) the rates of interest or yield at financial institutions where the funds are to be deposited;~~

~~(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;~~

~~(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and~~

~~(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.~~

(~~f~~b) Except as otherwise provided herein, only client or third-party funds may be held in a trust account. A lawyer may deposit or retain the lawyer's own funds in a client trust account for the sole purpose of paying or avoiding a financial institution's ~~only in an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of~~ service charges on that account, but only in an amount reasonably necessary for that purpose ~~or fees~~.

(c) A lawyer must deposit into a client trust account legal fees and expenses that have been paid in advance of services rendered, to be withdrawn by the lawyer only as fees are earned or expenses incurred. Funds belonging to the lawyer must be disbursed to the lawyer within a reasonable time after the fee is earned and the client has been billed, has had an opportunity to dispute the disbursement, or otherwise has agreed to the disbursement.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer must promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer must promptly render a full accounting regarding such property.

(e) When in the course of representation, a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim interests, the property must be kept separate by the lawyer until the dispute is resolved. The lawyer must promptly distribute all portions of the property as to which the interests are not in dispute.

~~(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred.~~

~~(h) No interest or dividends from the client trust account shall be available to the lawyer.~~

~~(i) The lawyer shall direct the eligible institution to:~~

~~(1) remit the interest and dividends from an IOLTA account, less allowable reasonable fees, if any, to the Michigan State Bar Foundation at least quarterly;~~

~~(2) transmit with each remittance a report that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and~~

~~(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.~~

~~(j) A lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA account is not reviewable by a disciplinary body. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA account.~~

Comments:

Fiduciary Capacity. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

Fiduciary Obligation. A lawyer must hold property of others with the care required of a professional fiduciary. All property belonging to a client or a third person must be kept separate from the lawyer's business and personal property and, if funds, must be kept in one or more trust accounts. See MRPC 1.15A(a).

Reasonable Time for Disbursing Earned Fees. Depending on the circumstances, disbursement of earned fees from the trust account within a period of thirty days is presumed to be reasonable under paragraph (c).

Recordkeeping. A lawyer must maintain, on a regular basis, books, and records in accordance with MRPC 1.15B.

Minimum Balance. A lawyer may maintain funds in the account to maintain a minimum balance or pay financial institution service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's funds.

Disputed Funds. A third person, such as a client's creditors, may have a just claim against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such a third-party claim against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person. The disputed portion of the funds must be held in the trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds or other property must be promptly distributed.

Disputed Other Property. The lawyer should keep separate all other property held in safekeeping for which the ownership is in dispute and suggest means for prompt resolution of the dispute.

Fees Paid in Advance. Whether titled a flat fee, fixed fee, retainer, or other title, if the funds are not yet earned, the funds must be deposited into an IOLTA or non-IOLTA. If a lawyer-client relationship is terminated before all services are rendered but after payment of a fixed fee, the lawyer shall refund any portion of the fee which has not been earned. *Plunkett v Capitol Bancorp*, 212 Mich App 325 (1995). An agreement for delivery of legal services for a fixed fee may provide that certain portions of the fee are earned by the lawyer based upon the passage of time, the completion of certain tasks, or any other basis mutually agreed upon by the lawyer and client.

Inability to Locate Rightful Owner. If the lawyer is unable to locate the rightful owner of funds held in the lawyer's trust account after making reasonable efforts to locate the owner, the lawyer must comply with the Michigan Uniform Unclaimed Property Act, MCL 567.221, *et seq.*

Rule 1.15A. Lawyer Trust Accounts ~~Overdraft Notification~~.

(a) Type of Account. All client or third person funds in connection with a representation must be deposited in a client trust account, which is either an Interest on Lawyer Trust Account (IOLTA) or non-IOLTA.

(1) "IOLTA" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, held at an eligible and approved financial institution, from which funds may be withdrawn upon request as soon as permitted by law, and interest is paid to the Michigan State Bar Foundation. An IOLTA may only hold client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.

(2) "Non-IOLTA" refers to an interest- or dividend-bearing account held at an approved financial institution, from which funds may be withdrawn upon request as soon as permitted by law. A non-IOLTA must be:

(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or

(B) a pooled client trust account with subaccounting by the financial institution or by the lawyer, which provides for computation of net interest or dividend earned by each client or third person's funds and the payment of interest or dividend to the client or third person.

~~Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.~~

~~(1) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.~~

~~(2) For any trust account which is an IOLTA account pursuant to Rule 1.15, the "Notice to Eligible Financial Institution" shall constitute notice to the depository institution that such account is subject to this rule. Lawyers shall clearly identify any other accounts in which funds are held in trust as "trust" or "escrow" accounts, and lawyers must inform the depository institution in writing that such other accounts are trust accounts for the purposes of this rule.~~

(b) In determining whether client or third person funds should be deposited in an IOLTA or a non-IOLTA, a lawyer must consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of

(A) the amount of the funds to be deposited;

(B) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and

(C) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTAs for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of the financial institution or lawyer to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

(c) A lawyer's good-faith decision, after considering the factors set forth in paragraph (b), regarding the deposit or holding of such funds in an IOLTA or non-IOLTA is not reviewable by a disciplinary body.

(d) Interest or dividends from any client trust account cannot be available to the lawyer.

~~Overdraft Notification Agreement Required. In addition to meeting the requirements of Rule 1.15, each bank, credit union, savings and loan association, savings bank, or open-end investment company registered with the Securities and Exchange Commission (hereinafter "financial institution") referred to in Rule 1.15 must be approved by the State Bar of Michigan in order to serve as a depository for lawyer trust accounts. To apply for approval, financial institutions must file with the State Bar of Michigan a signed agreement, in a form provided by the State Bar of Michigan, that it will submit the reports required in paragraph (d) of this rule to the Grievance Administrator and the trust account holder when any properly payable instrument is presented against a lawyer trust account containing insufficient funds or when any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit is honored and irrespective of any overdraft protection or other similar privileges that may attach to such account. The agreement shall apply to the financial institution for all of its locations in Michigan and cannot be canceled except on 120 days notice in writing to the State Bar of Michigan. Upon notice of cancellation or termination of the agreement, the financial institution must notify all holders of trust accounts subject to the provisions of this rule at least 90 days before termination of approved status that the financial institution will no longer be approved to hold such trust accounts.~~

~~The State Bar of Michigan shall establish guidelines regarding the process of approving and terminating "approved status" for financial institutions, and for other operational procedures to effectuate this rule in consultation with the Grievance Administrator. The State Bar of Michigan shall periodically publish a list of approved financial institutions. No trust account shall be~~

maintained in any financial institution that has not been so approved. Approved status under this rule does not substitute for "eligible financial institution" status under Rule 1.15.

(d) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the State Bar of Michigan:

(1) The identity of the financial institution

(2) The identity of the account holder

(3) The account number

(4) Information identifying the transaction item

(5) The amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid.

The financial institution must provide the information required by the notification agreement within five banking days after the date the item was paid or returned unpaid.

(e) Costs. The overdraft notification agreement must provide that a financial institution is not prohibited from charging the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTA accounts payable to the Michigan State Bar Foundation under Rule 1.15. Such costs, if charged, shall not be borne by clients.

(f) Notification by Lawyers. Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit was honored, shall, upon receipt of a request for investigation from the Grievance

~~Administrator, provide the Grievance Administrator, in writing, within 21 days after issuance of such request, a full and fair explanation of the cause of the overdraft and how it was corrected.~~

~~(g) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the requirements mandated by this rule and shall be deemed to have consented under applicable privacy laws, including but not limited to those of the Gramm-Leach-Bliley Act, 15 USC 6801, to the reporting of information required by this rule.~~

Comments:

Review of Accounts. A lawyer must review the IOLTA at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA.

Electronic Transfers. A lawyer may accept the electronic transfer of money for services if appropriate safeguards to protect confidentiality and client property are employed.

Approved Financial Institution. A bank, credit union, or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government; or an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The State Bar of Michigan is authorized to approve financial institutions that have agreed to the Overdraft Notification Agreement and requirements required in MRPC 1.15D. The State Bar of Michigan has established guidelines regarding the process of approving and terminating "approved status" for financial institutions, and for other operational procedures to effectuate this rule in consultation with the Grievance Administrator. The State Bar of Michigan must periodically publish a list of approved financial institutions. A lawyer may not maintain a trust account at a financial institution that has not been approved.

Eligible Institution. An approved financial institution that is deemed eligible to hold IOLTAs by the Michigan State Bar Foundation. Eligibility is determined based upon factors, including reporting

requirements, remittance requirements, and comparable rate requirements, set forth in the Michigan State Bar Foundation IOLTA Handbook, as adopted by the Michigan Supreme Court. The financial institution may charge reasonable fees on IOLTA, including per transaction charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA administrative or maintenance fee. All other fees are the responsibility of the lawyer maintaining the IOLTA and cannot be charged to the client. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter must not be taken from interest or dividends earned on other IOLTA or from the principal of the account.

The Michigan State Bar Foundation must periodically publish a list of eligible institutions. A lawyer may not maintain an IOLTA at a financial institution that is not eligible.

MRPC 1.15B. Lawyer Trust Account Records

(a)A lawyer has a duty to maintain ongoing and complete records of client trust accounts, for a period of five years after termination of representation, including

(1) a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, as well as the date, the payee, and purpose of each disbursement.

(2) for each separate trust client or third party,

(A) the source of all funds deposited;

(B) the date of each deposit;

(C) the names of all persons for whom the funds are or were held;

(D) the amount of such funds;

(E) the dates, descriptions, and amounts of charges or withdrawals; and

(F) the names of all persons or entities to whom funds were disbursed.

(3) copies of all accountings provided to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of client files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them.

(4) where applicable, all client trust account checkbook registers, check stubs, account statements, records of deposit, electronic transfer documents, and checks or other records of debits.

(5) all retainer and compensation agreements with clients.

(6) all bills rendered to clients for legal fees and expenses.

(7) appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

(b) Records required by this Rule may be maintained by electronic, photographic, or other media provided that copies can be produced and the records are readily accessible to the lawyer.

MRPC 1.15C. Trust Account Overdraft Notification

(a) Scope. Lawyers who practice law in this jurisdiction must deposit all funds held in connection with a representation in trust, IOLTA or non-IOLTA, in accordance with Rule 1.15 and 1.15A.

(b) Requirements. Lawyers must only hold trust accounts, IOLTA or non-IOLTA, in an approved financial institution and comply with the following:

(1) For any trust account, the lawyer must complete and submit the applicable notice to financial institution form drafted and published by the Michigan State Bar Foundation or State Bar of Michigan, which constitutes notice to the depository institution that the account is subject to this rule.

(2) Lawyers must clearly identify any accounts in which funds are held in trust as "trust account," "escrow account," or "IOLTA".

(c) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the Attorney Grievance Commission:

(1) The identity of the financial institution;

(2) The identity of the account holder;

(3) The account number;

(4) Information identifying the transaction item; and

(5) The amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid. The financial institution must provide the information required by the notification agreement within five business days after the date the item was paid or returned unpaid.

(d) Costs. The overdraft notification agreement must provide that a financial institution may charge the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTAs payable to the Michigan State Bar Foundation under Rule 1.15A. Such costs, if charged, shall not be borne by clients.

(e) Notification by Lawyers. Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account (overdraft notification), whether or not the instrument or other debit was honored, must, upon receipt of a request for information or investigation from the Grievance Administrator, provide the Grievance Administrator, in writing, within 21 days after issuance of such request, a full and fair explanation of the cause of the overdraft and how it was corrected.

(f) Every lawyer practicing or admitted to practice in this jurisdiction shall be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

Order

Michigan Supreme Court
Lansing, Michigan

September 20, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2023-24

Proposed Amendment of Rule 3.701
and Proposed Additions of Rules 3.715,
3.716, 3.717, 3.718, 3.719, 3.720, 3.721,
and 3.722 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.701 and additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Subchapter 3.700 Personal Protection and Extreme Risk Protection Proceedings

Rule 3.701 Applicability of Rules: Forms

(A) Scope. Except as provided by this subchapter and the provisions of MCL 600.2950, ~~and~~ MCL 600.2950a, and MCL 691.1801 to MCL 691.1821, actions for personal protection for relief against domestic violence or stalking and actions for extreme risk protection are governed by the Michigan Court Rules. Procedure related to personal protection orders against adults is governed by MCR 3.702 to MCR 3.709, and procedure related to extreme risk protection is governed by MCR 3.715 to MCR 3.722~~this subchapter~~. Procedure related to personal protection orders against minors is governed by subchapter 3.900, except as provided in MCR 3.981.

(B) Forms. The state court administrator shall approve forms for use in personal protection act proceedings and for use in extreme risk protection act proceedings. The forms shall be made available for public distribution by the clerk of the circuit court.

[NEW] Rule 3.715 Definitions

When used in MCR 3.716-3.722, unless the context otherwise indicates:

(1) "Existing action" means an action in any court in which both the petitioner and the respondent are parties; existing action includes, but is not limited to, pending and completed domestic relations actions, and other actions for personal protection or extreme risk protection orders.

(2) "Extreme risk protection order" means that term as defined in MCL 691.1803.

(3) "Family member," "guardian," "health care provider," and "law enforcement officer," mean those terms as defined in MCL 691.1803.

(4) "Minor" means a person under the age of 18.

(5) "Petition" means a pleading for commencing an independent action for extreme risk protection and is not considered a motion as defined in MCR 2.119.

(6) "Petitioner" means the party seeking an extreme risk protection order.

(7) "Respondent" means the party to be restrained by the extreme risk protection order.

[NEW] Rule 3.716 Commencing an Extreme Risk Protection Action

(A) Filing.

(1) An extreme risk protection action is an independent action commenced by filing a petition with the family division of the circuit court. A petition may be filed regardless of whether the respondent owns or possesses a firearm. A proposed extreme risk protection order must be prepared on a form approved by the State Court Administrative Office and submitted at the same time as the petition. When completing the proposed order, the petitioner must complete the case caption and the known fields with identifying information, including the race, sex, and date of birth or age of the respondent. The personal identifying information form approved by the State Court Administrative Office does not need to be completed or filed in extreme risk protection actions. There are no fees for filing an extreme risk protection action, and no summons is issued. An extreme risk protection action may

not be commenced by filing a motion in an existing case or by joining a claim to an action.

(2) An extreme risk protection action may only be commenced by the following individuals:

(a) the spouse of the respondent;

(b) a former spouse of the respondent;

(c) an individual who:

(i) has a child in common with the respondent,

(ii) has or has had a dating relationship with the respondent, or

(iii) resides or has resided in the same household with the respondent;

(d) a family member;

(e) a guardian of the respondent;

(f) a law enforcement officer; or

(g) a health care provider, if filing and maintaining the action does not violate requirements of the health insurance portability and accountability act of 1996, Public Law 104-191, or regulations promulgated under that act, 45 CRF parts 160 and 164, or physician-patient confidentiality.

(B) Petition in General. The petition must

(1) be in writing;

(2) state the respondent's name and address;

(3) state with particularity the facts that show the issuance of an extreme risk protection order is necessary because the respondent

(a) can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and

(b) has engaged in an act or acts or made significant threats that substantially support the expectation in subrule (3)(a).

(4) if known by the petitioner, state if any following circumstances are applicable:

(a) the respondent is required to carry a pistol as a condition of the respondent's employment and is issued a license to carry a concealed pistol,

(b) the respondent is any of the following:

(i) police officer licensed or certified under the Michigan Commission on Law Enforcement Standards Act (MCOLES), MCL 28.601 to MCL 28.615,

(ii) sheriff or deputy sheriff,

(iii) member of the Department of State Police,

(iv) local corrections officer,

(v) employee of the Michigan Department of Corrections, or

(vi) federal law enforcement officer who carries a pistol during the normal course of the officer's employment or an officer of the Federal Bureau of Prisons,

(c) if the petitioner knows or believes that the respondent owns or possesses firearms, the petitioner must state that in the petition and, to the extent possible, identify the firearms, giving their location and any additional information that would help a law enforcement officer find the firearms;

(5) state the relief sought;

(6) state whether an ex parte order is being sought;

(7) state whether an extreme risk protection action involving the respondent has been commenced in another jurisdiction; and

(8) be signed by the party or attorney as provided in MCR 1.109(E).

The petitioner's address must not be disclosed in any pleading, paper, or in any other manner. The petitioner must provide the court with their address and contact information in the form and manner established by the State Court Administrative Office. The clerk of the court must maintain the petitioner's address as confidential in the court file.

(C) Petition Against a Minor. In addition to the requirements outlined in subrule (B), a petition against a minor must also list, if known or can be easily ascertained, the names and addresses of the minor's parent(s), guardian, or custodian.

(D) Other Pending Actions; Order, Judgments.

(1) The petition must specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number, if known.

(a) If the petition is filed in the same court as a pending action or where an order or judgment has already been entered by that court affecting the parties, it shall be assigned to the same judge.

(b) If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court may contact the court where the pending actions were filed or orders or judgments were entered, if practicable, to determine any relevant information.

(2) If the prior action resulted in an order providing for continuing jurisdiction of a minor, and the new action requests relief with regard to the minor, the court must comply with MCR 3.205.

(E) Venue.

(1) If the respondent is an adult, the petitioner may file an extreme risk protection action in any county in Michigan regardless of the parties' residency or location.

(2) If the respondent is a minor, the petitioner must file an extreme risk protection action in either the petitioner's or respondent's county of residence.

(3) If the respondent does not live in Michigan, the petitioner must file an extreme risk protection order in the petitioner's county of residence.

(F) Minor or Legally Incapacitated Individual as Petitioner.

(1) If a petitioner is a minor or a legally incapacitated individual, the petitioner shall proceed through a next friend. The petitioner shall certify that the next friend is not disqualified by statute and that the next friend is an adult.

(2) Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment. However, the court shall appoint a next friend if the minor is less than 14 years of age.

[NEW] Rule 3.717 Dismissal

Except as specified in MCR 3.718(A)(5), MCR 3.718(D), and MCR 3.720, an action for an extreme risk protection order may only be dismissed upon motion by the petitioner prior to the issuance of an order. There is no fee for such a motion.

[NEW] Rule 3.718 Issuing Extreme Risk Protection Orders

(A) Ex Parte Orders. Except as otherwise provided in this rule:

(1) The court must rule on a request for an ex parte order within one business day of the filing date of the petition.

(2) An ex parte order must be granted if it clearly appears from the specific facts shown by a verified, written petition that

(a) by a preponderance of the evidence after considering the factors identified in MCL 691.1807(1), the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that substantially support the expectation that the respondent will intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm; and

(b) there is clear and convincing evidence that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before an order can be issued.

(3) An ex parte order expires one year after the date of issuance.

(4) If an ex parte order is entered, the petition and order must be served as provided in MCR 3.719(B). However, failure to make service does not affect the order's validity or effectiveness.

(5) If the court refuses to grant an ex parte order, it must state the reasons in writing and advise the petitioner of the right to request a hearing as provided in subrule (D). If the petitioner does not request a hearing within 21 days of entry of the order, the order denying the petition is final. The court is not required to give such notice if the court determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit that the action should be dismissed without a hearing.

(B) Immediate Emergency Ex Parte Orders.

(1) A petitioner who is a law enforcement officer may verbally request by telephone that the court immediately issue an emergency ex parte order under subrule (A) if the officer is responding to a complaint involving the respondent and the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the respondent or another individual by possessing a firearm.

(2) The court must immediately rule on a verbal request made under this subrule and, if the court issues an immediate emergency ex parte order,

(a) the officer must notify the respondent of the court's order and advise where they can obtain a copy of the order;

(b) within one business day, the officer must file a sworn written petition detailing the facts and circumstances presented verbally to the court; and

(c) if the officer does not file the petition within one business day, the court must

(i) terminate the immediate emergency ex parte order,

(ii) order that the respondent, subject to the restrictions in MCL 691.1815, may reclaim any seized firearm(s), and

(iii) dismiss the case.

(C) Anticipatory Search Warrant. If the court orders the firearms immediately surrendered, the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) may file an affidavit requesting that the court issue an anticipatory search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition. An anticipatory search warrant issued under this subrule must be subject to and contingent on the failure or refusal of the respondent, following service of the order, to immediately comply with the order and immediately surrender to a law enforcement officer any firearm or concealed pistol license in the individual's possession or control.

(D) Hearing.

(1) The court must expedite and give priority to hearings required by the extreme risk protection act.

(2) The court must schedule a hearing for the issuance of an extreme risk protection order in the following instances:

(a) the petition does not request an ex parte order;

(b) the court refuses to enter an ex parte order and the petitioner timely requests a hearing; or

(c) the court entered an ex parte order and the respondent requests a hearing.

(3) If the court enters an ex parte order or an immediate emergency ex parte order and the respondent requests a hearing, the hearing must occur

(a) unless subrule (3)(b) applies, within 14 days of the request for a hearing; or

(b) within 5 days of the request for a hearing if the respondent is an individual described in MCL 691.1805(5).

(4) The petitioner must serve on the respondent the petition and notice of the hearing as provided in MCR 2.105(A), for a hearing scheduled under subrules (D)(2)(a)-(b). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian are known, the petitioner shall also in the same manner serve the petition and notice of the hearing on

the respondent's parent(s), guardian, or custodian. The clerk of the court must serve the respondent's request for a hearing under subrule (D)(2)(c) on the petitioner, as provided in MCR 2.107(C), due to the confidential nature of the petitioner's address. If the respondent is a person described in MCL 691.1805(5), providing notice one day before the hearing is deemed as sufficient notice to the petitioner.

(5) The hearing must be held on the record. In accordance with MCR 2.407 and MCR 2.408, the court may allow the use of videoconferencing technology.

(6) The petitioner must attend the hearing and carries the burden of proving, by a preponderance of the evidence, that the respondent can reasonably be expected within the near future to, intentionally or unintentionally, seriously physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation. If the petitioner fails to attend the hearing, the court may adjourn and reschedule the hearing or dismiss the petition.

(7) If the respondent fails to appear at a hearing on the petition under subrules (D)(2)(a)-(b) and the court determines the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the order may be entered without further notice to the respondent if the court determines an extreme risk protection order is necessary. If the respondent fails to appear at a hearing on the petition requested under subrule (D)(2)(c), the court may adjourn and reschedule the hearing or continue the order without further hearing.

(8) At the hearing, the court must consider the factors identified in MCL 691.1807(1) and state on the record the reasons for granting, denying, or continuing an extreme risk protection order and enter an appropriate order. Additionally, the court must immediately state the reasons for granting, denying, or continuing an extreme risk protection order in writing.

[NEW] Rule 3.719 Orders

(A) Form and Scope of Order. An order granting an extreme risk protection order must include the following provisions:

(1) Respondent Responsibilities. The respondent must complete the filing requirements contained in subrule (D)(1) within one business day after the respondent receives a copy of the extreme risk protection order or has actual notice of the order. A failure to comply with the filing requirements may

subject the respondent to contempt of court proceedings and immediate arrest.

(2) Purchase/Possession of Firearms. The respondent must not purchase or possess a firearm. If the respondent has been issued a license under MCL 28.422 that the respondent has not used and that is not yet void, the respondent must not use it and must surrender it to the law enforcement agency designated under MCL 691.1809(1)(g).

(3) Concealed Carry Licenses. The respondent must not apply for a concealed pistol license. If the respondent has been issued a license to carry a concealed pistol, the license will be suspended or revoked under MCL 28.428, once the extreme risk protection order is entered into the law enforcement information network (LEIN). The respondent must surrender the license to carry a concealed pistol as required by MCL 28.428.

(4) Firearm Surrender. The respondent must, within 24 hours or, at the court's discretion, immediately after being served with the order, surrender any firearms in the respondent's possession or control to the law enforcement agency designated under MCL 691.1809(1)(g) or, if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under MCL 691.1818.

If the court orders the respondent to immediately surrender the individual's firearms, the order must include a statement that the law enforcement agency designated under MCL 691.1809(1)(g) must proceed to seize the respondent's firearms after the respondent is served with or receives actual notice of the extreme risk protection order, after giving the respondent an opportunity to surrender the respondent's firearms. Unless the petitioner is a law enforcement officer or health care provider, there is a presumption that the respondent will have 24 hours to surrender the firearms.

(5) Firearm Description. If the petitioner has identified any firearms in the petition, a specific description of the firearms to be surrendered or seized.

(6) Hearing Request. If the extreme risk protection order was issued without written or oral notice to the respondent, the order must include a statement that the respondent may request and attend a hearing to modify or rescind the order. The hearing will be held within 14 days of the request for a hearing or, if the respondent is an individual described in MCL 691.1805(5), the hearing will be held within 5 days of the request for a hearing.

(7) Motions. A statement that the respondent may file a motion to modify or rescind the order as allowed under MCL 691.1801 *et seq*., and that motion forms and filing instructions are available from the clerk of the court.

(8) Law Enforcement Agency Designation. A designation of the law enforcement agency that is responsible for forwarding the order to the Federal Bureau of Investigation under MCL 691.1815(1). The designated law enforcement agency must be an agency within whose jurisdiction the respondent resides.

(9) LEIN Entry. Directions to a local entering authority or the law enforcement agency designated under MCL 691.1809(1)(g) to enter the order into LEIN.

(10) Order Violations. A statement that violating the order will subject the respondent to the following:

(a) immediate arrest;

(b) contempt of court;

(c) an automatic extension of the order; and

(d) criminal penalties, including imprisonment for up to one year for an initial violation and up to five years for a subsequent violation.

(11) Right to Attorney. A statement that the respondent has the right to seek the advice of an attorney.

(12) Expiration Date. An expiration date that is one year after the date of issuance.

(B) Service.

(1) Except as provided in subrule (B)(2), the petitioner must serve the order on the respondent as provided in MCR 2.105(A). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian is known, the petitioner must also in the same manner serve the order on the respondent's parent(s), guardian, or custodian. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J). Failure to serve the order does not affect its validity or effectiveness.

(2) If the court ordered the immediate surrender of the respondent's firearms, the order must be served personally by a law enforcement officer.

(3) Proof of service must be filed with the court within one business day after service.

(C) Oral Notice. If oral notice of the order is made by a law enforcement officer as described in MCL 691.1813(3), proof of the notification must be filed with the court by the law enforcement officer within one business day after the notification.

(D) Respondent Responsibilities.

(1) Not later than one business day after the respondent receives a copy of the extreme risk protection order or has actual notice of the order, the respondent must do one of the following:

(a) File with the court that issued the order one or more documents or other evidence verifying that all of the following are true:

(i) All firearms previously in the respondent's possession or control were surrendered to or seized by the local law enforcement agency designated under MCL 691.1809(1)(g), or, if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under MCL 691.1818.

(ii) Any concealed pistol license was surrendered to the county clerk as required by the order and MCL 28.428.

(iii) At the time of the verification, the respondent does not have any firearms or a concealed pistol license in the respondent's possession or control.

(b) File with the court that issued the order one or more documents or other evidence verifying that both of the following are true:

(i) At the time the order was issued, the respondent did not have a firearm or concealed pistol license in the respondent's possession or control.

(ii) At the time of the verification, the respondent does not have a firearm or concealed pistol license in the respondent's possession or control.

(2) Failure to File. The clerk of the court must review the proof of service filed with the court and determine whether the respondent has complied with the filing requirements of subrule (D)(1). If the respondent has not complied

with the filing requirements of subrule (D)(1), the clerk and the court must take the following actions:

(a) Clerk of the Court. The clerk of the court must notify the local law enforcement agency identified in MCL 691.1809(1)(g) of the failure to comply with the filing requirements. If this notice is provided, the clerk of the court must again notify the local law enforcement agency when the respondent has complied with the filing requirements.

(b) Court. The court must issue either a bench warrant or an order to show cause to initiate contempt proceedings as identified in MCR 3.721. If issuing an order to show cause, the hearing must be scheduled within 5 days of the date the proof of service is filed with the court. The court may recall the bench warrant or cancel the order to show cause if the respondent makes the required filings identified in subrule (D)(1). If the respondent fails to appear for the show cause hearing, the court must issue a bench warrant.

If the court issues a bench warrant under this subrule, a law enforcement officer may file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition.

(E) Clerk of the Court Responsibilities. The clerk of the court that issues an extreme risk protection order must complete the actions identified in MCL 691.1811.

[NEW] Rule 3.720 Modification, Termination, or Extension of Order

(A) Modification or Termination.

(1) Time for Filing and Number of Motions.

(a) The petitioner may file a motion to modify or terminate the extreme risk protection order and request a hearing at any time after the extreme risk protection order is issued.

(b) The respondent may file one motion to modify or terminate an extreme risk protection order during the first six months that the order is in effect and one motion during the second six months that the order is in effect. If the order is extended under subrule (B), the respondent

may file one motion to modify or terminate the order during the first six months that the extended order is in effect, and one motion during the second six months that the extended order is in effect. If the respondent files more than one motion during these times, the court shall review the motion before a hearing is held and may summarily dismiss the motion without a response from the petitioner and without a hearing.

(c) The moving party carries the burden and must prove by a preponderance of the evidence that the respondent no longer poses a risk to seriously physically injure another individual or the respondent by possessing a firearm.

(2) Service. The nonmoving party must be served, as provided in MCR 2.107 at the mailing address or addresses provided to the court, the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve the respondent's motion on the petitioner due to the confidential nature of the petitioner's address.

(3) Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate an extreme risk protection order within 14 days of the filing of the motion.

(4) Notice of Modification or Termination. If an extreme risk protection order is modified or terminated, the clerk must immediately notify the law enforcement agency specified in the extreme risk protection order of the change. A modified or terminated order must be served on the respondent as provided in MCR 2.107.

(5) If the extreme risk protection order expires or is terminated, the court must order, subject to the restrictions in MCL 691.1815, that the respondent may reclaim any seized firearm(s). Upon the motion of the respondent, the court may also order, at any time, the transfer of the respondent's firearm(s) seized by law enforcement under the extreme risk protection order to a licensed firearm dealer if the respondent sells or transfers ownership of the firearm to the dealer.

(B) Extension of Order.

(1) Motions.

(a) Time for Filing and Service. Upon motion by the petitioner or the court's own motion, the court may issue an extended extreme risk protection order that is effective for one year after the expiration of the preceding order. The respondent must be served the motion to extend the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.107 at the mailing address or addresses provided to the court. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve both the petitioner and respondent if upon the court's own motion. Failure to timely file a motion to extend the effectiveness of the order does not preclude the petitioner from commencing a new extreme risk protection action regarding the same respondent, as provided in MCR 3.716.

(b) Legal Standard. The court shall only issue the extended order under this subrule if the preponderance of the evidence shows the restrained individual can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.

(2) Automatic Extensions. If the court or a jury finds that the respondent has refused or failed to comply with an extreme risk protection order, the court that issued the order must issue an extended extreme risk protection order effective for 1 year after the expiration of the preceding order.

(3) Notice of Extension. If the court issues an extended extreme risk protection order, it must enter an amended order. The clerk must immediately notify the law enforcement agency specified in the extreme risk protection order if the court enters an amended order. The petitioner must serve an amended order on the respondent as provided in MCR 2.107.

(C) Minors and Legally Incapacitated Individuals. Petitioners or respondents who are minors or legally incapacitated individuals must proceed through a next friend, as provided in MCR 3.716(F).

(D) Fees. There are no motion fees for modifying, terminating, or extending an extreme risk protection order.

[NEW] Rule 3.721 Contempt Proceedings for Violation of Extreme Risk Protection Orders

(A) In General. An extreme risk protection order is enforceable under MCL 691.1810(4)-(5), MCL 691.1815(4), and MCL 691.1819.

(B) Motion to Show Cause.

(1) Filing. If the respondent violates the extreme risk protection order, the prosecuting attorney for the county in which the order was issued or a law enforcement officer may file a motion, supported by appropriate affidavit, to have the respondent found in contempt. There is no fee for such a motion. If the motion and affidavit establish probable cause for a finding of contempt, the court must either:

(a) order the respondent to appear at a specified time to answer the contempt charge; or

(b) issue a bench warrant for the arrest of the respondent.

(2) Service. If issuing an order to show cause, the hearing must be held within 5 days. The prosecuting attorney or law enforcement officer must serve the motion to show cause and the order on the respondent and petitioner as provided in MCR 2.107.

(C) Search Warrant. If the violation alleges that the respondent has a firearm or concealed pistol license in the respondent's possession or control, a law enforcement officer or prosecuting attorney may also file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition.

(D) Arraignment; Advice to Respondent.

At the respondent's first appearance before the court for arraignment on contempt of court, the court must:

(1) advise the respondent

(a) of the alleged violation,

(b) of the right to contest the charge at a contempt hearing, and

(c) that they are entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the

court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated an extreme risk protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one;

(2) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority;

(3) set a reasonable bond pending a hearing of the alleged violation; and

(4) take a guilty plea as provided in subrule (E) or schedule a hearing as provided in subrule (F).

(E) Pleas of Guilty. The respondent may plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the respondent and receiving the respondent's response, must:

(1) advise the respondent

(a) that by pleading guilty the respondent is giving up the right to a contested hearing, and if the respondent is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (D)(1)(c);

(b) of the maximum possible jail sentence for the violation; and

(c) that if they plead guilty to violating the extreme risk protection order, the court will automatically extend the duration of the extreme risk protection order for 1 year after the expiration of the preceding order;

(2) ascertain that the plea is understandingly, voluntarily, and knowingly made; and

(3) establish factual support for a finding that the respondent is guilty of the alleged violation.

(F) Scheduling or Postponing Hearing. Following the respondent's appearance or arraignment, the court shall do the following:

(1) Set a date for the hearing at the earliest practicable time.

(a) The hearing of a respondent being held in custody for an alleged violation of an extreme risk protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. The court must set a reasonable bond pending the hearing unless the court determines that release will not reasonably ensure the safety of the respondent or any other individual(s).

(b) If a respondent is released on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) necessary to reasonably ensure the safety of the respondent and other individuals, including continued compliance with the extreme risk protection order. The release order shall comply with MCL 765.6b.

(c) If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, upon motion of the prosecutor, the court may postpone the hearing for the outcome of that prosecution.

(2) Notify the prosecuting attorney of a contempt proceeding.

(3) Notify the petitioner and the petitioner's attorney, if any, and the law enforcement officer that filed the motion, if applicable, of the contempt proceeding and direct the party to appear at the hearing and give evidence on the charge of contempt.

(G) Prosecution After Arrest. If the court holds a contempt proceeding, the prosecuting attorney shall prosecute the proceeding.

(H) The Violation Hearing.

(1) Jury. There is no right to a jury trial.

(2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses.

(3) Evidence; Burden of Proof. The rules of evidence apply to both criminal and civil contempt proceedings. The prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by clear and convincing evidence.

(4) Judicial Findings. At the conclusion of the hearing, the court must find the facts specifically, state separately its conclusion of law, and direct entry of

the appropriate judgment. The court must state its findings and conclusion on the record or in a written opinion made a part of the record.

(5) Sentencing. If the respondent is found in contempt, the court may impose sanctions as provided by MCL 600.1701 *et seq.*

[NEW] Rule 3.722 Appeals

(A) Rules Applicable. Except as provided by this rule, appeals involving an extreme risk protection order must comply with subchapter 7.200.

(B) From Entry of Extreme Risk Protection Order.

(1) Either party has an appeal of right from:

(a) an order granting, denying, or continuing an extreme risk protection order after a hearing under MCR 3.718(D).

(b) an order granting or denying an extended extreme risk protection order after a hearing under MCR 3.720(B).

(2) Appeals of all other orders are by leave to appeal.

(C) From Finding After Violation Hearing. The respondent has an appeal of right from a judgment of sentence for criminal contempt entered after a contested hearing.

Staff Comment (ADM File No. 2023-24): The proposed amendments would offer procedural guidance to trial courts for implementing the Extreme Risk Protection Order (ERPO) Act, MCL 691.1801 *et seq*.

Note that the comment period for this proposal is slightly shorter than the typical three-month period so that this issue can be considered by the Court for adoption before the ERPO Act takes effect.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by December 1, 2023 by clicking on the

"Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-24. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J., would have declined to publish the proposal for comment.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 20, 2023

Clerk

Public Policy Position
ADM File No. 2023-24: Proposed Amendment of MCR 3.701 and Proposed Additions of MCR 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722

Support with Amendments

Explanation
The Committee voted to support ADM File No. 2023-24 with the amendments recommended jointly by the Family Law Section and the Michigan Judges Association.

Position Vote:
Voted For position: 17
Voted against position: 3
Abstained from vote: 2
Did not vote (absence): 9

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
ADM File No. 2023-24: Proposed Amendment of MCR 3.701 and Proposed Additions of MCR 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722

Support with Amendments

Explanation
The Court Rules Committee for the Family Law Council carefully compared the ERPO Act with the proposed ADM File to ensure that the court rules were consistent with the statute. The suggested amendments correct some grammatical errors, but mostly are designed to make the court rules a little more clear and in line with the content of the statute.

Position Vote:
Voted for position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Jennifer Johnsen
Email: jenjohnsen@westmichigandivorce.com

Order

September 20, 2023

ADM File No. 2023-24

Proposed Amendment of Rule 3.701
and Proposed Additions of Rules 3.715,
3.716, 3.717, 3.718, 3.719, 3.720, 3.721,
and 3.722 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.701 and additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Subchapter 3.700 Personal Protection and Extreme Risk Protection Proceedings

Rule 3.701 Applicability of Rules: Forms

(A) Scope. Except as provided by this subchapter and the provisions of MCL 600.2950., an4--MCL 600.2950a, and MCL 691.1801 to MCL 691.1821, actions for personal protection for relief against domestic violence or stalking and actions for extreme risk protection are governed by the Michigan Court Rules. Procedure related to personal protection orders against adults is governed by MCR 3.702 to MCR 3.709, and procedure related to extreme risk protection is governed by MCR 3.715 to MCR 3.722this subchapter. Procedure related to personal protection orders against minors is governed by subchapter 3.900, except as provided in MCR 3.981.

(B) Forms. The state court administrator shall approve forms for use in personal protection act proceedings and for use in extreme risk protection act proceedings. The forms shall be made available for public distribution by the clerk of the circuit court.

[NEW] Rule 3.715 Definitions

When used in MCR 3.716-3.722, unless the context otherwise indicates:

(1) "Existing action" means an action in any court in which both the petitioner and the respondent are parties; existing action includes, but is not limited to, pending and completed domestic relations actions, and other actions for personal protection or extreme risk protection orders.

(2) "Extreme risk protection order" means that term as defined m MCL 691.1803.

(3) "Family member," "guardian," "health care provider," and "law enforcement officer," mean those terms as defined in MCL 691.1803.

(4) "Minor" means a person under the age of 18.

(5) "Petition" means a pleading for commencing an independent action for extreme risk protection and is not considered a motion as defined in MCR 2.119.

(6) "Petitioner" means the party seeking an extreme risk protection order.

(7) "Respondent" means the party to be restrained by the extreme risk protection order.

[NEW] Rule 3.716 Commencing an Extreme Risk Protection Action

(A) Filing.

(1) An extreme risk protection action is an independent action commenced by filing a petition with the family division of the circuit court. A petition may be filed regardless of whether the respondent owns or possesses a firearm. A proposed extreme risk protection order must be prepared on a form approved by the State Court Administrative Office and submitted at the same time as the petition. When completing the proposed order, the petitioner must complete the case caption and the known fields with identifying information, including the race, sex, and date of birth or age of the respondent. The personal identifying information form approved by the State Court Administrative Office does not need to be completed or filed in extreme risk protection actions. There are no fees for filing an extreme risk protection action.~~, and no summons is issued.~~ An extreme risk protection action may

Commented [TYJ1]: The statute requires a summons. MCL 691.1805(3)

not be commenced by filing a motion in an existing case or by joining a claim to an action.

(2) An extreme risk protection action may only be commenced by the following individuals:

(a) the spouse of the respondent;

(b) a former spouse of the respondent;

(c) an individual who:

(i) has a child in common with the respondent,

(ii) has or has had a dating relationship with the respondent, or

(iii) resides or has resided in the same household with the respondent;

(d) a family member;

(e) a guardian of therespondent;

(f) a law enforcement officer; or

(g) a health care provider, if filing and maintaining the action does not violate requirements of the health insurance portability and accountability act of 1996, Public Law 104-191, or regulations promulgated under that act, 45 CRF parts 160 and 164, or physician-patient confidentiality.

(B) Petition in General. The petition must

(1) be in writing;

(2) state the respondent's name and address;

(3) state with particularity the facts that show the issuance of an extreme risk protection order is necessary because the respondent

(a) can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and

(b) has engaged in an act or acts or made significant threats that substantially support the expectation in subrule (3)(a).

(4) if known by the petitioner, state if any following circumstances are applicable:

(a) the respondent is required to carry a pistol as a condition of the respondent's employment and is issued a license to carry a concealed pistol,

(b) the respondent is any of the following:

(i) police officer licensed or certified under the Michigan Commission on Law Enforcement Standards Act (MCOLES), MCL 28.601 to MCL 28.615,

(ii) sheriff or deputy sheriff,

(iii) member of the Department of State Police,

(iv) local corrections officer,

(v) employee of the Michigan Department of Corrections, or

(vi) federal law enforcement officer who carries a pistol during the normal course of the officer's employment or an officer of the Federal Bureau of Prisons,

(5) if the petitioner knows or believes that the respondent owns or possesses firearms, the petitioner must state that in the petition and, to the extent possible, identify the firearms, giving their location and any additional information that would help a law enforcement officer find the firearms;

(6) state the relief sought;

(7) state whether an ex parte order is being sought;

(8) state whether an extreme risk protection petition ~~action~~ involving the respondent has been filed ~~commenced~~ in another jurisdiction; and provide the county, docket number, and current status of the extreme risk protection petition.

(9) be signed by the party or attorney as provided in MCR 1.109(E).

Commented [DW2]: This numbering change is to reflect more accurately the language of the statute. See MCL 691.1805(6).

Commented [TYJ3]: This is to prevent forum shopping and provide the court with sufficient information of actions in other jurisdictions.

Commented [JV4R3]: Should it say "provide" rather than "provided?"

Commented [TYJ5R3]: Yes fixed

(C) The petitioner's address must not be disclosed in any pleading, paper, or in any other manner. The petitioner must provide the court with ~~their~~ an address and contact information in the form and manner established by the State Court Administrative Office for service of notices and other filings. The clerk of the court must maintain the petitioner's address as confidential in the court file.

Commented [DW6]: First, we are anchoring an orphaned paragraph with a designated subsection.

Second, we struck "their" address because the address may not belong to the petitioner (e.g., a shelter, a relative's home, a PO Box, etc.).

Third, we added the "for service of notice and other filings" to comport with the statutory language.

(D) Petition Against a Minor. In addition to the requirements outlined in subrule (B), a petition against a minor must also list, if known or can be easily ascertained, the names and addresses of the minor's parent(s), guardian, or custodian.

(E) Other Pending Actions; Order, Judgments.

(1) The petition must specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number, if known.

(a) If the petition is filed in the same court as a pending action or where an order or judgment has already been entered by that court affecting the parties, it shall be assigned to the same judge.

(b) If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court may contact the court where the pending actions were filed or orders or judgments were entered, if practicable, to determine any relevant information.

(2) If the prior action resulted in an order providing for continuing jurisdiction of a minor, and the new action requests relief with regard to the minor, the court must comply with MCR 3.205.

(F) Venue.

(1) If the respondent is an adult, the petitioner may file an extreme risk protection action in any county in Michigan regardless of the parties' residency or location.

(2) If the respondent 1s a minor, the petitioner must file an extreme risk protection action in either the petitioner's or respondent's county of residence.

(3) If the respondent does not live in Michigan, the petitioner must file an extreme risk protection order in the petitioner's county of residence.

(G) Minor or Legally Incapacitated Individual as Petitioner.

(1) If a petitioner is a minor or a legally incapacitated individual, the petitioner shall proceed through a next friend. If the Petitioner is 14 years old or older, ~~T~~the petitioner shall certify that the next friend is not disqualified by statute and that the next friend is an adult. If the Petitioner is not yet 14 years old, the next friend shall certify that the next friend is not disqualified by statute and that the next friend is an adult.

Commented [DW7]: This language is added to comport with MCR 2.201(E).

(2) Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment. However, the court shall appoint a next friend if the minor is less than 14 years of age.

[NEW] Rule 3.717 Dismissal

Except as specified in MCR 3.718(A)(5), MCR 3.718(B)(2)(c), MCR 3.718(D), and MCR 3.720, an action for an extreme risk protection order may only be dismissed upon motion by the petitioner prior to the issuance of an order. There is no fee for such a motion.

Commented [TYJ8]: This is another section that allows dismissal that should be added.

[NEW] Rule 3.718 Issuing Extreme Risk Protection Orders

(A) Ex Parte Orders. Except as otherwise provided in this rule:

(1) The court must rule on a request for an ex parte order within one business day of the filing date of the petition.

(2) An ex parte order must be granted if it clearly appears from the specific facts shown by a verified, written petition that

(a) by a preponderance of the evidence after considering the factors identified in MCL 691.1807(1), the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that substantially support the expectation that the respondent will intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm; and

(b) there is clear and convincing evidence that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before an order can be issued.

(3) An ex parte order expires one year after the date of issuance.

(4) If an ex parte order is entered, the petition and order must be served as provided in MCR 3.719(B). However, failure to ~~make~~ effect service does not affect the order's validity or effectiveness.

Commented [DW9]: "Effect" is a better word.

(5) If the court refuses to grant an ex parte order, it must state the reasons in writing and advise the petitioner of the right to request a hearing as provided in subrule (D). If the petitioner does not request a hearing within 21 days of entry of the order, the order denying the petition is final. The court is not required to give such notice if the court determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit that the action should be dismissed without a hearing.

(B) Immediate Emergency Ex Parte Orders.

(1) A petitioner who is a law enforcement officer may verbally request by telephone that the court immediately issue an emergency ex parte order under subrule (A) if the officer is responding to a complaint involving the respondent and the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the respondent or another individual by possessing a firearm.

(2) The court must immediately rule on a verbal request made under this subrule and, if the court issues an immediate emergency ex parte order,

(a) the officer must notify the respondent of the court's order and advise where they can obtain a copy of the order;

(b) within one business day, the officer must file a sworn written petition detailing the facts and circumstances presented verbally to the court; and

(c) if the officer does not file the petition within one business day, the court must

(i) terminate the immediate emergency ex parte order,

(ii) order that the respondent, subject to the restrictions in MCL 691.1815, may reclaim any seized firearm(s), and

(iii) dismiss the case.

(C) Anticipatory Search Warrant. If the court orders the firearms immediately surrendered, ~~the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) shallmay file an affidavit requesting that~~ the court shall also issue an anticipatory search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. ~~The law enforcement officer's affidavit may include affirmative allegations contained in the petition.~~ An anticipatory search warrant issued under this subrule must be subject to and contingent on the failure or refusal of the respondent, following service of the order, to immediately comply with the order and immediately surrender to a law enforcement officer any firearm or concealed pistol license in the individual's possession or control. If the respondent does not immediately comply with the order and immediately surrender to a law enforcement officer any firearm or concealed pistol license in the individual's possession or control, the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) shall file an affidavit stating the reasons the law enforcement officer executed the anticipatory search warrant.

(D) Probable Cause. At any time while an extreme risk protection order is in effect, the prosecuting attorney for the county in which the order was issued or a law enforcement officer may file an affidavit with the court that issued the order alleging that the restrained individual has a firearm or a concealed pistol license in the individual's possession or control. If an affidavit is filed under this subsection, the court shall determine whether probable cause exists to believe that the restrained individual has a firearm or concealed pistol license in the individual's possession or control. If the court finds that probable cause exists, the court may issue an arrest warrant or order a hearing. The court shall also issue a search warrant describing the firearm or firearms or the concealed pistol license believed to be in the restrained individual's possession or control and authorizing a designated law enforcement agency to search the location or locations where the firearm or firearms or concealed pistol license is believed to be and to seize any firearm or concealed pistol license discovered by the search.

~~(D)~~(E) Hearing.

(1) The court must expedite and give priority to hearings required by the extreme risk protection act.

(2) The court must schedule a hearing for the issuance of an extreme risk protection order in the following instances:

(a) the petition does not request an ex parte order;

(b) the court refuses to enter an ex parte order and the petitioner timely requests a hearing; or

(c) the court entered an ex parte order and the respondent requests a

Commented [DW10]: There is no requirement of a law enforcement officer affidavit contained in the statute. The statute mandates issuance of an anticipatory search warrant. MCL 691.1807(8). And if the person doesn't comply, the officer has to back up their actions with the affidavit.

Commented [TYJ11]: This is not discretionary

Commented [DW12]: This is 691.1810(5). It was not included anywhere in the proposed Court Rule.

hearing.

(3) If the court enters an ex parte order or an immediate emergency ex parte order and the respondent requests a hearing, the hearing must occur

(a) unless subrule (3)(b) applies, within 14 days of the request for a hearing; or

(b) within 5 days of the request for a hearing if the respondent is an individual described in MCL 691.1805(5).

(4) The ~~petitioner must serve on the~~ respondent must be served with the petition and notice of the hearing as provided in MCR 2.105(A), for a hearing scheduled under subrules (D)(2)(a)-(b). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian are known, ~~the petitioner shall also in the same manner serve~~ the petition and notice of the hearing must be served on the respondent's parent(s), guardian, or custodian. The clerk of the court serve the respondent's request for a hearing under subrule (D)(2)(c) on the petitioner, as provided in MCR 2.107(C), due to the confidential nature of the petitioner's address. If the respondent is a person described in MCL 691.1805(5), providing notice one day before the hearing is deemed as sufficient notice to the petitioner.

Commented [DW13]: This is intended to remove a perceived burden on those unfamiliar with the legal system and Court Rules, and to make it clearer and more consistent with the way our Court Rules read.

(5) The hearing must be held on the record. In accordance with MCR 2.407 and MCR 2.408, the court may allow the use of videoconferencing technology.

(6) The petitioner must attend the hearing and carries the burden of proving, by a preponderance of the evidence, that the respondent can reasonably be expected within the near future to, intentionally or unintentionally, seriously physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation. If the petitioner fails to attend the hearing, the court may adjourn and reschedule the hearing or dismiss the petition.

(7) If the respondent fails to appear at a hearing on the petition under subrules (D)(2)(a)-(b) and the court determines the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the order may be entered without further notice to the respondent if the court determines an extreme risk protection order is necessary. If the respondent fails to appear at a hearing on the petition requested under subrule (D)(2)(c), the court may adjourn and reschedule the hearing or continue the order without further hearing.

(8) At the hearing, the court must consider the factors identified in MCL 691.1807(1) and state on the record the reasons for granting, denying, or continuing an extreme risk protection order and enter an appropriate order. Additionally, the court must immediately state the reasons for granting,

denying, or continuing an extreme risk protection order in writing.

[NEW] Rule 3.719 Orders

(A) Form and Scope of Order. An order granting an extreme risk protection order must include the following provisions:

(1) Respondent Responsibilities. The respondent must complete the filing requirements contained in subrule (D)(1) within one business day after the respondent receives a copy of the extreme risk protection order or has actual notice of the order. A failure to comply with the filing requirements may subject the respondent to contempt of court proceedings and immediate arrest.

(2) Purchase/Possession of Firearms. The respondent must not purchase or possess a firearm. If the respondent has been issued a license under MCL 28.422 that the respondent has not used and that is not yet void, the respondent must not use it and must surrender it to the law enforcement agency designated under MCL 691.1809(1)(g).

(3) Concealed Carry Licenses. The respondent must not apply for a concealed pistol license. If the respondent has been issued a license to carry a concealed pistol, the license will be suspended or revoked under MCL 28.428, once the extreme risk protection order is entered into the law enforcement information network (LEIN). The respondent must surrender the license to carry a concealed pistol as required by MCL 28.428.

(4) Firearm Surrender. The respondent must, within 24 hours or, at the court's discretion, immediately after being served with the order, surrender any firearms in the respondent's possession or control to the law enforcement agency designated under MCL 691.1809(1)(g) or, if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under MCL 691.1818.

If the court orders the respondent to immediately surrender the individual's firearms, the order must include a statement that the law enforcement agency designated under MCL 691.1809(1)(g) must proceed to seize the respondent's firearms after the respondent is served with or receives actual notice of the extreme risk protection order, after giving the respondent an opportunity to surrender the respondent's firearms. Unless the petitioner is a law enforcement officer or health care provider, there is a presumption that the respondent will have 24 hours to surrender the firearms.

(5) Firearm Description. If the petitioner has identified any firearms in the petition, a specific description of the firearms to be surrendered or seized.

(6) Hearing Request. If the extreme risk protection order was issued without written or oral notice to the respondent, the order must include a statement that the respondent may request and attend a hearing to modify or rescind the order. The hearing will be held within 14 days of the request for a hearing or, if the respondent is an individual described in MCL 691.1805(5), the hearing will be held within 5 days of the request for a hearing.

(7) Motions. A statement that the respondent may file a motion to modify or rescind the order as allowed under MCL 691.1801 *et seq.*, and that motion forms and filing instructions are available from the clerk of the court.

(8) Law Enforcement Agency Designation. A designation of the law enforcement agency that is responsible for forwarding the order to the Federal Bureau of Investigation under MCL 691.1815(1). The designated law enforcement agency must be an agency within whose jurisdiction the respondent resides.

(9) LEIN Entry. Directions to a local entering authority or the law enforcement agency designated under MCL 691.1809(1)(g) to enter the order into LEIN.

(10) Order Violations. A statement that violating the order will subject the respondent to the following:

(a) immediate arrest;

(b) contempt of court;

(c) an automatic extension of the order; and

(d) criminal penalties, including imprisonment for up to one year for an initial violation and up to five years for a subsequent violation.

(11) Right to Attorney. A statement that the respondent has the right to seek the advice of an attorney.

(12) Expiration Date. An expiration date that is one year after the date of issuance.

(B) Service.

(1) Except as provided in subrule (B)(2), the petitioner must serve the order on the respondent as provided in MCR 2.105(A). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian is known, the petitioner must also in the same manner serve the order on the respondent's parent(s), guardian, or custodian. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J). Failure to serve the order does not affect its validity or effectiveness.

(2) If the court ordered the immediate surrender of the respondent's firearms, the order must be served personally by a law enforcement officer.

(3) Proof of service must be filed with the court within one business day after service.

(C) Oral Notice. If oral notice of the order is made by a law enforcement officer as described in MCL 691.1813(3), proof of the notification must be filed with the court by the law enforcement officer within one business day after the notification.

(D) Respondent Responsibilities.

(1) Not later than one business day after the respondent receives a copy of the extreme risk protection order or has actual notice of the order, the respondent must do one of the following:

(a) File with the court that issued the order one or more documents or other evidence verifying that all of the following are true:

(i) All firearms previously in the respondent's possession or control were surrendered to or seized by the local law enforcement agency designated under MCL 691.1809(1)(g), or, if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under MCL 691.1818.

(ii) Any concealed pistol license was surrendered to the county clerk as required by the order and MCL 28.428.

(iii) At the time of the verification, the respondent does not have any firearms or a concealed pistol license in the respondent's possession or control.

(b) File with the court that issued the order one or more documents or other evidence verifying that both of the following are true:

(i) At the time the order was issued, the respondent did not have a firearm or concealed pistol license in the respondent's possession or control.

(ii) At the time of the verification, the respondent does not have a firearm or concealed pistol license in the respondent's possession or control.

(2) Failure to File. The clerk of the court must review the proof of service filed with the court and determine whether the respondent has complied with the filing requirements of subrule (D)(l). If the respondent has not complied

with the filing requirements of subrule (D)(l), the clerk and the court must take the following actions:

(a) Clerk of the Court. The clerk of the court must notify the local law enforcement agency identified in MCL 691.1809(1)(g) and the assigned judge of the failure to comply with the filing requirements. If this notice is provided, the clerk of the court must again notify the local law enforcement agency and the assigned judge when the respondent has complied with the filing requirements.

(b) Court. The court must hold a compliance hearing not later than five (5) days after the restrained individual has been served with the order or receives actual notice of the order. If at the compliance hearing the restrained individual fails to appear or has failed to comply with the filing requirements of subrule (D)(1), the court must issue a bench warrant and issue a search warrant to seize any firearms and may hold the individual in direct contempt of court. ~~The court must issue either a bench warrant or an order to show cause to initiate contempt proceedings as identified in MCR 3.721. If issuing an order to show cause, the hearing must be held scheduled within 5 days of the date the proof of service is filed with the court.~~ The court may recall the bench warrant or ~~cancel the order to show cause~~ cancel the hearing if the respondent makes the required filings identified in subrule (D)(l). ~~If the respondent fails to appear for the show cause hearing, the court must issue a bench warrant.~~

~~If the court issues a bench warrant under this subrule, a law enforcement officer may file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition.~~

(E) Clerk of the Court Responsibilities. The clerk of the court that issues an extreme risk protection order must complete the actions identified in MCL 691.1811.

[NEW] Rule 3.720 Modification, Termination, or Extension of Order

(A) Modification or Termination.

(1) Time for Filing and Number of Motions.

(a) The petitioner may file a motion to modify or terminate the extreme risk protection order and request a hearing at any time after the extreme risk protection order is issued.

Commented [TYJ14]: The judge will not know to take action under subsection (b) below unless notified.

Commented [DW15]: Nowhere in MCL 691.1810(1) is a "show cause" proceeding mentioned; this language follows the statute more directly.

Commented [TYJ16]: Scheduled means it can be put on the docket months down the road. The intent is "held" within 5 days.

Commented [DW17]: This appears to be partial language from 691.1810(5), and we created a subrule for that part of the statute [3.718(D)].

(b) If the order is issued *ex parte*, the respondent may file a request for hearing on the order by not later than 14 days after the order is served on the restrained individual or after the restrained individual receives actual notice of the order.

~~(b)~~(c) If the order is issued after a hearing, or if the order is affirmed at a hearing scheduled under MCR 3.720(A)(1)(b), t~~T~~he respondent may file one motion to modify or terminate an extreme risk protection order during the first six months that the order is in effect and one motion during the second six months that the order is in effect. If the order is extended under subrule (B), the respondent may file one motion to modify or terminate the order during the first six months that the extended order is in effect, and one motion during the second six months that the extended order is in effect. If the respondent files more than one motion during these times, the court shall review the motion before a hearing is held and may summarily dismiss the motion without a response from the petitioner and without a hearing.

~~(c)~~(d) The moving party carries the burden and must prove by a preponderance of the evidence that the respondent no longer poses a risk to seriously physically injure another individual or the respondent by possessing a firearm.

(2) Service. The nonmoving party must be served, as provided in MCR 2.107 at the mailing address or addresses provided to the court, the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve the respondent's motion on the petitioner due to the confidential nature of the petitioner's address.

(3) Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate an extreme risk protection order within 14 days ~~of~~ after the filing of the motion.

(4) Notice of Modification or Termination. If an extreme risk protection order is modified or terminated, the clerk must immediately notify the law enforcement agency specified in the extreme risk protection order of the change. A modified or terminated order must be served on the respondent as provided in MCR 2.107.

(5) If the extreme risk protection order expires or is terminated, the court must order, subject to the restrictions in MCL 691.1815, that the respondent may reclaim any seized firearm(s). Upon the motion of the respondent, the court may also order, at any time, the transfer of the respondent's firearm(s) seized by law enforcement under the extreme risk protection order to a licensed firearm dealer if the respondent sells or transfers ownership of the firearm to the dealer.

Commented [DW18]: There was no provision for the hearing within 14 days. MCL 691.1807(3).

Commented [DW19]: This allows for all individuals (even ones who got into court within fourteen days to have a hearing) to have the chance to change the Court's mind in the first six months after the order is issued, as provided in MCL 691.1807..

(B) Extension of Order.

(1) Motions.

(a) Time for Filing and Service. Upon motion by the petitioner or the court's own motion, the court may issue an extended extreme risk protection order that is effective for one year after the expiration of the preceding order. The respondent must be served the motion to extend the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.107 at the mailing address or addresses provided to the court. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve both the petitioner and respondent if upon the court's own motion. Failure to timely file a motion to extend the effectiveness of the order does not preclude the petitioner from commencing a new extreme risk protection action regarding the same respondent, as provided in MCR 3.716.

(b) Legal Standard. The court shall only issue the extended order under this subrule if the preponderance of the evidence shows the restrained individual can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.

(2) Automatic Extensions. If ~~the court or a jury finds that~~ the respondent has refused or failed to comply with an extreme risk protection order, the court that issued the order must issue an extended extreme risk protection order effective for 1 year after the expiration of the preceding order.

(3) Notice of Extension. If the court issues an extended extreme risk protection order, it must enter an amended order. The clerk must immediately notify the law enforcement agency specified in the extreme risk protection orderif the court enters an amended order. The petitioner must serve an amended order on the respondent as provided in MCR 2.107.

(C) Minors and Legally Incapacitated Individuals. Petitioners or respondents who are minors or legally incapacitated individuals must proceed through a next friend, as provided in MCR 3.716(F). The Court may appoint a GAL or LGAL under MCR 2.201(E).

(D) Fees. There are no motion fees for modifying, terminating, or extending an extreme risk protection order.

[NEW] Rule 3.721 Contempt Proceedings for Violation of Extreme Risk Protection Orders

Commented [TYJ20]: This is redundant and confusing, it implies that there may be a right to a jury trial in all violations, which is inaccurate.

Commented [DW21]: The Court will be able to issue an ex parte order without delay and then later determine if the Court should appoint a GAL or provide the minor with a LGAL.

Commented [TYJ22]: If a petition in entered against the child of a petitioner, that child should be appointed a GAL

Commented [JV23R22]: The references here should be to MCR 2.201(E) (1)(c) and MCR 3.707(C), which require appointment of a GAL for a minor respondent.

Commented [TYJ24R22]: corrected

Commented [DW25R22]: Neither MCR 3.307(C) nor MCR 3.707(C) applies.

(A) In General. An extreme risk protection order is enforceable under MCL 691.1810(4)-(5), MCL 691.1815(4), and MCL 691.1819.

(B) Motion to Show Cause.

(1) Filing. If the respondent violates the extreme risk protection order, the prosecuting attorney for the county in which the order was issued or a law enforcement officer may file a motion, supported by appropriate affidavit, to have the respondent found in contempt. There is no fee for such a motion. If the motion and affidavit establish probable cause for a finding of contempt, the court must either:

(a) order the respondent to appear at a specified time to answer the contempt charge; or

(b) issue a bench warrant for the arrest of the respondent.

(2) Service. If issuing an order to show cause, the hearing must be held within 5 days. The prosecuting attorney or law enforcement officer must serve the motion to show cause and the order on the respondent and petitioner as provided in MCR 2.107.

(C) Search Warrant. If the violation alleges that the respondent has a firearm or concealed pistol license in the respondent's possession or control, a law enforcement officer or prosecuting attorney may also file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition.

(D) Arraignment; Advice to Respondent.

At the respondent's first appearance before the court for arraignment on contempt of court, the court must:

(1) advise the respondent

(a) of the alleged violation,

(b) of the right to contest the charge at a contempt hearing, and

(c) that they are entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the

court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated an extreme risk protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one;

(2) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority;

(3) set a reasonable bond pending a hearing of the alleged violation; and

(4) take a guilty plea as provided in subrule (E) or schedule a hearing as provided in subrule (F).

(E) Pleas of Guilty. The respondent may plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the respondent and receiving the respondent's response, must:

(1) advise the respondent

(a) that by pleading guilty the respondent is giving up the right to a contested hearing, and if the respondent is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule **(D)(l**)(**c**);

(b) of the maximum possible jail sentence for the violation; and

(c) that if they plead guilty to violating the extreme risk protection order, the court will automatically extend the duration of the extreme risk protection order for 1 year after the expiration of the preceding order;

(2) ascertain that the plea is understandingly, voluntarily, and knowingly made;

(3) establish factual support for a finding that the respondent is guilty of the alleged violation.

(F) Scheduling or Postponing Hearing. Following the respondent's appearance or arraignment, the court shall do the following:

(1) Set a date for the hearing at the earliest practicable time.

(a) The hearing of a respondent being held in custody for an alleged violation of an extreme risk protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. The court must set a reasonable bond pending the hearing unless the court determines that release will not reasonably ensure the safety of the respondent or any other individual(s).

(b) If a respondent is released on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) necessary to reasonably ensure the safety of the respondent and other individuals, including continued compliance with the extreme risk protection order. The release order shall comply with MCL 765.6b.

(c) If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, upon motion of the prosecutor, the court may postpone the hearing for the outcome of that prosecution.

(2) Notify the prosecuting attorney of a contempt proceeding.

(3) Notify the petitioner and the petitioner's attorney, if any, and the law enforcement officer that filed the motion, if applicable, of the contempt proceeding and direct the party to appear at the hearing and give evidence on the charge of contempt.

(G) Prosecution After Arrest. If the court holds a contempt proceeding, the prosecuting attorney must~~shall~~ prosecute the proceeding.

(H) The Violation Hearing.

(1) Jury. There is no right to a jury trial.

(2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses.

(3) Evidence; Burden of Proof. The rules of evidence apply to both criminal and civil contempt proceedings. The prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by clear and convincing evidence.

(4) Judicial Findings. At the conclusion of the hearing, the court must find the facts specifically, state separately its conclusion of law, and direct entry of

Commented [TYJ26]: Pursuant to Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) Shall is ambiguous. It can mean either the mandatory or will:

shall, vb. (bef. 12c) 1. Has a duty to; more broadly, is required to "the requester shall send notice" "notice shall be sent". This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts) "all claimants shall request mediation". 3. May "no person shall enter the building without first signing the roster". When a negative word such as not or no precedes shall (as in the example in angled bracket), the word shall often means may. What is being negated is permission, not a requirement. 4. Will (as a future tense verb) "the corporation shall then have a period of 30 days to object". 5. Is entitled to "the secretary shall be reimbursed for all expenses". Only sense 1 is acceptable under strict standards of drafting.

the appropriate judgment. The court must state its findings and conclusion on the record or in a written opinion made a part of the record.

(5) Sentencing. If the respondent is found in contempt, the court may impose sanctions as provided by MCL 600.1701 *et seq.*

[NEW] Rule 3.722 Appeals

(A) Rules Applicable. Except as provided by this rule, appeals involving an extreme risk protection order must comply with subchapter 7.200.

(B) From Entry of Extreme Risk Protection Order.

(1) Either party has an appeal of right from:

(a) an order granting, denying, or continuing an extreme risk protection order after a hearing under MCR 3.718(D).

(b) an order granting or denying an extended extreme risk protection order after a hearing under MCR 3.720(B).

(2) Appeals of all other orders are by leave to appeal.

(C) From Finding After Violation Hearing. The respondent has an appeal of right from a judgment of sentence for criminal contempt entered after a contested hearing.

Staff Comment (ADM File No. 2023-24): The proposed amendments would offer procedural guidance to trial courts for implementing the Extreme Risk Protection Order (ERPO) Act, MCL 691.1801 *et seq.*

Note that the comment period for this proposal is slightly shorter than the typical three-month period so that this issue can be considered by the Court for adoption before the ERPO Act takes effect.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by December **1,** 2023 by clicking on the

"Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-24. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J., would have declined to publish the proposal for comment.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 20, 2023

Clerk

STATE OF MICHIGAN
PROBATE AND FAMILY COURT OF CLINTON COUNTY

COURTHOUSE | 100 E. STATE STREET, STE 4300
ST. JOHNS, MICHIGAN 48879 | (989) 224-5194 | FAX (989) 227-6565

Lisa Sullivan, Judge

Theresa Nelson, Register
nelsont@clinton-county.org

October 3, 2023

Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2023-24
Proposed Additional Court Rule 3.718 and 3.720

Justices:

There are two proposed court rules that I would ask for clarification and/or modification.

First, under MCR 3.718(B): Although the statute assigns Extreme Risk Protection Orders to the Family Division of the Circuit Court, it also authorizes a judge **or magistrate on duty** to issue an immediate emergency ex parte order. MCL 691.1807(4).

a. Should the court rule reflect the authority of a magistrate to issue an order under this section?

b. During business hours, should law enforcement contact the clerk's office to determine which judge would be assigned the case (in a multi-judge county)?

c. During non-business hours (if no judge is on duty), should law enforcement contact the magistrate on duty and, if issued, have a judge assigned the next business day?

d. If courts do not have on duty magistrates during non-business hours, how will a judge be assigned to respond to law enforcement's request?

Second, under MCR 3.718(C), the court rule states that, if an order is issued under this section and requires immediate surrender of firearms, the officer **may** file an affidavit for an anticipatory search warrant.

a. The statute, however, indicates that a court **shall** order an anticipatory search warrant.

b. Given the language in Subsection (B), can the courts assume both judges and magistrates have this authority?

Thank you, in advance, for your time and attention to these comments.

Sincerely,

Lisa Sullivan

Hon. Lisa Sullivan
Family Division Judge

Order

Michigan Supreme Court
Lansing, Michigan

September 13, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2022-33

Proposed Amendment of
Rule 4.303 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.303 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Rule 4.303 Notice

(A)-(C) [Unchanged.]

(D) Dismissal for Lack of Progress. On motion of a party or on its own initiative, the court may order that an action in which no progress has been made within 91 days be dismissed for lack of progress. A dismissal under this subrule is without prejudice, unless the court orders otherwise.

Staff Comment (ADM File No. 2022-33): The proposed amendment of MCR 4.303 would allow courts to dismiss small claims cases for lack of progress.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-33. Your comments and the comments of others will be posted under the chapter affected by this proposal.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 13, 2023

Clerk

Public Policy Position
ADM File No. 2022-33: Proposed Amendment of MCR 4.303

Support with Amendment

Explanation

The Committee voted unanimously (18) to support ADM File No. 2022-33 with an additional amendment to have a "notice of intent" sent out to all the parties prior to dismissal.

The Committee believes that the proposed amendment to MCR 4.303 will streamline court dockets and encourage diligence as parties will be incentivized to diligently pursue their claims, knowing that inaction could result in dismissal. The Committee's additional proposed amendment would promote procedural fairness and access to justice in proceedings that typically involve parties who are less knowledgeable about legal process and are, by the nature of small claims proceedings, unrepresented by counsel.

Position Vote:

Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Persons:

Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2022-33: Proposed Amendment of MCR 4.303

Support with Amendments

Explanation

The Committee voted to support ADM File No. 2022-33 with two additional amendments: (1) clarifying when "within 91 days" begins; and (2) including additional language, as follows: "Prior to a court dismissing a case for no progress on its own initiative, the court shall serve notice on all parties that the case will be dismissed if no progress has been made within 14 days." As a general matter, the Committee believes that it is advisable to align MCR 4.303 as closely as possible with the civil dismissal rule.

Position Vote:

Voted For position: 18
Voted against position: 2
Abstained from vote: 1
Did not vote (absence): 10

Contact Person:

Marla Linderman Richelew lindermanlaw@sbcglobal.net

Order

Michigan Supreme Court
Lansing, Michigan

September 20, 2023

ADM File No. 2022-24

Proposed Amendments of Rules 6.907, 6.909, and 6.933 of the Michigan Court Rules

Elizabeth T. Clement, Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden, Justices

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.907, 6.909, and 6.933 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 6.907 Arraignment on Complaint and Warrant

(A) [Unchanged.]

(B) Temporary Detention Pending Arraignment. If the prosecuting attorney has authorized the filing of a complaint and warrant charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, a juvenile may, following apprehension, be detained pending arraignment:

(1)-(3) [Unchanged.]

If no juvenile facility is reasonably available and if it is apparent that the juvenile may not otherwise be safely detained, the magistrate may, without a hearing, authorize that the juvenile be lodged pending arraignment in a facility used to incarcerate adults. The juvenile must be kept separate from adult prisoners as required by law. Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision.

(C) [Unchanged.]

Rule 6.909 Releasing or Detaining Juveniles Before Trial or Sentencing

(A) [Unchanged.]

(B) Place of Confinement.

(1)-(3) [Unchanged.]

(4) Separate Custody of Juvenile. The juvenile in custody or detention must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a. Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision.

(C) [Unchanged.]

Rule 6.933 Juvenile Probation Revocation

(A)-(F) [Unchanged.]

(G) Disposition in General.

(1) [Unchanged.]

(2) Other Violations. If the court finds that the juvenile has violated juvenile probation, other than as provided in subrule (G)(1), the court may order the juvenile committed to the Department of Corrections as provided in subrule (G)(1), or may order the juvenile continued on juvenile probation and under state wardship, and may order any of the following:

(a)-(h) [Unchanged.]

If the court determines to place the juvenile in jail for up to 30 days, and the juvenile is under 18 years of age, the juvenile must be placed separately from adult prisoners as required by law. Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision.

(3) [Unchanged.]

(H)-(J) [Unchanged.]

Staff Comment (ADM File No. 2022-24): As a condition for the State's receipt of federal funds under the Prison Rape Elimination Act, 34 USC 30301 *et seq*., the conditions of confinement for juveniles must comply with federal regulations promulgated under that act, including the requirement that best efforts be made to avoid placing incarcerated youthful inmates in isolation. See 28 CFR 115.14. The proposed amendments clarify that youthful inmates should not be placed in isolation in order to keep them separate from adults.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-24. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ZAHRA, J. and VIVIANO, J., would have declined to publish the proposal for comment.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 20, 2023

Clerk

Public Policy Position
ADM File No. 2022-24: Proposed Amendments of MCR 6.907, 6.909, and 6.933

Support with Amendments

Explanation
The Committee voted unanimously (18) to support ADM File No. 2022-24 with an amendment clarifying the definition of "youthful inmate." While that term is defined in the federal Prison Rape Elimination Act National Standards regulations (28 CFR § 115.5), it does not appear in the Michigan Court Rules, which may lead to unintended confusion.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Explanation
The Committee also voted to support the additional amendment proposed by the Children's Law Section in principle, without taking a position on the specific language recommended by the Section.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 6

Contact Persons:
Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2022-24: Proposed Amendments of MCR 6.907, 6.909, and 6.933

Support with Recommended Amendments

Explanation
The Children's Law Council supports ADM File No 2022-24 as it adopts federal regulations regarding placing youth in isolation when held in a jail during an automatic waiver proceeding. However, the Council also recommends amendments to the ADM before adoption. Specifically, after each instance of the new sentence "Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision", we recommend the addition another sentence reading "If the youthful inmate is placed in isolation, the jail must immediately notify the assigned judge or on-call judge or magistrate and indicate the reasons for the placement in isolation, and the court must provide the youthful inmate with an opportunity for a hearing within 24 hours."

It is well understood that isolation can be detrimental to any incarcerated person, particularly children. Federal regulations strongly discourage the practice. Bringing our court rules into compliance with federal law is a positive step. The Children's Law Section Council believes that more is needed, though. If a child is placed in isolation for any reason, the court should be made aware immediately, and the youth should have the opportunity to appear in court and have a hearing to discuss the issue and determine whether other options are available to ensure the safety and well-being of the youth while minimizing the time they would be forced to spend in isolation.

Position Vote:
Voted for position: 13
Voted against position: 0
Abstained from vote: 0
Did not vote: 6

Contact Person: Joshua Pease
Email: jpease@sado.org

Public Policy Position
ADM File No. 2022-24: Proposed Amendments of MCR 6.907, 6.909, and 6.933

Support with Recommended Amendments

Explanation
Motion to support these proposed changes with added language "requiring immediate written notice to the Court having jurisdiction should isolation or seclusion occur and opportunity for hearing."

Position Vote:
Voted for position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Edwar Zeineh
Email: edwar@zeinehlaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 9, 2023

Re: HB 5046 and SB 514 – Court Reporter/Recorder Fees for Transcripts

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Background

In 1986, the Michigan Legislature established fees to be paid to circuit court reporters and recorders for original transcripts ($1.75 per page) and copies ($0.30 per page). Those fees have not been adjusted since enactment, despite numerous bills having been introduced on the subject.[1] Some argue that the current fees have led to a shortage of court reporters and recorders in Michigan, which results in long delays in production times for transcripts that are necessary for subsequent court hearings and appeals.

As introduced, House Bill 5046 would increase the statutory fee to $3.75 per original page and $0.90 per page for each copy. The bill would also establish a minimum charge of $50.00 for an original transcript. These amounts would be adjusted every five years (beginning on January 1, 2030) based on the consumer price index. The was amended by the House Criminal Justice Committee to adopt a substitute (H-1) that addresses concerns raised by the Michigan Association of Counties. Specifically, the substitute provides that, for a transcript ordered by the circuit judge, reporters or recorders are entitled to the same compensation from the funding unit for work completed outside of court business hours. During court business hours, a reporter or recorder must give first priority to appellate transcripts paid for by the court funding unit. Finally, the substitute bill now provides that an official court reporter or recorder must purchase supplies and equipment necessary for the production of transcripts, while the court funding unit must purchase the supplies and equipment necessary to capture and preserve the record. As substituted, House Bill 5046 was unanimously (13-0-0) reported with recommendation by the House Criminal Justice Committee on October 17, 2023. It then passed the full House by a vote of 104-6 on November 1, was transmitted to the Senate, and has been referred to the Senate Committee on Civil Rights, Judiciary & Public Safety.

House Bill 5046 is supported by the Michigan Electronic Court Reporters Association, Michigan Association of Freelance Court Reporters, Michigan Association of Professional Court Reporters, Michigan District Judges Association, and the Michigan Association of Counties. The State Court Administrative Office has indicated that it is neutral on the bill.

Senate Bill 514, as introduced, was identical to its House counterpart. It has not been heard in committee at this time.

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[1] 2005 SB 33; 2007 HB 4501; 2009 HB 4332; 2018 SB 1070; 2019 HB 4329; and 2020 SB 793.

The State Bar of Michigan has a long history with legislative attempts to increase transcript fees. In 2005, the Board of Commissioners unanimously voted to support 2005 SB 33 in principle.[2] This bill would have increased the fee for original transcripts to $3.00 per page and the fee for copies to $0.50 per page. The Board supported the bill "in principle" only, because its support was contingent upon the bill being amended to "provide relief for transcript fee costs for indigent parties and parties represented by pro bono counsel." 2005 SB 33 was never reported from the Senate Judiciary Committee. In the subsequent 18 years, with similar legislation having been introduced in at least five legislative sessions, SBM has maintained its position of supporting an increase in transcript fees contingent upon the provision of a fee waiver for indigent parties in civil matters.[3]

Keller Considerations

The cost and timely availability of transcripts are issues necessarily related to both access to legal services and the functioning of the courts. As such, House Bill 5046 and Senate Bill 514 are *Keller*-permissible and may be considered on their merits.

As noted above, some argue that stagnant transcript fees have led to a shortage of court recorders and reporters in Michigan causing delays in transcript production, which has negatively impacted the timeliness of appeals and other court proceedings. On the other hand, others argue that increased transcript costs will negatively impact access to legal services by adding yet another unaffordable expense to the list of those borne by indigent parties in civil matters, thereby pricing them out of access to justice. Regardless of how one ultimately balances these interests and equities, with transcripts playing an essential role in nearly every civil and criminal proceeding, legislation implicating the cost and availability of transcripts has significant ramifications for the functioning of Michigan courts and access to legal services.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

House Bill 5046 and Senate Bill 514 necessarily related to both access to legal services and the functioning of the courts. The bills are therefore *Keller*-permissible and may be considered on their merits.

[2] https://www.michbar.org/file/publicpolicy/documents/positionpdf269.pdf.
[3] MCR 6.433 provides a transcript fee waiver in criminal proceedings.

SUBSTITUTE FOR

HOUSE BILL NO. 5046

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 2543 (MCL 600.2543), as amended by 2004 PA 328.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2543. (1) The circuit court reporters or recorders are entitled to demand and receive per page for a transcript ordered by any person ~~the sum of $1.75~~ **$3.75** per original page and ~~30~~ **90** cents per page for each copy, unless a lower rate is agreed ~~upon.~~ **on.** For a transcript ordered by the circuit judge, reporters or recorders are entitled to receive from the ~~county~~ **court funding unit** the same compensation ~~. The supreme court, by administrative order or court rule, may authorize the payment to circuit court reporters or recorders the sum of $3.00 per original page and 50 cents per page~~

~~for each copy for transcripts ordered and timely filed as part of a program of differentiated case management for appeals of civil cases in which the circuit court either grants or denies summary disposition. If a transcript ordered under a program of differentiated case management is not timely filed, the circuit court reporter or recorder is not entitled to receive the increased rate for that transcript.~~**for work completed outside of normal court business hours. During normal court business hours, a reporter or recorder shall give first priority to appellate transcripts paid for by the court funding unit. The minimum charge for a transcript is $50.00 for the original and 90 cents per page for any copy requested. On January 1, 2030, and on January 1 of every fifth year after 2030, the state treasurer shall adjust the amounts in this subsection to reflect the cumulative annual percentage change in the Consumer Price Index and publish the adjusted amounts.**

(2) Only if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal ~~shall~~ **may** the amount of reporters' or recorders' fees paid for the transcript be recovered as a part of the taxable costs of the prevailing party in the motion, in the court of appeals or the supreme court.

(3) An official court reporter or recorder shall purchase supplies and equipment necessary for the production of transcripts, such as transcript paper, ink, binders, software, and hardware used in the production of transcripts. The court funding unit shall purchase the supplies and equipment necessary to capture and preserve the record, such as steno machines, digital audio-video recording equipment, computers, and digital storage media.

(4) As used in this section, "Consumer Price Index" means the most comprehensive index of consumer prices available for this

state from the Bureau of Labor Statistics of the United States Department of Labor.

Legislative Analysis

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

INCREASE COURT REPORTER TRANSCRIPT FEES

House Bill 5046 (H-1) as reported from committee
Sponsor: Rep. Nate Shannon
Committee: Criminal Justice
Revised 11-9-23

SUMMARY:

House Bill 5046 would amend Chapter 25 (Fees) of the Revised Judicature Act to increase fees court reporters or recorders may charge for a transcript of a criminal or civil court case and to add provisions relating to the purchase of supplies and equipment.

Currently, unless a lower rate is agreed upon, the fee court reporters or recorders may charge for a transcript of a criminal or civil court case is $1.75 per original page and 30 cents per page for each copy. This fee was established in 1986.

The bill would increase the fee to $3.75 per original page and 90 cents per page for each copy. The bill would also provide that the minimum charge for a transcript is $50 for the original and 90 cents per page for any copy requested. On January 1, 2030, and on January 1 of every fifth year after 2030, the state treasurer would have to adjust the amounts described above to reflect the cumulative annual percentage change in the ***Consumer Price Index*** and publish the adjusted amounts. (Presumably those adjusted amounts would then apply under the act, though there is no explicit mechanism.)

> ***Consumer Price Index*** would mean the most comprehensive index of consumer prices available for this state from the Bureau of Labor Statistics of the U.S. Department of Labor. (This would appear to mean the Detroit Consumer Price Index, known as the D-CPI, or the CPI-U to encompass the Detroit-Warren-Dearborn urban area.[1])

In addition, the act currently provides that reporters or recorders are entitled to receive the same compensation from the county for a transcript ordered by the circuit judge. The bill would amend this to say that, for a transcript ordered by the circuit judge, reporters or recorders are entitled to receive from the court funding unit the same compensation for work completed outside of normal court business hours. During normal court business hours, a reporter or recorder would have to give first priority to appellate transcripts paid for by the court funding unit.

The bill would further provide that an official court reporter or recorder must purchase supplies and equipment necessary for the production of transcripts, such as transcript paper, ink, binders, software, and hardware used in the production of transcripts. The court funding unit would have to purchase the supplies and equipment necessary to capture and preserve the record, such as steno machines, digital audio-video recording equipment, computers, and digital storage media.

[1] https://www.bls.gov/regions/midwest/news-release/consumerpriceindex_detroit.htm

[**Note**: The bill addresses section 2543 of the act, which deals specifically with circuit court reporters or recorders. Sections 878 and 8631 of the act provide that court reporters and recorders in probate and district courts, respectively, are entitled to receive "the same fees as provided [by section 2543] for circuit court reporters or recorders." The provisions of the bill concerning fees would thus apply to probate and district courts as well as to the circuit court. It is unclear whether the provisions concerning the purchase of supplies and equipment are intended to, or would, apply to probate and district courts in addition to the circuit court.]

Finally, the bill would remove obsolete provisions that allowed for higher fees for transcripts ordered as part of an expedited case management system for appeals of certain civil cases that was ended in 2007.

MCL 600.2543

FISCAL IMPACT:

House Bill 5046 would have an indeterminate fiscal impact on local court funding units if transcripts are ordered by courts. The fiscal impact would depend on the number of requests for transcripts made by courts. An increase in the per page fee amounts for transcripts would result in an increase in costs. If transcripts are ordered by any party other than courts, the requesting parties would be responsible for paying the compensation to the reporter or recorder.

POSITIONS:

Representatives of the following entities testified in support of the bill:

- Michigan Electronic Court Reporters Association (10-10-23, 10-17-23)
- Michigan Association of Counties (10-17-23)

The following entities indicated support for the bill (10-17-23):

- Michigan Association of Freelance Court Reporters
- Michigan Association of Professional Court Reporters
- Michigan District Judges Association
- Negligence Law Section of the State Bar of Michigan

The State Court Administrative Office indicated a neutral position on the bill. (10-10-23)

Legislative Analyst: Rick Yuille
Fiscal Analyst: Robin Risko

SENATE BILL NO. 514

September 20, 2023, Introduced by Senators IRWIN, SHINK, WOJNO, BELLINO and KLINEFELT and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 2543 (MCL 600.2543), as amended by 2004 PA 328.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2543. (1) The circuit court reporters or recorders are entitled to demand and receive per page for a transcript ordered by any person ~~the sum of $1.75~~ **$3.75** per original page and ~~30~~ **90** cents per page for each copy, unless a lower rate is agreed ~~upon.~~ **on.** For a transcript ordered by the circuit judge, reporters or recorders are entitled to receive from the county the same compensation. ~~The supreme court, by administrative order or court rule, may authorize~~

~~the payment to circuit court reporters or recorders the sum of $3.00 per original page and 50 cents per page for each copy for transcripts ordered and timely filed as part of a program of differentiated case management for appeals of civil cases in which the circuit court either grants or denies summary disposition. If a transcript ordered under a program of differentiated case management is not timely filed, the circuit court reporter or recorder is not entitled to receive the increased rate for that transcript.~~**The minimum charge for a transcript is $50.00 for the original and 90 cents per page for any copy requested. On January 1, 2030, and on January 1 of every fifth year after 2030, the state treasurer shall adjust the amounts in this subsection to reflect the cumulative annual percentage change in the Consumer Price Index and publish the adjusted amounts.**

(2) Only if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal ~~shall~~ **may** the amount of reporters' or recorders' fees paid for the transcript be recovered as a part of the taxable costs of the prevailing party in the motion, in the court of appeals or the supreme court.

(3) As used in this section, "Consumer Price Index" means the most comprehensive index of consumer prices available for this state from the Bureau of Labor Statistics of the United States Department of Labor.

Public Policy Position
HB 5046 and SB 514

Neutral

Explanation

The Committee voted to recommend that the State Bar of Michigan remain neutral on House Bill 5046 and Senate Bill 514. The Committee took note of both the reality that Michigan is facing a shortage of court reporters and recorders and the fact that this legislation is moving at an accelerated pace that makes the prospect of substantive change unlikely. At the same time, the Committee believes that it is inappropriate to support an increase in transcript fees without provisions being made to provide a waiver for indigent parties in civil matters. Transcript costs already represent a significant access to justice barrier today. Without a waiver, that barrier will only grow under this legislation.

Position Vote:

Voted For position: 13
Voted against position: 3
Abstained from vote: 1
Did not vote (absence): 7

***Keller* Permissibility Explanation**

The Committee voted unanimously that this legislation is *Keller*-permissible because transcript costs are reasonably related to both the functioning of the courts and access to legal services, because low reimbursement rates have led to a transcriptionist shortage. Without enough reporters and recorders, there have been delays in producing transcripts for cases, which in turn result in the delays for hearings, trials, and appeals. Additionally, increased costs imposed on indigent parties in civil matters erects an access to justice barrier, which also makes this legislation reasonably related to access to legal services.

Contact Persons:

Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
HB 5046 and SB 514

Support with Amendments

Explanation
The Committee voted to support HB 5046 and SB 514 with the following recommended amendments: (1) A fee waiver must be incorporated in civil matters for indigent parties and parties represented by pro bono counsel; (2) It should be made explicit that these statutory fees apply only to in-court proceedings (vs. deposition); and (3) the $50 minimum should be removed.

Position Vote:
Voted For position: 14
Voted against position: 5
Abstained from vote: 3
Did not vote (absence): 9

***Keller* Permissible Explanation**
The Committee voted unanimously that this legislation is *Keller*-permissible because transcript costs are reasonably related to both the functioning of the courts and access to legal services.

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
HB 5046 and SB 514

Support

Explanation
The Committee voted unanimously to support HB 5046 and SB 514. The Committee acknowledged that this recommendation is a deviation from the position advocated by SBM on similar legislation dating back to 2005. However, particularly in criminal matters, the Committee felt that the current statutory fees were creating a shortage of court reporters and recorders, which results in lengthy wait times for transcripts—a barrier to access to justice.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

***Keller* Permissible Explanation**
The Committee voted unanimously that this legislation is *Keller*-permissible because transcript costs are reasonably related to both the functioning of the courts and access to legal services.

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

Public Policy Position
HB 5046 and SB 514

Oppose

Explanation

The Committee voted to oppose House Bill 5046 (and Senate Bill 514) unless the bills are amended to provide a transcript fee waiver for indigent parties and parties represented by pro bono counsel in civil proceedings. While the Committee recognizes that the transcript fees established by statute in 1986 have not been increased since that time, the cost of transcripts already presents a significant financial barrier that impedes access to justice for indigent parties and parties represented by pro bono counsel in civil matters. Increasing the fees without a waiver will only exacerbate this challenge. The Committee also took note of the fact that such a waiver is already available in criminal proceedings under MCR 6.433.

Position Vote:

Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Person:

Ashley E. Lowe alowe@lakeshorelegalaid.org

Public Policy Position
SB 514

Support in Part, Oppose in Part, and Recommend Amendment

Explanation
The Children's Law Section Council voted to support the portions of the bill which would raise the per page rate for original transcripts from $1.75 to $3.75, create a $50 minimum charge for an original transcript, and allow for review every 5 years. With no raises in 40 years, the lack of pay for transcriptionists has created a shortage which has negatively impacted litigants in children's law appeals, with long waiting times on cases where permanency and finality are always considerations. Delays in appeals can harm both children and parents as their cases linger without final resolution. To the extent that this bill will help alleviate shortages of transcriptionists and quicken turnaround times, the Council support it.

The Council voted to opposed raising the per page rate for copies. Along those lines, the Council also voted to support an amendment to limit the cost of an electronic copy of a transcript to $10. Most copies of transcripts are electronic, whether a PDF or Word document, and are sent via email. Increasing the rate for copies when the copy sent requires minimal work beyond the original serves only cost courts and litigants money which could be better used on elsewhere.

Position Vote:
Voted for position: 13
Voted against position: 0
Abstained from vote: 0
Did not vote: 6

***Keller*-Permissibility Explanation**
The cost of transcripts is related to the functioning of the courts in that low reimbursement rates have led to a shortage of transcriptionists, which itself has led to delays in producing and providing transcripts for cases, which has itself led to delays in hearings, both at the trial and appellate level. Raising the rates may alleviate this shortage and therefore lead to better efficiency on cases in which transcripts are necessary.

Contact Person: Joshua Pease
Email: jpease@sado.org

Public Policy Position
SB 0514

Support

Explanation
Criminal Law Section voted to support this Bill as proposed. The vote passed unanimously

Position Vote:
Voted for position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Edwar Zeineh
Email: edwar@zeinehlaw.com

Public Policy Position
SB 0514

Support with Recommended Amendments

Explanation
Overall there was support for an increase in original transcript fees, but there was some disagreement as to whether copies, which are generally emailed as PDF files as opposed to paper copies, warranted the proposed increase in the bill. Family Law Section supports the bill with the following amendments, (1) support the new cost structure in the bill for original transcripts; (2) delete any increase in cost for copies of transcripts; and (3) Cap the cost for emailed electronic copies to $10 per trial/hearing day.

Position Vote:
Voted for position: 10
Voted against position: 0
Abstained from vote: 1
Did not vote: 10

***Keller* Permissible Explanation**
Transcription costs are directly tied to access to justice, including, but not limited to, appeals. Prompt and affordable access to court transcripts is directly tied to availability of legal services to society and the improvement of the functioning of the courts.

Contact Person: James Chryssikos
Email: jwc@chryssikoslaw.com

Public Policy Position
HB 5046 and SB 0514

Support

Explanation:
It is long overdue to increase fees to reimburse court reporters. These bills will help address the shortage in court reporters and help expedite receipt of legal records.

Position Vote:
Voted for position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 2

Contact Person: Todd Tennis
Email: ttennis@capitolservices.org

SBM STATE BAR OF MICHIGAN

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306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2083

October 7, 2005

The Honorable Michael N. Switalski
State Senator
State Capitol
P.O. Box 30036
Lansing, MI 48909-7536

Re: SB 33 Civil Procedure Transcript Fee Increase

Dear Senator Switalski:

At its September 21, 2005 meeting, the State Bar of Michigan's Board of Commissioners unanimously voted to **support in principle[1] SB 33 provided that the bill is amended or tie-barred to legislation enacted to recognize and provide relief for transcript fee costs for indigent parties and parties represented by pro bono counsel.** We recognize the need for court reporters to receive an increase, especially given the considerable period of time since the last increase. However, we are concerned that a mechanism be in place to ensure record fees are not increased for those parties who cannot afford to pay the current rates, or the proposed increase. If access to court records is diminished due to increased costs, then an individual's access to justice may be directly affected. We have enclosed for your information a position statement from the State Bar's Standing Committee on Justice Initiatives that provides greater detail.

If you would like to discuss this position in further detail or have questions, please contact Janet Welch directly at (517) 346-6375, jwelch@mail.michbar.org; or Elizabeth Lyon directly at (517) 346-6325, elyon@mail.michbar.org.

Sincerely,

Janet Welch
General Counsel

Elizabeth K. Lyon
Public Policy Program Analyst

CC. Thomas W. Cranmer, President
John T. Berry, Executive Director
Nell Kuhnmuench, Governmental Consultant Services, Inc.

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[1] Definition of support in principle: Pending legislation that the State Bar supports but is not the subject of active lobbying effort. The State Bar is on record on this position and will explain it upon request.

COURT TRANSCRIPT PAGE RATES PER STATE**

State	Original Page Rate	Copy Page Rate	Appeal Rate	Specific type rates	Expedited / Rush Rate
Alabama	$3.50	$0.50	$4.00		rush: capped at $15/page
					Daily capped at $25/page
Alaska					parties find their own transcriber
Arizona	$2.50	$0.30			
Arkansas	$4.10	$0.05			reporter's discretion
California varies by county	average: $3.22				
Colorado	$3.00	$0.75		Civil cases: market rates	$3.75
Connecticut private party	$3.00				$4.75 rush $6.35 next day $10.00-next morning
Connecticut request by municipal or state entity	$2.00	$0.75			$3.50 standard $4.45/$1.55 for copy-next day $6.75-next morning (copy is $2.00)
Delaware (includes original + one copy)	$3.00	$2.00			$5.00-original+copy $3.00-copy
Florida	$4.50	$1.25			$6.75-one week $9.00-overnight
Georgia: criminal	120 days= $6.00				48 hours from court: $5.70 page
	over 120 days= $5.				24 hours= $7.58 page
	certified: $3.78	certified: $1.51			Preliminary, unedited, expedited: $5.70 --- preliminary unedited, daily: $7.58
Hawaii (includes original +3copies)					

COURT TRANSCRIPT PAGE RATES PER STATE**

Idaho	$3.25- 30 day turnaround				$4.25 - 7 days turnaround $5.25 - overnight/one-day
Illinois (rates are set via union negotiations	$4.00 (3 weeks)	$1.00 (public)/ $0.50 (government)			1-7 days: $4.75 copy: $1.50 or $0.50 --- Daily-$5.50 copies: $2.00/ $0.75
Indiana					
Iowa	$3.50	$0.50			0+1=$4.50, .75 for copy
					daily: $5.50 original daily: $1.00 copy
					Rough draft:$2.25 copy: $0.25
Kansas	$3.50	$0.50			3/day turnaround= $7.00 daily: $14/page
Louisiana					
Maine	$3.30 (30-days turnaround	$0.95			1-day turnaround-$5.75 3-days turnaround-$4.65 7-days turnaround - $4.35 14-days turnaround-$3.95 21-days turnaround-$3.70
Maryland	$3.50	$0.50			$3.75 - $8.00
Massachusetts					
Michigan	$1.75	$0.30			
Minnesota	criminal: $4.25				
	civil: $5.75				
Mississippi	$2.40	various			
Missouri			Criminal: $3.30	civil: $2.40-appeals	
Montana	$2.70	$0.50	$2.00		$4.35
Nebraska	$3.75	$0.75			7-day:$4.50 daily: $5.60
Nevada	$3.80	$1.00	$5.80 (for original and 2)		

COURT TRANSCRIPT PAGE RATES PER STATE**

New Jersey	$4.68	$0.78			7-10 days-$7.02 copy-$1.17
					daily-$9.36 copy-$1.56
New Mexico	civil: $3.25		$3.50-civil		
	criminal: $2.00		$2.50-criminal		
New York	$3.30-$4.30	$1.00			$4.40-$5.40
North Dakota					
Ohio - Criminal	$4.75	$0.08 (paper)			reporter's discretion
Civil	$6.25	$0.08 (paper)			reporter's discretion
Oklahoma	$3.50				
Oregon	$3.00	$0.25			
Pennsylvania	$2.25	$0.75		hard copy: $0.25	$3.25 expedited
Rhode Island	$3.00	$1.50			
South Carolina	$4.25	$1.00		$40 to email PDF to requestor	$1.50 for condensed version $1.00 per page for word index (Price to original requestor) ---------- $5.00-7 days turnaround/ $1.00 expedited copy ---------- $6.00-/$1.25 overnight ---------- $7.00-daily $1.25 daily copy
South Dakota	$3.00	$0.40			
Tennessee	$4.00	$0.50			per diem: $350 full
					per diem: $175/half day
Texas					
Utah	$4.50	$0.50			
Virginia					

COURT TRANSCRIPT PAGE RATES PER STATE**

Washington State criminal: indigent defendants	$2.80	$0.25			
Washington State, all other transcripts, criminal, civil	set by reporter ($4.00-$6.00)	$1.50			
West Virginia (steno writer)	$2.85	$1.00; additional copies: $0.75			
Wisconsin	$2.25	$0.50			

Data is compiled from various internet web search sources on January 4, 2023 for informational purposes only. Efforts are made to be accurate but monetary amounts could vary or be outdated due to information being obtained from such sources. Findings are compiled by Jessica Janes (CSR 7597) and Amy Shankleton-Novess (CER 0838)

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Stephan W. Currie, Executive Director

October 9, 2023

RE: House Bill 5046, sponsored by Representative Shannon

Rep. Kara Hope
Chair
House Committee on Criminal Justice
Room 519, House Office Building
Lansing, MI 48933

Dear Chair Hope and Members of the House Criminal Justice Committee:

The Michigan Association of Counties (MAC) understands the reason for this bill is to update fees for court reporters and recorders that have not been addressed in over 35 years. It is critical to pay court reporters and recorders at a rate that incentivizes and merits high-performing work. However, it is requested that with the page fee increases, two critical issues counties have long had with the funding structure of court recorders, can also be addressed:

1) Ensuring that work done on county time is given priority, to the extent it does not conflict or interfere with court rule. Some counties have found themselves cited on audits because of "double dipping" concept where court recorders were found to be using court time to prepare transcripts in which they were paid a salary and then additional transcript fees.

2) Delineates between supplies/equipment that shall be provided by the reporter/recorder versus the court funding unit. Transcription supplies and equipment is too be satisfied by the reporter/recorder at their own expenses as consistent with federal guidance*. The funding unit is responsible for items required to preserve the court record.

    a. *Reference federal guidance (260.50) re supplies: https://cdn.ymaws.com/www.aaert.org/resource/resmgr/Docs/Federal_Guidelines.pdf

MAC recognizes that an increase in fees is certainly due for court reporters and recorders. If the above concerns are addressed, counties can support this legislation.

AMY SHANKLETON-NOVESS (CER 0838)
MODERN COURT REPORTING & VIDEO, LLC
101 -A North Lewis Street, Saline, Michigan 48176

Established: 1988 SCAO Firm #08228
Telephone: (734) 429-9143 *e-mail: moderncourtreporting@hotmail.com*

We as official court stenograph reporters (CSR), certified electronic recorders (CERs), and freelance court reporters/recorders, would respectfully request that you consider supporting legislation to increase the page rate for official court transcripts. We have had many bills introduced in the past, but our efforts have not been successful. We would request your support of the proposed legislation to increase our rates for the following reasons:

1) Presently MCL 600.2543, effective as of January 1, 1987, mandates the page rate for official court transcripts as $1.75 for the original and 30 cents for the copy. For comparison purposes, Federal Court transcript rates are $3.65 per original page; copies are 90 cents per page. We would note that no other profession to our knowledge, has gone over 35 years without a pay increase.

2) The State of Michigan itself contracts with private court reporting firms for its own administrative agencies at rates averaging around $3.00 per page. The copy rate for these transcripts is determined by the transcription company itself.

3.) Michigan is one of the few states requiring stringent testing and certification of those individuals who prepare and file transcripts, yet compared to other states, Michigan's page rate is one of the lowest.

4) Michigan rules and statutes require that official court transcripts be prepared by state certified court recorders and reporters. It should be noted that the pool of qualified, experienced, and certified recorders and reporters has diminished in the last few years for various reasons: retirements, resignations, and that the per page rate has remained stagnant.

5) It should be noted that the costs of many court transcripts are paid by the private parties involved in the case, not the court or funding unit.

6) The history of court reporting is that each judge had a CSR or CER. Said CSR/CER produced all the transcripts that they reported or recorded. There has been a dramatic shift in the production of court transcripts over the last few years as digital and/or video recording technology has been instituted. The proceedings are often recorded by a court clerk, magistrate, or even the judge or law clerk. As such, courts are now increasingly outsourcing the production of transcripts.

7) Elimination of these court recorder/reporter positions has enabled courts to appropriate this financial savings to other facets of the court system. These cost savings consist of not only personnel salaries, but medical and retirement benefits, paid vacations, office expenses, internet services, supplies and equipment, and technical support. These savings to courts is transferred as overhead costs to freelance firms and the CSRs/CERs who transcribe after work hours. As such, these individuals shoulder all of these costs that court-employed CSRs/CERs are usually afforded.

7) Private firms also must carry the various liability, unemployment, and workers compensation insurances and taxes that are required of freelance company owners who provide court transcription services.

8) Registered freelance firms who are willing to provide court transcription services are overwhelmed with transcript requests. These transcript requests may be declined due to a heavy workload and the shortage of qualified, experienced, and certified transcribers. This shortage of certified transcribers frequently causes delayed transcript production, resulting in the inability to prepare for and proceed with upcoming court hearings, trials, and appeals. The causal effect is a decrease in judicial economy and justice not being served.

9) The general consensus among CERs statewide is a new precedent wherein CERs are often forbidden to prepare transcripts during court time, a change in practice from years past. Oftentimes CERs perform additional responsibilities besides recording, i.e. jury clerk, court administrator/ assistant court administrator, probation officer, traffic clerk, judge's secretary, and court clerks.

10) The field of court reporting/recording is a female-dominated industry. Producing transcripts after hours during family time, holidays and weekends, after working long days, is not financially advantageous to the court recorders at the present page rate. These employees search for firms to outsource their transcript production.

Respectfully submitted,

S/Amy Shankleton-Novess

Amy Shankleton-Novess
MECRA Legislative Committee

Jacobs and Diemer

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* Deceased
** Licensed in MI and FL

October 15, 2023

VIA EMAIL ONLY

Chair, Rep. Kara Hope
Clerk, Melissa Sweet
Criminal Justice Committee
124 N. Capitol Ave.
Lansing, MI 48933
karahope@house.mi.gov
msweet@house.mi.gov

Letter in Support of House Bill 5046/Senate Bill 514

It has been 37 years since Michigan Court Reporters received a raise. The maximum rate court reporters can charge per page of transcript was set in 1986 without any adjustments for inflation or otherwise. This is a problem for court reporters, themselves, as well as attorneys like me who depend on the timely production of transcripts to do my job.

In my role as an appellate attorney, ordering trial and hearing transcripts is a regular feature of my law practice. When I first started my career, court reporters could regularly produce transcripts in 7 to 10 days on an expedited basis, an enormous help when confronting an emergency faced by a client. Now, because of the shortage of court reporters, expedited transcripts are an exception not the rule.

By way of example, my law firm is working on a case that went to trial in July of 2022. The transcripts were ordered immediately and paid for up front. To date, we have received two of the seven volumes of trial transcripts. Another case went to trial in December of 2022 and we have received even less of those trial proceedings. In a case my firm was just hired for last week, we were given an expected timeline of 90 days for the production of two days of trial. As a result, we will be asking the trial judge to grant our client a new trial based on the collective memories

of the trial lawyers rather than the transcripts of the proceedings, themselves.

The exceedingly long timeline for the production of transcripts is not the fault of the individual court reporters. Far from it, court reporters are responsive, diligent and dutifully produce transcripts as soon as they can.

The problem is that there are too few of them and they are stretched too thin. The paltry page rate has caused many court reporters to leave the profession while discouraging others from joining.

An increase in the allowable page rate would go a long way toward alleviating the problem many of us in the legal profession face. The two bills under consideration should be passed and signed into law.

In addition to an immediate page rate increase, the bill beneficially includes mandatory cost-of-living increases every 5 years to ensure that the current 37-year wait does not happen again. Mandatory cost-of-living increases are found in many other areas of the law and have proven to be an effective and objective method of accounting for cost-of-living increases.

I would be more than happy to discuss my experiences further with the Criminal Justice Committee as House Bill 5046/Senate Bill 514 is under consideration. Although I am not a criminal practitioner, the rights at stake in criminal proceedings are even more important than what is typically at stake in civil proceedings and a delay in transcript production is assuredly an even bigger problem for criminal law practitioners.

Sincerely yours,

/s/

Timothy A. Diemer

TAD/

October 16, 2023

Chair, Rep. Kara Hope
Criminal Justice Committee
124 N. Capitol Ave.
Lansing, MI 48933

Re: HB 5046

Dear Chair Hope and Members of the Criminal Justice Committee:

On behalf of Certified Shorthand Reporters (CSRs) and Certified Electronic Recorders (CERs), both court-employed and freelance, we are urging you to pass HB 5046. There is a crisis in Michigan involving the preparation of transcripts that stems from the statutory page rate that has remained stagnant for over 36 years.

Over the years the number of CSRs and CERs has dwindled to an unsustainable level. Many have left the profession due to insufficient compensation and younger generations are reluctant to join. HB 5046 would bring Michigan's page rate to a competitive level more commensurate with neighboring states and appropriately compensate us for our valuable skill. This page rate increase will begin to reverse the effects of ignoring this issue for so long.

Not only does this crisis affect the CSRs and CERs themselves, but any defendant, litigant, attorney, judge, court staff, or court administrator that need timely transcripts to effectively administer justice.

An August 26, 2022 article in the Lansing State Journal reported that the backlog was at approximately 900 cases. As a result, the 30th Circuit Court in Lansing repurposed a nearby building which has been used for just over a year for visiting judges to assist in clearing the backlog.

When asked how the shortage of qualified transcriptionists is affecting the court system, an attorney from the Ingham County Public Defender's office stated, "Our clients end up sitting in jail for significant periods of time or are having to wait months on bond so that some sort of motion practice can eventually occur. The lack of transcript essentially just puts the brakes on moving the case forward in any way."

You have recently heard testimony on HB 5046. There are a few items we wanted to expand upon that came up during the questioning and answer portion of the testimony.

- Transcripts for Indigent Defendants: This page rate increase will not affect indigent defendants. If a defendant has appointed counsel, their counsel can request a transcript and it is billed to and paid by the appropriate agency. If a defendant is appealing their conviction the entire record is prepared at public expense.

- Copy rate: The copy rate applies to both hard and digital copies. Not all courts participate in the MiFILE system and hard copies are still required in many jurisdictions. This is similar to copy fee policies for court records. Courts also charge the same for hard and digital copies. In some jurisdictions the copy rate is has high as $2.00 per page.

- Timing for Filing: The court rules spell out how much time we have to file transcripts for various types of appeals. While we strive to turn out transcripts within those timelines and non-appeal orders in a reasonable time period, due to the shortage of available CERs and CSRs, this has resulted in the untimely filing of transcripts and delay in disposition of appellate disputes. If we are able to attract and/or recoup CERs and CSRs with an appropriate page rate, we will be able to fill orders faster and litigants will gain quicker access to their record.

- MAC Opposition: We are aware of MAC's card in opposition to this legislation and the issues raised in their letter to you dated October 9, 2023. We are extremely interested in working with MAC to address their concerns and gain their support. Each court has a unique system for the preparation of court transcripts. We believe it would be beneficial that any amendment address MAC's audit concerns while giving individual courts the ability to implement policies that best serve their needs.

As indicated below, HB 5046 has the full support of all professional court reporting organizations in Michigan including the Michigan Electronic Court Reporters Association (MECRA), the Michigan Association of Professional Court Reporters (MAPCR), and the Michigan Association of Freelance Court Reporters (MAFCR). We collectively ask this Committee to vote yes on this vital piece of legislation.

Thank you for your consideration, and please do not hesitate to contact any of us if you have questions or wish to discuss the matter further.

s/ Jacqueline Reed
Chair, Legislative Committee
Michigan Electronic Court Reporters Association (MECRA)
734-646-7463
jarlovesgod@gmail.com

s/ Kelli Werner
Director, Michigan Association of Professional Court Reporters (MAPCR)
Ingham County Circuit Court
517.483.6427
StenoKelli@outlook.com

s/ Kara Van Dam
Founder, Michigan Association of Freelance Court Reporters (MAFCR)
Ace Transcripts, LLC
734.368.9960
mafcr2019@gmail.com

October 15, 2023

Criminal Justice Committee,

My name is Alison Joersz and I've been a freelance court reporter/CER since 2017.

I'm writing to you regarding HB 5046 and the issue of fair pay for court reporters in the State of Michigan. As I'm sure you're aware, court reporters in this state, a female dominated profession, have not had a raise since 1986. Can you imagine if your own salary remained stagnant since 1986? Legislators were only making $36,520. The minimum wage was $3.35. Your own salaries have almost doubled since that time. Minimum wage has nearly tripled! Yet court reporter fees, mandated by statute, have not changed at all.

Given that many circuit courts (and others) rely heavily on transcription firms and freelance court reporters such as myself to do the important work of transcribing court proceedings, it's downright shameful that our wages have remained frozen in time for so long. Our work demands professionalism and accuracy. The work that Michigan's appellate courts do, including handing down precedent setting case law, **requires** accurate transcripts. Court processes and decision-making are put on hold while we do our work. And yet, timely production of transcripts has become more and more difficult given the exodus of workers from this field due to the dismally low - *lowest in the nation!* - rate of pay. The work we do is skilled labor and yet we remain sorely undervalued and taken for granted.

In addition to receiving a 1980's-based rate of pay, our status as independent contractors means we receive no benefits: no healthcare, no retirement benefits, no paid time off, etc. As a single mother of two young children, court reporting could never be my primary source of income as I could never make ends meet that way. Instead, I work 3 jobs, frequently dedicating evening and weekends to transcription work, simply to maintain a living wage.

This page rate increase is long overdue. Please help my family and other court reporters like me earn a respectable living that's commensurate with the important work we do.

Respectfully,

Alison Joersz
1070 Alton Ave
Flint, MI 48507
(734)846-7808

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 9, 2023

Re: HB 5131 – Court of Appeals Redistricting

Background

Article VI, Section 8 of the Michigan Constitution provides that judges of the Court of Appeals "shall be nominated and elected at non-partisan elections from districts drawn on county lines and as nearly as possible of equal population, as provided by law." It further provides that "[t]he number of judges comprising the Court of Appeals may be increased, and the districts from which they are elected may be changed by law." MCL 600.302 sets forth the current Court of Appeals districts, which were last redrawn in 2012 following the 2010 decennial census.

House Bill 5131 would redistrict the Court of Appeals based on the 2020 decennial census. As introduced, the bill proposed to increase the number of judicial districts from four to five and add five new judges to the Court of Appeals. Shortly after the bill was introduced, the State Court Administrative Office (SCAO) expressed concerns about the additional proposed judgeships based on available caseload data. Specifically, SCAO noted that, in 2010, there were 28 sitting judges on the Court of Appeals who handled 6,177 filings and 6,131 dispositions. Then, in 2013, the Court of Claims was placed within the Court of Appeals. Despite incorporating the Court of Claims, the Court of Appeals combined caseload has significantly decreased between 2010 and 2022. In 2022, the Court of Appeals and the Court of Claims handled 4,988 filings (a 19% decrease from 2010) and 4,455 dispositions (a 29% decrease from 2010). Even with the Court of Appeals having three fewer judges than in 2010, the number of filings per judge has decreased from a high of 284 in 2006 to 200 filings per judge in 2020. Based on this data, SCAO opposed the new judgeships proposed in House Bill 5131. SCAO did note that if the legislation was amended to remove the new judgeships, they would not take a position on the bill (i.e., the judicial district maps alone). In response to SCAO's opposition, a substitute bill was prepared (and is included in your materials). No committee hearings have been held at this time and, as such, the substitute has not been adopted.

***Keller* Considerations**

The composition of Court of Appeals election districts is a political question committed to the Legislature by the Michigan Constitution and outside the scope of *Keller*-permissible subject-areas for public policy advocacy by the State Bar.

The State Bar of Michigan has a long history of supporting the use of data-driven methodology, such as SCAO's biennial Judicial Resources Recommendation, to guide policymakers' decisions regarding

the appropriate number of judges assigned to a given bench. Allocating scarce judicial resources based on caseload data—whether it be for a district, circuit, probate, or appeals court—so that the state can ensure there are sufficient judges to manage a given court's docket is a subject reasonably related to the functioning of the courts. Legislation aligning (or misaligning) the number of judgeships with a given court's caseload relates to the functioning of the courts and is therefore *Keller*-permissible.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

To the extent House Bill 5131 addresses the question of aligning the number of judges on the Court of Appeals with the court's caseload, it is reasonably related to the functioning of the courts and therefore *Keller*-permissible. The composition of the Court of Appeals election districts is not *Keller*-permissible.

HOUSE BILL NO. 5131

October 12, 2023, Introduced by Reps. Skaggs and Andrews and referred to the Committee on Government Operations.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending sections 301, 302, and 303d (MCL 600.301, 600.302, and 600.303d), section 301 as amended by 2012 PA 40, section 302 as amended by 2012 PA 624, and section 303d as amended by 2005 PA 326, and by adding section 303e; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 301. ~~Except as otherwise provided in this section, the~~ **The** court of appeals consists of ~~28~~ **the number of** judges **as**

provided in section 303e and is a court of record. ~~Beginning on the date as determined under section 303a, the court of appeals consists of 24 judges.~~

Sec. 302. The state is divided into ~~4~~ **5** judicial districts for the election of judges of the court of appeals. ~~Except as otherwise provided in this section,~~ **Beginning on the date as determined under section 303e,** each district is entitled to ~~7~~ **6** judges. ~~Beginning on the date as determined under section 303a, each district is entitled to 6 judges.~~ The districts are constituted and numbered as follows:

(a) District 1 consists of the counties of ~~Branch, Hillsdale, Kalamazoo,~~ Lenawee, Monroe, ~~St. Joseph,~~ and Wayne.

(b) District 2 consists of the counties of Genesee, ~~Macomb, and~~ **Lapeer,** Oakland**, Saginaw, and Shiawassee**.

(c) District 3 consists of the counties of ~~Allegan, Barry, Berrien, Calhoun, Cass, Eaton, Ionia, Jackson, Kent, Mason, Montcalm, Muskegon, Newaygo, Oceana, Ottawa, Van Buren, and Washtenaw.~~**Alcona, Alger, Alpena, Antrim, Baraga, Benzie, Charlevoix, Cheboygan, Chippewa, Clare, Crawford, Delta, Dickinson, Emmet, Gladwin, Gogebic, Grand Traverse, Houghton, Iron, Isabella, Kalkaska, Kent, Keweenaw, Lake, Leelanau, Luce, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Missaukee, Montcalm, Montmorency, Muskegon, Newaygo, Oceana, Ogemaw, Ontonagon, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Schoolcraft, and Wexford.**

(d) District 4 consists of the counties of ~~Alcona, Alger, Alpena, Antrim,~~ Arenac, ~~Baraga,~~ Bay, ~~Benzie, Charlevoix, Cheboygan, Chippewa, Clare,~~ Clinton, ~~Crawford, Delta, Dickinson, Emmet, Gladwin, Gogebic, Grand Traverse,~~ Gratiot, ~~Houghton,~~ Huron, Ingham, Iosco, ~~Iron, Isabella, Kalkaska, Keweenaw, Lake, Lapeer, Leelanau,~~

Livingston, ~~Luce, Mackinac, Manistee, Marquette, Mecosta, Menominee,~~ **Macomb,** Midland, ~~Missaukee, Montmorency, Ogemaw, Ontonagon, Osceola, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw,~~ Sanilac, ~~Schoolcraft, Shiawassee,~~ St. Clair, **and** Tuscola. ~~, and Wexford.~~

(e) District 5 consists of the counties of Allegan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Hillsdale, Ionia, Jackson, Kalamazoo, Ottawa, St. Joseph, Van Buren, and Washtenaw.

Sec. 303d. ~~(1) To effectuate the transition from 3 districts having a total of 24 judges to 4 districts having a total of 28 judges, the following special provisions apply:~~

~~(a) The judgeship in district 1 filled on October 13, 1993 by an incumbent whose term expires January 1, 1995 and who is not eligible to seek reelection shall terminate January 1, 1995 and shall not be filled by election in 1994.~~

~~(b) To provide 7 judges in districts 3 and 4:~~

~~(*i*) In district 3, 4 new judgeships shall be filled by election in 1994. The candidate receiving the highest number of votes is elected for a term of 10 years, the candidates receiving the second and third highest number of votes are elected for terms of 8 years each, and the candidate receiving the fourth highest number of votes is elected for a term of 6 years.~~

~~(*ii*) In district 4, 1 new judgeship shall be filled by election in 1994. The candidate receiving the highest number of votes is elected for a term of 6 years.~~

~~(2) A~~ **Except as otherwise provided in this section, a** judge of the court of appeals who is elected or appointed to a first term that begins on or after January 1, 1994 shall maintain offices only in the principal court of appeals offices in the district in which

~~he or she~~ **the judge** was elected or appointed or in another office located in the municipality where the principal court of appeals facilities are located. **Beginning on the effective date of the amendatory act that added section 303e, a judge elected or appointed to district 4 or 5 may maintain an office in the principal court of appeals facilities in the county of Ingham.**

Sec. 303e. To effectuate the transition from 4 districts that have a total of 25 judges on the effective date of the amendatory act that added this section to 5 districts that have a total of 30 judges, the following special provisions apply:

(a) The judgeship in district 1 occupied on October 1, 2023 by an incumbent whose term expires January 1, 2025 and who is not eligible to seek reelection terminates on January 1, 2025 and must not be filled by election in 2024.

(b) To provide 6 judges in districts 3, 4, and 5, all of the following apply:

(*i*) In district 3, 1 new judgeship shall be filled by election in 2024.

(*ii*) In district 4, 1 new judgeship shall be filled by election in 2024.

(*iii*) In district 5, 4 new judgeships shall be filled by election in 2024. The 2 candidates that receive the highest and second highest number of votes are each elected for a term of 10 years. The candidate that receives the third highest number of votes is elected for a term of 8 years. The candidate that receives the fourth highest number of votes is elected for a term of 6 years.

Enacting section 1. Sections 303a, 303b, and 303c of the revised judicature act of 1961, 1961 PA 236, MCL 600.303a,

600.303b, and 600.303c, are repealed.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"

by amending sections 301, 302, and 303d (MCL 600.301, 600.302, and 600.303d), section 301 as amended by 2012 PA 40, section 302 as amended by 2012 PA 624, and section 303d as amended by 2005 PA 326, and by adding section 303e; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 301. ~~Except as otherwise provided in this section, the~~ **The** court of appeals consists of ~~28~~ **the number of** judges **as provided in section 303e** and is a court of record. ~~Beginning on the date as determined under section 303a, the court of appeals consists of 24 judges.~~

Sec. 302. The state is divided into ~~4~~ **5** judicial districts for the election of judges of the court of appeals. ~~Except as otherwise provided in this section,~~ **Beginning on the date as determined under section 303e,** each district is entitled to ~~7~~ **5** judges. ~~Beginning on the date as determined under section 303a, each district is entitled to 6 judges.~~ The districts are constituted and numbered as follows:

(a) District 1 consists of the counties of ~~Branch, Hillsdale, Kalamazoo,~~ Lenawee, Monroe, ~~St. Joseph,~~ and Wayne.

(b) District 2 consists of the counties of Genesee, **Lapeer, Livingston,** ~~Macomb, and Oakland~~**, and Shiawassee**.

(c) District 3 consists of the counties of ~~Allegan, Barry, Berrien, Calhoun, Cass, Eaton, Ionia, Jackson, Kent, Mason, Montcalm, Muskegon, Newaygo, Oceana, Ottawa, Van Buren, and Washtenaw.~~ **Alger, Antrim, Baraga, Calhoun, Charlevoix, Cheboygan, Chippewa, Clare, Crawford, Delta, Dickinson, Eaton, Emmet, Gladwin, Gogebic, Grand Traverse, Houghton, Ionia, Iron, Isabella, Kalkaska, Kent, Keweenaw, Lake, Luce, Mackinac, Marquette, Mecosta, Menominee, Midland, Missaukee, Montcalm, Newaygo, Ogemaw, Ontonagon, Osceola, Oscoda, Roscommon, Schoolcraft, and Wexford.**

(d) District 4 consists of the counties of Alcona, ~~Alger,~~ Alpena, ~~Antrim,~~ Arenac, ~~Baraga,~~ Bay, ~~Benzie, Charlevoix, Cheboygan, Chippewa, Clare,~~ Clinton, ~~Crawford, Delta, Dickinson, Emmet, Gladwin, Gogebic, Grand Traverse,~~ Gratiot, ~~Houghton,~~ Huron, Ingham, Iosco, ~~Iron, Isabella, Kalkaska, Keweenaw, Lake, Lapeer,~~

~~Leelanau, Livingston,~~ ~~Luce, Mackinac, Manistee, Marquette, Mecosta, Menominee,~~ **Macomb,** ~~Midland~~, ~~Missaukee,~~ Montmorency, ~~Ogemaw, Ontonagon, Osceola, Oscoda,~~ Otsego, Presque Isle, ~~Roscommon,~~ Saginaw, Sanilac, ~~Schoolcraft, Shiawassee,~~ St. Clair, **and** Tuscola. ~~, and Wexford.~~

(e) District 5 consists of the counties of Allegan, Barry, Benzie, Berrien, Branch, Cass, Hillsdale, Jackson, Kalamazoo, Leelanau, Manistee, Mason, Muskegon, Oceana, Ottawa, St. Joseph, Van Buren, and Washtenaw.

Sec. 303d. ~~(1) To effectuate the transition from 3 districts having a total of 24 judges to 4 districts having a total of 28 judges, the following special provisions apply:~~

~~(a) The judgeship in district 1 filled on October 13, 1993 by an incumbent whose term expires January 1, 1995 and who is not eligible to seek reelection shall terminate January 1, 1995 and shall not be filled by election in 1994.~~

~~(b) To provide 7 judges in districts 3 and 4:~~

~~(*i*) In district 3, 4 new judgeships shall be filled by election in 1994. The candidate receiving the highest number of votes is elected for a term of 10 years, the candidates receiving the second and third highest number of votes are elected for terms of 8 years each, and the candidate receiving the fourth highest number of votes is elected for a term of 6 years.~~

~~(*ii*) In district 4, 1 new judgeship shall be filled by election in 1994. The candidate receiving the highest number of votes is elected for a term of 6 years.~~

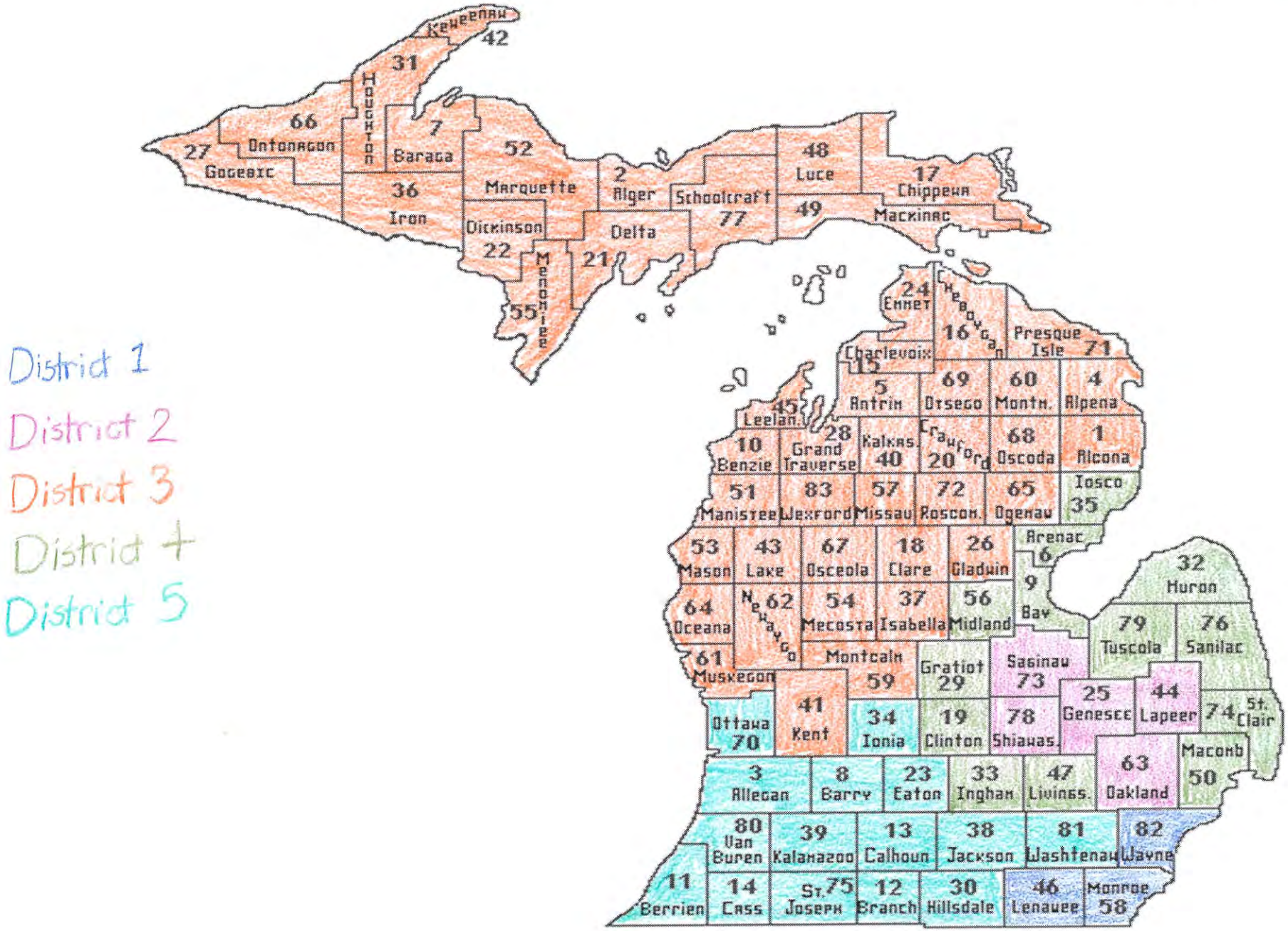
~~(2) A~~ **Except as otherwise provided in this section, a** judge of the court of appeals who is elected or appointed to a first term that begins on or after January 1, 1994 shall maintain offices only in the principal court of appeals offices in the district in which ~~he or she~~ **the judge** was elected or appointed or in another office located in the municipality where the principal court of appeals facilities are located. **Beginning on the effective date of the amendatory act that added section 303e, a judge elected or appointed to district 4 or 5 may maintain an office in the principal court of appeals facilities in the county of Ingham.**

Sec. 303e. To effectuate the transition from 4 districts that have a total of 25 judges on the effective date of the amendatory act that added this section to 5 districts that have a total of 25 judges, the following special provisions apply:

(a) The 2 judgeships in district 1 occupied on October 1, 2023 by incumbents whose terms expire January 1, 2025 terminate on January 1, 2025 and must not be filled by election in 2024.

Enacting section 1. Sections 303a, 303b, and 303c of the revised judicature act of 1961, 1961 PA 236, MCL 600.303a, 600.303b, and 600.303c, are repealed.

Original



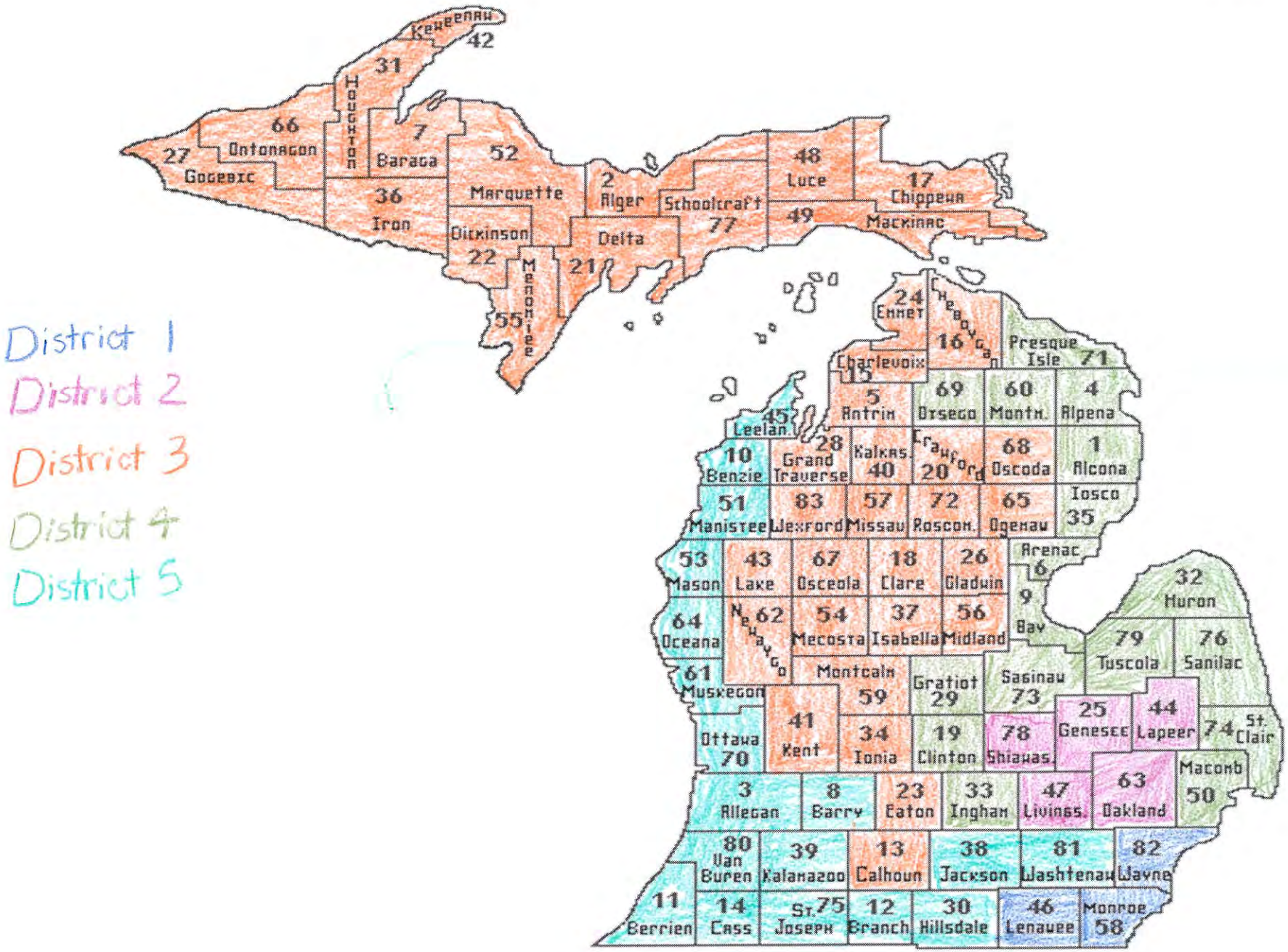
District 1

District 2

District 3

District 4

District 5



District 1
District 2
District 3
District 4
District 5

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 9, 2023

Re: HB 5271 – Post-Conviction DNA Testing Petitions

Background

Since 2001, MCL 770.16 has permitted certain defendants with felony convictions to petition the circuit court to order DNA testing of biological material. Under current law, if an individual was convicted *before* January 8, 2001 (the effective date of 2000 PA 402, which added MCL 770.16 to the Code of Criminal Procedure) and is still serving their sentence, they may petition for DNA testing of any biological material identified during the investigation leading to their conviction, and for a new trial based on the results of that testing. MCL 770.16(1). If an individual was convicted *on or after* January 8, 2001, they may only petition for testing and a new trial based on that testing if they meet three criteria: (1) DNA testing was done in their case, (2) the DNA testing was inconclusive, and (3) testing using current DNA technology will likely lead to a conclusive result. *Id.*

House Bill 5271, which was developed in consultation with the Cooley Innocence Project, would remove the temporal limitations and permit anyone convicted of a felony to petition for DNA testing of biological material if either: (1) the biological material was no subject to DNA testing or (2) the biological material was subject to DNA testing, and either (a) the DNA testing requested uses a method or technology that is likely to provide more accurate or probative results than the previous testing or (b) the court determines that granting the petition is in the interest of justice. In addition, current law requires the defendant's felony conviction to have been "at trial" and that the defendant is presently incarcerated. House Bill 5271 removes "at trial" from the statute, which would allow individuals who pleaded guilty to petition for post-conviction DNA testing, as well as permitting those who have completed their sentences to file a petition.

Under current law, the court shall order DNA testing if an eligible defendant presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in conviction. The defendant must also establish by clear and convincing evidence that (1) a sample of the biological material is available for testing, (2) the biological material was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted, and (3) the identity of the defendant as the perpetrator of the crime was at issue during trial. House Bill 5271 would instead require that a court order DNA testing if the defendant presents prima facie evidence that (1) the biological material sought to be tested is material to the convicted defendant's identity as the perpetrator of, or accomplice to, the crime that resulted in conviction and (2) a sample of identified biological material is available for testing.

If the DNA results call into question the defendant's identity as the perpetrator, the court shall appoint counsel and hold a hearing to determine whether the DNA testing results, as well as any other new evidence, make a different result probable on retrial.

House Bill 5271 also provides a definition of "biological material" as including "any evidence for which there is a reasonable probability of containing quantities of DNA from any human body product." The term is undefined under current law.

Keller Considerations

The State Bar of Michigan has supported four previous pieces of legislation amending MCL 770.16: 2007 HB 5089 (which became 2008 PA 410), 2011 SB 361 (which became 2011 PA 212), 2014 SB 1050, and 2015 SB 151 (which became 2015 PA 229). In each of these cases, it was determined that legislation related to the procedures governing petitions for post-conviction DNA testing was reasonably related to the availability of legal services to society. Likewise, House Bill 5271 is reasonably related to the availability of legal services to society because it will expand access to post-conviction DNA testing (and to associated new trials in cases that meet the standards set forth in the bill) to a larger population of individuals, while also requiring that the court appoint counsel, under MCR 6.505(A), if the results of DNA testing call into question the defendant's identity as the perpetrator.

Keller Quick Guide

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	• Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

House Bill 5271, like previous legislation considered by the Board of Commissioners related to post-conviction DNA testing, is reasonably related to the availability of legal services to society and therefore *Keller*-permissible. The bill may be considered on its merits.

HOUSE BILL NO. 5271

October 26, 2023, Introduced by Reps. Hope, Rheingans, Wilson, Dievendorf, McKinney, Hood, O'Neal, Price, Edwards, Tsernoglou and Whitsett and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

by amending section 16 of chapter X (MCL 770.16), as amended by 2015 PA 229.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER X

Sec. 16. (1) Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony ~~at trial before January 8, 2001 who is serving a prison sentence for the felony conviction~~ may petition the circuit court to order DNA testing of biological material identified during the investigation leading to

~~his or her~~ **the defendant's** conviction, and for a new trial based on the results of that testing. ~~Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:~~**A petition filed under this subsection must establish that either of the following circumstances apply to the biological material:**

(a) ~~That DNA testing was done in the case or under this act.~~**It was not subjected to DNA testing.**

(b) ~~That the results of the testing were inconclusive.~~**It was subjected to DNA testing and 1 or both of the following circumstances apply:**

(*i*) The defendant is requesting DNA testing using a method or technology that provides a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

(*ii*) The court determines that granting the petition is in the interest of justice.

~~(c) That testing with current DNA technology is likely to result in conclusive results.~~

(2) A petition under this section ~~shall~~ **must** be filed in the circuit court for the county in which the defendant was sentenced and ~~shall~~ **must** be assigned to the sentencing judge or ~~his or her~~ **the judge's** successor. The petition ~~shall~~ **must** be served on the prosecuting attorney of the county in which the defendant was sentenced.

(3) A petition under this section ~~shall~~ **must** allege that biological material was collected and identified during the investigation of the defendant's case. If the defendant, after diligent investigation, is unable to discover the location of the identified biological material or to determine whether the biological material is no longer available, the defendant may petition the court for a hearing to determine whether the identified biological material is available. If the court determines that identified biological material was collected during the investigation, the court shall order appropriate police agencies, hospitals, or the medical examiner to search for the material and to report the results of the search to the court.

(4) The court shall order DNA testing if the defendant ~~does all of the following:~~

~~(a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.~~

~~(b) Establishes all of the following by clear and convincing evidence:~~

~~(*i*) A sample of identified biological material described in subsection (1) is available for DNA testing.~~

~~(*ii*) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.~~

~~(*iii*) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.~~**presents prima facie evidence of both of the following:**

(a) The biological material sought to be tested is material to the issue of the convicted defendant's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.

(b) A sample of identified biological material is available for DNA testing.

(5) The court shall state its findings of fact on the record or shall make written findings of fact supporting its decision to grant or deny a petition brought under this section.

(6) If the court grants a petition for DNA testing under this section, the identified biological material and a biological sample obtained from the defendant ~~shall~~ **must** be subjected to DNA testing by a laboratory approved by the court. If the court determines that the applicant is indigent, the cost of DNA testing ordered under this section ~~shall~~ **must** be borne by the state. The results of the DNA testing ~~shall~~ **must** be provided to the court and to the defendant and the prosecuting attorney. Upon motion by either party, the court may order that copies of the testing protocols, laboratory procedures, laboratory notes, and other relevant records compiled by the testing laboratory be provided to the court and to all parties.

(7) If the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material, both of the following apply:

(a) The court shall deny the motion for new trial.

(b) The defendant's DNA profile ~~shall~~ **must** be provided to the department of state police for inclusion under the DNA identification profiling system act, 1990 PA 250, MCL 28.171 to 28.176.

(8) If the results of the DNA testing ~~show that the defendant~~

~~is not the source of the identified biological material, the court shall appoint counsel pursuant to MCR 6.505(A) and hold a hearing to determine by clear and convincing evidence all of the following:~~

~~(a) That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.~~

~~(b) That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1).~~

~~(c) That the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.~~**call into question the defendant's identity as the perpetrator, the court shall appoint counsel as provided in MCR 6.505(A) and hold a hearing to determine whether the results of the testing, along with any other new evidence, make a different result probable upon retrial.**

(9) Upon motion of the prosecutor, the court shall order retesting of the identified biological material and shall stay the defendant's motion for new trial pending the results of the DNA retesting.

(10) The court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the defendant a new trial under this section. Notwithstanding section 3 of this chapter, an aggrieved party may

appeal the court's decision to grant or deny the petition for DNA testing and for new trial by application for leave granted by the court of appeals.

(11) If the name of the victim of the felony conviction described in subsection (1) is known, the prosecuting attorney shall give written notice of a petition under this section to the victim. The notice ~~shall~~ **must** be by first-class mail to the victim's last known address. Upon the victim's request, the prosecuting attorney shall give the victim notice of the time and place of any hearing on the petition and shall inform the victim of the court's grant or denial of a new trial to the defendant.

(12) The investigating law enforcement agency shall preserve any biological material identified during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material ~~shall~~ **must** be preserved for the period of time that any person is ~~incarcerated in connection with that case.~~**in the custody of this state, under the jurisdiction of this state, including while serving a term of probation or parole, or required to register under the sex offenders registration act, 1994 PA 295, MCL 28.721 to 28.730.**

(13) As used in this section, "biological material" includes any evidence for which there is a reasonable probability of containing quantities of DNA from any human body product.

Public Policy Position
HB 5271

Support with Amendment

Explanation

The Committee voted unanimously (14) to support HB 5271. The Committee believes that all of the proposed amendments to MCL 770.16 expand access to DNA testing in one form or another. The proposed legislation recognizes that justice is a two-way street, and that while it is important to have a process that holds offenders accountable for their role in criminal behavior, it is equally important to have a readily accessible process that enables those offenders to present evidence supporting their innocence – regardless of the stage of their case. House Bill 5271 will remove barriers that continue to prevent many Michiganders from being able to support their claims of innocence with readily available DNA evidence that the government refuses to test.

The Committee further recommends that Section 16(12) of the bill be amended as follows:

> The investigating law enforcement agency shall preserve any biological material identified during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material must be preserved until either (1) 25 years have passed from the date that the convicted person ceases to be in the custody of this state, under the jurisdiction of this state, including while serving a term of probation or parole, or required to register under the sex offender registration act, 1994 PA 295, MCL 28.721 to 28.730, or (2) the investigating law enforcement agency receives notice that the convicted person is deceased, whichever is sooner.

The Committee believes that the preservation time period should extend beyond the convicted person's time in state custody. Some Michiganders who may benefit from petitioning for DNA testing may complete their time in state custody before their legal claims are fully litigated. Given that a felony conviction can have devastating, life-altering impact on a Michigander's ability to find a job, find housing, and thrive in the community, Michiganders who have completed their time in state custody may still desire to prove their innocence and clear their record. Their ability to establish their innocence through post-conviction proceedings should not evaporate simply because they've served their sentence – particularly in cases where the convicted person had a relatively short sentence to begin with.

Position Vote:

Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

Keller Permissibility Explanation

The Committee voted unanimously that this legislation is *Keller*-permissible because it would expand the availability of legal services to society by: (1) broadening the conditions under which Michiganders can petition for DNA testing, and (2) requiring the court to appoint counsel pursuant to MCR 6.505(A) and hold a hearing to determine whether the results of the DNA testing, as well as any other new evidence, make a different result probable upon retrial.

Contact Persons:

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Public Policy Position
HB 5271

Support

Explanation

The Committee voted to support House Bill 5271. A majority of the Committee members felt that the legislation would address several long-standing concerns about the structure of Michigan's post-conviction DNA testing statute and update MCL 770.16 to take account of the rapid pace of technological change in the field of DNA testing. Some Committee members expressed concern about the impact the legislation would have on court dockets and state/local budgets, as well as the breadth of the definition of "biological material" proposed in the bill.

Position Vote:

Voted For position: 10
Voted against position: 7
Abstained from vote: 1
Did not vote (absence): 6

***Keller* Permissible Explanation**

The Committee voted unanimously that this legislation is *Keller*-permissible because it would expand the availability of legal services to society. It is also reasonably related to the functioning of the courts in that itestablishes specific court procedures that would apply in post-conviction DNA testing petitions.

Contact Persons:

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John A. Shea jashea@earthlink.net

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 9, 2023

Re: HB 5300 – Name Change Petition Procedures

Background
In July 2022, the Board of Commissioners considered proposed amendments to MCR 3.613 (ADM File No. 2021-21) related to court procedures governing petitions for name changes. The Board voted unanimously to support the proposed amendments with two additional recommendations that:

(1) The Court should make good cause presumptive for persons whose name change is sought for affirmation of gender identity, and for victims of human trafficking and domestic violence; and

(2) The Court should add language to provide for court-approved alternative service for notice of a hearing to noncustodial parents, rather than requiring publication of such notice in a newspaper.

In May 2023, the Court issued its order amending MCR 3.613. The Court incorporated the Bar's alternative service recommendation but did not include any provision for presumptive good cause. In addition, Justice Zahra (joined by Justice Viviano) dissented from the Court's order and identified two areas where he believed that the Court had exceeded its rulemaking authority by adopting language that went beyond procedural implementation of MCL 711.3. Justice Cavanagh disagreed with the dissent's conclusion in her concurrence, which was joined by Justice Welch.

At the same time the Court was considering these Michigan Court Rules amendments, legislators were developing a bill to update the Probate Code, 1939 PA 288, to make it easier for individuals to petition for a name change in Michigan courts. House Bill 5300 is the result. The bill would amend MCL 711.3 to adopt the Board of Commissioners recommendation of establishing a presumption of good cause if the petitioner is a victim of an assaultive crime, domestic violence, harassment, human trafficking, or stalking, or if the petitioner seeks to affirm their gender identity. In addition, the bill directly addresses both of the issues raised in Justice Zahra's aforementioned dissent to align the statutory language with the Court's recent amendments to MCR 3.613.

House Bill 5300 would require a petitioner with a criminal record (including a pending criminal charge) to include their criminal record in the petition but would remove the presumption that a petitioner

with a criminal record seeking a name change is doing so with fraudulent intent. The bill also removes the requirement that a petitioner 22 years of age or older have two complete sets of fingerprints taken at a local police agency and that these fingerprints be forwarded to the Department of State Police and Federal Bureau of Investigation for a background check. The bill permits the court, upon filing of a petition, to set a time and place for a hearing on the petition or to issue an order without a hearing at its discretion. Finally, the bill defines several terms used throughout the bill.

Keller Considerations

House Bill 5300 proposes a series of amendments to the Probate Code, 1939 PA 288, that address the procedures that courts must use when considering a petition for a name change. The bill does not make substantive changes to the underlying law regarding who is eligible for a name change. The bill's proponents state that it is intended to remove barriers that prevent petitioners from reasonably accessing name changes today. Removal of such barriers will give more individuals access to these court proceedings, which are out of reach or overly burdensome for many. Additionally, the bill will align the Probate Code and MCR 3.613 to provide clarity for Michigan courts, attorneys, and petitioners. The legislation is inextricably linked with the court rules and the procedures governing name change proceedings, as evidenced by the fact that the bill would incorporate the Board's own proposal that was offered in the court rule context into statute, while also addressing concerns raised by dissenting justices. As such, House Bill 5300 is reasonably related to both availability of legal services to society and improvement in functioning of the courts.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

House Bill 5300 is reasonably related to both availability of legal services to society and improvement in functioning of the courts. The bill is therefore *Keller*-permissible and may be considered on its merits.

HOUSE BILL NO. 5300

November 03, 2023, Introduced by Reps. Pohutsky, Dievendorf, Brabec, Scott and Morgan and referred to the Committee on Judiciary.

A bill to amend 1939 PA 288, entitled

"Probate code of 1939,"

by amending sections 1 and 3 of chapter XI (MCL 711.1 and 711.3), section 1 as amended by 2020 PA 40 and section 3 as added by 2000 PA 111.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER XI

Sec. 1. (1) The family division of the circuit court for a county may enter an order to change the name of an individual who has been a resident of the county for not less than 1 year, ~~and who in accordance with subsection (2)~~ petitions in writing to the court

for that purpose**,** ~~showing~~ **and shows that** a sufficient reason for the proposed change **exists** and that the change is not sought with a fraudulent intent. If the ~~individual who petitions for a name change~~ **petitioner** has a criminal record, ~~the individual is presumed to be seeking a name change with a fraudulent intent. The burden of proof is on a petitioner who has a criminal record to rebut the presumption.~~ **including, but not limited to, a charge pending against the petitioner, the petitioner shall include the criminal record in the petition. If the petitioner does not have a criminal record, the petitioner shall state, in the petition, that the petitioner does not have a criminal record.** The court shall set a time and place for hearing ~~and,~~ **or,** except as provided **in subsection (6), enter the order without hearing. Except as provided** in section 3 of this chapter, **the court shall also** order publication as provided by supreme court rule.

~~(2) An individual who is 22 years of age or older and who petitions to have his or her name changed shall have 2 complete sets of his or her fingerprints taken at a local police agency. The fingerprints, along with a copy of the petition and the required processing fees, must be forwarded to the department of state police. The department of state police shall compare those fingerprints with its records and shall forward a complete set of fingerprints to the Federal Bureau of Investigation for a comparison with the records available to that agency. The department of state police shall report to the court in which the petition is filed the information contained in the department's records with respect to any pending charges against the petitioner or a record of conviction of the petitioner and shall report to the court similar information obtained from the Federal Bureau of~~

~~Investigation. If there are no pending charges or record of conviction against the petitioner, the department of state police shall destroy its copy of the petitioner's fingerprints. The court shall not act upon the petition for a name change until the department of state police reports the information required by this subsection to the court.~~

(2) ~~(3)~~ If the court enters an order to change the name of an individual who has a criminal record, the court shall forward the order to the central records division of the department of state police and to ~~1 or more~~ **all** of the following**, as applicable**:

(a) The department of corrections, if the individual named in the order is in prison or on parole or has been imprisoned or released from parole in the immediately preceding 2 years.

(b) The sheriff of the county in which the individual named in the order was last convicted, if the individual was incarcerated in a county jail or released from a county jail within the immediately preceding 2 years.

(c) The court that has jurisdiction over the individual named in the order, if the individual named in the order is under the jurisdiction of the family division of the circuit court or has been discharged from the jurisdiction of that court within the immediately preceding 2 years.

(3) ~~(4)~~ The court may permit an individual ~~having~~ **that has** the same name, or a similar name, to that which the petitioner proposes to assume, to intervene in the proceeding ~~for the purpose of showing~~ **to show** fraudulent intent.

(4) ~~(5)~~ Except as provided in subsection ~~(7),~~ **(6),** if ~~the~~ **a** petitioner **under this section** is a minor, the petition must be signed by the ~~mother and father~~ **minor's parents,** jointly; by the

surviving parent, if 1 **parent** is deceased; ~~if both parents are deceased,~~ by the guardian of the minor; or by 1 of the minor's parents, if there is only 1 ~~legal~~ parent **with legal custody** available to give consent. If either parent has been declared mentally incompetent, the petition may be signed by the guardian for that parent. ~~The~~ **If the minor is 14 years of age or older,** written consent to the **minor's name** change ~~of name of a minor 14 years of age or older,~~ **must be** signed by the minor ~~in the presence of the court, must be~~ **and** filed with the court before an order ~~changing~~ **to change** the name of the minor is entered**, but the minor is not required to sign the consent in the presence of the court**. If the court considers the ~~child~~ **minor** to be of sufficient age to express a preference, the court shall consult ~~a~~ **the** minor, ~~under~~ **if the minor is less than** 14 years of age, as to a change in ~~his or her~~ **the minor's** name, and the court shall consider the minor's wishes.

(5) ~~(6)~~ If ~~the~~ **a** petitioner **under this section** is married, the court, in its order ~~changing~~ **to change** the name of the petitioner, may include the name of the spouse, if the spouse consents, and ~~may include~~ the names of minor children of the petitioner of whom the petitioner has legal custody. ~~The~~ **If a minor described in this subsection is 14 years of age or older,** written consent to the **minor's name** change ~~of name of a child 14 years of age or older,~~ **must be** signed by the ~~child in the presence of the court, must be~~ **minor and** filed with the court before the court includes ~~that child~~ **the minor** in its order**, but the minor is not required to sign the consent in the presence of the court**. Except as provided in subsection ~~(7), the name of a minor under~~ **(6), if a minor described in this subsection is less than** 14 years of age, ~~may~~ **the minor's**

name must not be changed unless ~~he or she~~ **the minor** is ~~the~~ **a** natural or adopted child of the petitioner and ~~unless~~ consent is obtained from the ~~mother and father~~ **minor's parents,** jointly; ~~,~~ from the surviving parent, if 1 **parent** is deceased; ~~,~~ or from 1 of the minor's parents, if there is only 1 ~~legal~~ parent **with legal custody** available to give consent. If the court considers the ~~child~~ **minor** to be of sufficient age to express a preference, the court shall consult ~~a~~ **the** minor, ~~under~~ **if the minor is less than** 14 years of age, as to a change in ~~his or her~~ **the minor's** name, and the court shall consider the minor's wishes.

(6) ~~(7)~~ The name of a minor may be changed ~~pursuant to~~ **under** subsection ~~(5)~~ **(4)** or ~~(6)~~ **(5)** with the consent or signature of the custodial parent upon notice to the noncustodial parent as provided in supreme court rule and after a hearing in any of the following circumstances:

(a) If both of the following occur:

(*i*) The other parent, having the ability to support or assist in supporting the ~~child,~~ **minor,** has failed or neglected to provide regular and substantial support for the ~~child~~ **minor** or, if a support order has been entered, has failed to substantially comply with the order, for 2 years or more before the filing of the petition.

(*ii*) The other parent, having the ability to visit, contact, or communicate with the ~~child,~~ **minor,** has regularly and substantially failed or neglected to do so for 2 years or more before the filing of the petition.

(b) The other parent has been convicted of a violation of section 136b, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.520b to 750.520e, and

750.520g, and the ~~child~~ **minor** or a sibling of the ~~child~~ **minor** is a victim of the crime.

(c) The other parent has been convicted of a violation of section 316 or 317 of the Michigan penal code, 1931 PA 328, MCL 750.316 and 750.317.

(7) ~~(8)~~ A false statement that is intentionally included ~~within~~ **in** a petition for a name change constitutes perjury under section 422 of the Michigan penal code, 1931 PA 328, MCL 750.422.

Sec. 3. (1) In a proceeding under section 1 of this chapter, **all of the following apply:**

(a) If the court receives a petition that shows good cause, the court ~~may~~ **must** order ~~for good cause~~ that no publication of the proceeding take place and that the record of the proceeding be confidential. ~~Good cause under this section includes, but is not limited to, evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking or an assaultive crime.~~

(b) ~~(2) Evidence under subsection (1) of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if~~ **A petition that shows good cause must state the reason or reasons why the petitioner or the endangered individual fears** the **publication or availability of the** record ~~is published or otherwise available. If evidence is offered of stalking or an assaultive crime,~~ **of the proceeding, and** the **court must presume that a petition shows good cause if any of the following reasons are included in the statement:**

(*i*) The petitioner or the endangered individual is a victim of

an assaultive crime, domestic violence, harassment, human trafficking, or stalking.

(*ii*) The petitioner or the endangered individual seeks to affirm their gender identity.

(c) The court shall not require proof of an arrest or prosecution ~~for that crime~~ to ~~reach a finding of~~ **find that a petition shows** good cause. ~~under subsection (1).~~

(2) ~~(3)~~ A court officer, employee, or agent ~~who~~ **that** divulges, uses, or publishes, beyond the scope of ~~his or her~~ **the court officer's, employee's, or agent's** duties with the court, information from a record made confidential under this section is guilty of a misdemeanor. This subsection does not apply to a disclosure under a court order.

(3) ~~(4)~~ A confidential record created under this section is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(4) ~~(5)~~ As used in this section: ~~, "stalking"~~

(a) "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(b) "Domestic violence" means the occurrence of any of the following acts by a person that is not an act of self-defense:

(*i*) Causing or attempting to cause physical or mental harm to a family or household member.

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) Causing or attempting to cause a family or household

member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) "Family or household member" includes any of the following:

(*i*) A spouse or former spouse.

(*ii*) An individual with whom the person resides or has resided.

(*iii*) An individual with whom the person has or has had a dating relationship.

(*iv*) An individual with whom the person is or has engaged in a sexual relationship.

(*v*) An individual to whom the person is related or was formerly related by marriage.

(*vi*) An individual with whom the person has a child in common.

(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*).

(d) "Gender identity" means an individual's gender-related self-identity, regardless of whether the self-identity is associated with the individual's assigned sex at birth.

(e) "Good cause" includes, but is not limited to, evidence that the publication or availability of the record of a proceeding under section 1 of this chapter could place the petitioner or another individual in physical danger, at an increased likelihood of physical danger, or at risk of unlawful discrimination or retaliation.

(f) "Human trafficking" means a violation of chapter LXVIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h.

(g) "Stalking" means that term as defined in sections 411h ~~and~~ **to** 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h ~~and~~ **to** 750.411i.

Public Policy Position
HB 5300

Support with an Amendment

Explanation
The Committee voted to support the proposed legislation with a recommendation that it be amended to require that a custodial parent notify the Friend of the Court of a minor's last name change.

In June 2022, the Committee considered proposed amendments to MCR 3.613 and recommended additional amendments that would create a presumption of confidentiality for people who are transgender and for survivors of domestic violence. While the Board of Commissioners ultimately supported these proposed amendments, they were not adopted by the Court in its final order. House Bill 5300 would largely accomplish the Committee's recommendations statutorily.

Creating a presumption of good cause to waive the publication requirement and make the record of the proceedings confidential will enhance access to justice because it will eliminate barriers experienced by vulnerable populations in moving on with their lives after major life events. Transgender people and survivors of violence, in particular, face a high risk of physical danger, discrimination, and retaliation when personal matters are made public, and there is no strong countervailing reason to deny them privacy regarding these matters.

Eliminating unnecessary barriers for people with criminal records and needless bureaucratic requirements will likewise enhance access to justice for people seeking name changes.

Requiring a custodial parent to notify the Friend of the Court of any change in a minor's last name will protect the privacy and safety of the minor child from public disclosure, while preventing administrative issues with support processing, parenting time or custody issues, and appropriate reunification efforts by providing a route for access to required information.

Position Vote:
Voted For position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote (absence): 10

***Keller* Permissibility Explanation**
The Committee voted unanimously that this legislation is *Keller*-permissible because it is reasonably related to the improvement of the functioning of the courts and the availability of legal services to society. The bill does not make substantive changes to the law regarding who is eligible for a name change, but rather modifies procedural requirements in order to eliminate barriers in the courtroom and associated dangers that people currently face when seeking a name change to which they have a legal right.

Contact Persons:
Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
HB 5300

Support

Explanation
The Committee voted unanimously (20) to support HB 5300 and to adopt the explanation of position put forth by the Access to Justice Policy Committee:

> In June 2022, the Committee considered proposed amendments to MCR 3.613 and recommended additional amendments that would create a presumption of confidentiality for people who are transgender and for survivors of domestic violence. While the Board of Commissioners ultimately supported these proposed amendments, they were not adopted by the Court in its final order. House Bill 5300 would largely accomplish the Committee's recommendations statutorily.
>
> Creating a presumption of good cause to waive the publication requirement and make the record of the proceedings confidential will enhance access to justice because it will eliminate barriers experienced by vulnerable populations in moving on with their lives after major life events. Transgender people and survivors of violence, in particular, face a high risk of physical danger, discrimination, and retaliation when personal matters are made public, and there is no strong countervailing reason to deny them privacy regarding these matters.
>
> Eliminating unnecessary barriers for people with criminal records and needless bureaucratic requirements will likewise enhance access to justice for people seeking name changes.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 11

***Keller* Permissible Explanation**
The Committee voted unanimously that this legislation is *Keller*-permissible because it is reasonably related to the improvement of the functioning of the courts and the availability of legal services to society.

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Order

Michigan Supreme Court
Lansing, Michigan

May 24, 2023

Elizabeth T. Clement,
Chief Justice

ADM File No. 2021-21

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

Amendment of Rule 3.613 of the Michigan Court Rules

_____

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.613 of the Michigan Court Rules is adopted, effective July 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 3.613 Change of Name

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(B~~A~~) Published Notice~~;~~ Contents. Unless otherwise provided in this rule, the court must order publication of the notice of the proceeding to change a name in a newspaper in the county where the action is pending. A published notice of a proceeding to change a name must~~shall~~ include the name of the petitioner; the current name of the subject of the petition; the proposed name; and the time, date, and place of the hearing. Proof of service must be made as provided by MCR 2.106(G)(1).

(C) No Publication of Notice; Confidential Record. Upon receiving a petition establishing good cause, the court must order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause includes but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger or increase the likelihood of such danger, such as evidence that the petitioner or another individual has been the victim of stalking, domestic violence, human trafficking, harassment, or an assaultive crime, or evidence that publication or the availability of a record of the proceeding could place the petitioner or another individual at risk of unlawful retaliation or discrimination.

(1) Evidence supporting good cause must include the petitioner's or the endangered individual's sworn statement stating the reason supporting good

cause, including but not limited to fear of physical danger, if the record is published or otherwise available. The court must not require proof of an arrest or prosecution to reach a finding of good cause.

(2) The court must issue an ex parte order granting or denying a petition requesting nonpublication and confidential record under this subrule.

(3) If a petition requesting nonpublication under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change under subrule (A); and

(c) if a minor is the subject of the petition, direct the petitioner to notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, notice to the noncustodial parent that is not directed solely to that parent, such as by publication under subrule (E)(2)(a), must not include the current or proposed name of the minor.

(4) If a petition requesting nonpublication under this subrule is denied, the court must issue a written order that states the reasons for denying relief and advises the petitioner of the right to

(a) request a hearing regarding the denial,

(b) file a notice of dismissal, or

(c) proceed with a hearing on the name change petition by submitting a publication of notice of hearing for name change form with the court within 14 days of entry of the order denying the petition requesting nonpublication. If the petitioner submits such form, in accordance with subrule (B) the court must set a time, date, and place of a hearing and order publication.

(5) If the petitioner does not request a hearing under subrule (4)(a) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4)(a) or file a notice of dismissal under subrule (4)(b) within 14 days of entry of the order denying

the petition requesting nonpublication, the court may set a time, date, and place of a hearing on the petition for a name change and order publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4)(a) must be held on the record.

(8) The petitioner must attend the hearing under subrule (4)(a). If the petitioner fails to attend the hearing, the court must adjourn and reschedule. If the petitioner fails to attend the rescheduled hearing, the court may adjourn and reschedule, dismiss the petition for name change, or notify the petitioner that it will publish notice of the name change proceeding if the petitioner does not file a notice of dismissal within 14 days from the date of the rescheduled hearing.

(9) Following the hearing under subrule (4)(a), the court must provide the reasons for granting or denying a petition requesting nonpublication on the record and enter an appropriate order.

(10) If a petition requesting nonpublication under this subrule is denied, and the petitioner or the court proceed with setting a time, date, and place of a hearing on the petition for a name change as provided in subrules (4)(c) or (6), the court must order that the record is no longer confidential.

(B) [Relettered (D) but otherwise unchanged.]

(E~~C~~) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name must~~shall~~ be made in the following manner:~~.~~

(1) Address Known. If the noncustodial parent's address or whereabouts is known, that parent must~~shall~~ be served with a copy of the petition and a notice of hearing at least 14 days before the hearing in a manner prescribed by MCR 2.107(C).

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent must~~shall~~ be served with a notice of hearing by one of the following methods:

(a) by publishing in a newspaper and filing a proof of service as provided by MCR 2.106~~(F) and~~ (G)(1). Unless otherwise provided in this rule, t~~T~~he notice must be published one time at least 14 days before the date of the hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the

noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (~~A~~B). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.

(b) upon the petitioner's request, and in the court's discretion, the court may order service by any manner reasonably calculated to give the noncustodial parent actual notice of the proceedings and an opportunity to be heard. The petitioner must specify the proposed method of service and explain how it is reasonably calculated. The request and order under this subrule must be made on a form approved by the State Court Administrative Office. Proof of service must be made as provided by MCR 2.104(A)(2) or (3).

(D)-(E) [Relettered (F)-(G) but otherwise unchanged.]

Staff Comment (ADM File No. 2021-21): The amendment of MCR 3.613 clarifies the process courts must use after receiving a petition requesting nonpublication and confidentiality of a name change proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I applaud the Court's decision to adopt these changes, which provide a straightforward, accessible name-change process for overwhelmingly unrepresented petitioners as well as for the courts handling the process. These improvements have been thoughtfully considered by the Court[1] to improve clarity while accommodating stakeholder concerns and remaining well within our rulemaking authority.

[1] The Court published an initial draft of the amendment for comment on April 13, 2022, held a public hearing on September 21, 2022, directed staff to work with stakeholders and commenters to improve the amendment, voted to adopt an amended version, and is now publishing with an effective date of July 1, 2023, to allow courts, partners, and staff to complete internal processes.

I disagree with the dissenting justices that several changes are substantive rather than procedural in nature and are therefore outside the Court's rulemaking authority. Instead, these changes are consistent with the statutory language and fill in the gaps where guidance is lacking. First, although the court rule says that the court "must" order nonpublication on a showing of good cause, MCR 3.613(C), and the statute uses "may," MCL 711.3(1), the use of "may" does not always signal discretion resting exclusively with the court. For example, in *James Twp v Rice*, 509 Mich 363, 372-376 (2022), we held that language in the Right to Farm Act, MCL 286.471 *et seq*., stating that a prevailing farm or farm operation "may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred" did not give courts discretion to refuse to award costs altogether, but instead entitled the prevailing party to recover costs with courts merely maintaining discretion as to whether the expenditures were "reasonably incurred."

Like all statutory language, the word "may" is properly understood only when read in context with the statute and the statutory scheme. *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 307 (2020). The use of "may" versus "must" is not the sole determinant of whether a statute is mandatory or permissive and can be overcome by the Legislature's intent. See *Kment v Detroit*, 109 Mich App 48, 61-62 (1981); see also 7 Sutherland, Statutes and Statutory Construction (7th ed), § 25:3 ("[N]o formalistic rule of grammar or word form should stand in the way of carrying out legislative intent."). "As a general rule, the word 'may' will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense." *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drain Dist*, 210 Mich App 559, 565 (1995).

Here, the word "may" must be considered in the context of the placement and purposes of the twin statutory provisions. MCL 711.1 explains the name-change process and requirements and that publication is the default; MCL 711.3 explains that the publication requirement may be waived for good cause. It makes little sense to read MCL 711.3 as allowing a court to refuse to order nonpublication despite its determination that good cause had been shown. Under the dissent's approach, a court would have the discretion to refuse to order nonpublication even if that court concluded that publication "could place the petitioner or another individual in physical danger[.]" MCL 711.3(1). Such a decision would be contrary to the statute's purpose and would smack of arbitrary application of the law outside the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006).

I further disagree that this amendment expands the definition of "good cause" beyond that contained in MCL 711.3. The statute uses broad "includes, but is not limited to" language as to what evidence can establish good cause for nonpublication. MCL 711.3(1). The rule now provides an illustrative list of reasons that, if supported by credible evidence, give rise to a finding of good cause, including statutory language on fear of

physical danger as well as fear of additional crimes, discriminatory conduct, or retaliatory conduct against which our laws offer protection. Again, the circuit court must still assess and weigh the evidence to determine whether it credibly establishes good cause. MCL 711.3(1). The rule does not divest courts of discretion to deny a request for nonpublication.

Much of the disagreement appears to stem from differing viewpoints on the level of guidance that we should be providing to the circuit courts. But it is well within this Court's authority to clarify the rules of practice and procedure, and we should take the opportunity to do so, especially when stakeholders tell us that the existing rules and statutes are confusing and inconsistently applied by courts. It makes perfect sense in this context to allow largely unrepresented petitioners an additional chance to attend a hearing on a request for nonpublication, with courts retaining discretion to dismiss or publish the petition after the second missed hearing. See MCR 3.613(C)(8). Similarly, it is logical to require courts to issue an appropriate order following a hearing on the denial of an ex parte order for nonpublication, MCR 3.613(9), just as the rules require in the personal-protection-order context, see MCR 3.705(B)(6) ("At the conclusion of the hearing the court must state the reasons for granting or denying a personal protection order on the record and enter an appropriate order."). These amendments, to be paired with user-friendly SCAO forms, provide maximum flexibility to courts while balancing the ability of largely pro se petitioners seeking name changes to access justice.

WELCH, J., joins the statement of CAVANAGH, J.

ZAHRA, J. (*dissenting*).

Although I agree with some of the changes aimed at making MCR 3.613 more consistent with the statutory requirements in MCL 711.3 regarding petitions not to publish notice of a name-change proceeding, I dissent from several aspects of this Court's order that go well beyond implementation of the statute. In short, several of this Court's changes to MCR 3.613—which were not included in this Court's April 13, 2022 order publishing for public comment the proposed revisions to MCR 3.613—impermissibly modify the substantive law pertaining to the discretion circuit courts have in deciding petitions requesting nonpublication of a name-change proceeding. Thus, these proposed amendments to our court rule fall outside the bounds of this Court's rulemaking authority.

The Michigan Constitution provides this Court with rulemaking authority pertaining to the practice and procedure of our courts.[2] In accordance with separation-of-powers principles, this Court's rulemaking authority is exclusive and "extends only to rules of practice and procedure, as 'this Court is not authorized to enact court rules that establish,

[2] See Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.").

abrogate, or modify the substantive law.' "[3] "Therefore, if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration[,] the court rule should yield."[4]

MCL 711.1 sets out the requirements and procedure for a petition seeking a name change. MCL 711.3 discusses publication of a name-change proceeding and provides, in relevant part:

> (1) In a proceeding under [MCL 711.1], the court may order for good cause that no publication of the proceeding take place and that the record of the proceeding be confidential. Good cause under this section includes, but is not limited to, evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking[5] or an assaultive crime.
>
> (2) Evidence under subsection (1) of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available. If evidence is offered of stalking or an assaultive crime, the court shall not require proof of an arrest or prosecution for that crime to reach a finding of good cause under subsection (1).

As a matter of public policy, then, the Legislature intended for circuit courts to decide whether a petitioner has established good cause to waive publication of a name-change proceeding and whether to grant a request for nonpublication. Although new Subrules (C) and (C)(1), as published for comment, modeled the language set forth in MCL 711.3(1) and (2),[6] the changes this Court now enacts conflict with the Legislature's policy determinations.

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[3] *People v Watkins*, 491 Mich 450, 472-473 (2012), quoting *McDougall v Schanz*, 461 Mich 15, 27 (1999).

[4] *McDougall*, 461 Mich at 30-31 (quotation marks, citation, and brackets omitted).

[5] MCL 711.3(5) provides that "stalking" is defined according to MCL 750.411h and MCL 750.411i, which define the term as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d); MCL 759.411i(1)(e).

[6] Proposed MCR 3.613(C), as published for comment, stated in part:

First, MCL 711.3(1) states that "the court *may* order for good cause that no publication of the [name-change] proceeding take place and that the record of the proceeding be confidential."[7] The plain language of the statute vests discretion in the circuit court to decline to require publication of notice of a name-change proceeding on a showing of good cause. This Court, however, has effectively rewritten the statute to strip circuit courts of that discretion by changing "may" to "must" in MCR 3.613(C), thereby *requiring* a court to order nonpublication of a name-change proceeding upon receiving a petition establishing good cause.[8] In other words, while MCL 711.3(1) clearly leaves discretion for the circuit court to deny a petition requesting nonpublication even if good cause is shown, this Court now removes that discretion altogether.

Second, this Court expands the statutory definition of "good cause" beyond what MCL 711.3(1) provides. MCL 711.3(1) defines "good cause" to include evidence involving possible physical danger, such as stalking or an assaultive crime. Thus, the Legislature not only chose to partially define the standard for nonpublication under its definition of "good cause," it also intended for the circuit courts to have the discretion to determine what else may constitute "good cause." Rather than effectuating that intent, this Court now creates a laundry list of circumstances that would definitively constitute "good cause" that, in conjunction with the prior change, automatically require the circuit court to grant the petition requesting nonpublication if good cause is established. Simply put, further defining "good cause" in MCR 3.613(C) goes beyond implementing MCL 711.3(1)

> No Publication of Notice; Confidential Record. Upon receiving a request establishing good cause, the court may order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause may include but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger.
>
> (1) Evidence of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available.

[7] Emphasis added.

[8] See *James Twp v Rice*, 509 Mich 363, 372 (2022) ("[T]he term 'may' is ordinarily considered to be permissive."). Justice CAVANAGH states that "the use of 'may' does not always signal discretion resting exclusively with the court," citing *Rice* in support. Unlike MCL 711.3(1), the plain language of the statute in *Rice* gave the prevailing farm or farm operation the discretion to recover attorney fees, not the court. *Id*. at 372 ("MCL 286.473b does not say that the court 'may award' costs, expenses, and fees but that the prevailing farm or farm operation 'may recover' them.").

under this Court's rulemaking authority and, instead, constitutes an impermissible substantive amendment to the statute.[9]

Third, this Court's changes to MCR 3.613(C)(8)[10] now mandate that circuit courts adjourn and reschedule a hearing regarding a denial of a petition requesting nonpublication if the petitioner fails to appear. Why is this Court meddling in the procedure and process of the circuit courts? There is no logical reason to *require* the circuit court to reschedule a hearing for which the petitioner—who requested the hearing in the first place—failed to appear. Once the petitioner fails to appear, the circuit court should have the discretion to reschedule it or proceed with publication unless the petitioner opts to dismiss the petition for a name change altogether.[11] New Subrule (C)(8) not only eliminates the discretion our circuit courts have in resolving with finality a petition requesting nonpublication, it also encroaches on the circuit courts' inherent authority to control their own dockets and "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[12]

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[9] Justice CAVANAGH relies on the statute's use of the "includes, but is not limited to" phrase to support the Court's extension of the definition of "good cause." I agree that the phrase contemplates circumstances constituting "good cause" for nonpublication beyond those that place the petitioner in physical danger. But the Legislature left it for the circuit courts to determine what those circumstances may be, not for this Court to prescribe those circumstances under the guise of our rulemaking authority.

[10] Proposed MCR 3.613(C)(8), as published for comment, stated: "The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change."

[11] Justice CAVANAGH believes it "makes perfect sense in this context to allow largely unrepresented petitioners an additional chance to attend a hearing on a request for nonpublication, with courts retaining discretion to dismiss or publish the petition after the second missed hearing." Although courts may generally afford pro se litigants some leniency in pursuing their claims, such as drafting pleadings, see *Haines v Kerner*, 404 US 519, 520 (1972) (noting allegations in a pro se complaint are held "to less stringent standards than formal pleadings drafted by lawyers"), I see no reason why that leniency, which is not without its limits, should allow a party to miss a hearing that the party requested.

[12] *Maldonado v Ford Motor Co*, 476 Mich 372, 376 (2006), citing *Chambers v NASCO, Inc*, 501 US 32, 43 (1991).

Finally, new MCR 3.613(C)(9) requires the court to "enter an appropriate order" after the conclusion of a hearing under Subrule (C)(4) regarding the denial of a petition requesting nonpublication. However, Subrule (C)(4) already requires the court to issue a written order stating the reasons for denying the petition requesting nonpublication, so it is unclear what this second "appropriate order" is supposed to be. Is this Court requiring the court to reaffirm its previous order if it continues to deny relief? Additionally, are requests for a hearing regarding the denial under Subrule (C)(4)(a) more appropriately categorized as motions for reconsideration, in which case the petitioner would need to show palpable error under MCR 2.119(F)(3)? The confusion Subrule (C)(9) is likely to cause further underscores the problems with these rule changes and the haste with which this Court adopts them.

In sum, although some of these changes may be well-intentioned, it is not our role to utilize our rulemaking authority to modify the policy choices of the Legislature, no matter how well-intentioned our actions may be.[13] Because the aforementioned changes have no basis in the statute they are intended to implement and, instead, modify the substance of that statute, these changes go beyond our rulemaking authority. Accordingly, I dissent from this Court's order.

VIVIANO, J., joins the statement of ZAHRA, J.

[13] See *People v Schaefer*, 473 Mich 418, 432 (2005) ("A court is not free to cast aside a specific policy choice adopted on behalf of the people of the state by their elected representatives in the Legislature simply because the court would prefer a different policy choice. To do so would be to empower the least politically accountable branch of government with unbridled policymaking power. Such a model of government was not envisioned by the people of Michigan in ratifying our Constitution, and modifying our structure of government by judicial fiat will not be endorsed by this Court.").

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July 29, 2022

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2021-21 – Proposed Amendment of Rule 3.613 of the Michigan Court Rules

Dear Clerk Royster:

At its July 22, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-21. The Board voted unanimously to support the proposed amendment with two additional recommendations:

- The Court should make good cause required under proposed Rule 3.613(C) presumptive for persons whose name change is sought for affirmation of gender identity, and for victims of human trafficking and domestic violence.

- The Court should add language to the rule to provide for Court-approved alternative service for the notice of a hearing to noncustodial parents, rather than requiring publication of such notice in a newspaper. Additionally, such notice must not include a minor child's name.

In its review of this proposed amendment, the Board considered recommendations from the Access to Justice Policy Committee, Civil Procedure & Courts Committee, and Children's Law Section. Both the Access to Justice Policy Committee and Children's Law Section submitted detailed proposals for alternative language amending Rule 3.613. While the Board ultimately opted not to endorse either of these proposals in their entirety, the Board believes that a review of both alternatives may help inform the Court's deliberations on this matter. As such, a copy of the Access to Justice Policy Committee proposal is included for the Court's review. The Children's Law Section proposal will be provided to the Court under separate cover.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Dana M. Warnez, President

Public Policy Position
ADM File No. 2021-21: Proposed Amendment of MCR 3.613

The Access to Justice Policy Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Access to Justice Policy Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar's position on this matter is to support the amendment to MCR 3.613 and recommend that the Court make the determination of good cause required by the proposed amendment presumptive for persons whose name change is sought for affirmation of gender identity, and for victims of human trafficking and domestic violence. The State Bar also recommends that language be added to the rule to provide for Court-approved alternative service for the notice of a hearing to noncustodial parents, rather than requiring publication of such notice in a newspaper, and further recommends that such notice not include a minor child's name.

The Access to Justice Policy Committee has a public policy decision-making body with 27 members. On June 29, 2022, the Committee adopted its position after a discussion at a scheduled meeting and an electronic discussion and vote. 16 members voted in favor of the Committee's position, 0 members voted against this position, 2 members abstained, 9 members did not vote.

Support with Recommended Amendments

Explanation

The Committee voted to support the proposed amendment of MCR 3.613 with additional recommended amendments. The Committee believes that establishing a presumption of confidentiality for transgender individuals seeking a name change to affirm their gender identity is necessary as it will protect these individuals from the threat of violence, including sexual assault, physical harm, and even murder, occasioned by name change proceedings. In addition, such a presumption would serve to support transgender individuals undertaking the process of affirming their gender identity without neighbors, acquaintances, colleagues, future employers, and other individuals becoming aware of their transgender identity.

In a similar vein, establishing a presumption of confidentiality for victims and survivors of domestic violence would serve to protect individuals seeking a name change to evade their abusers and individuals who support and enable their abusers, such as family and friends, as well as minor children of abusers who do not have physical custody, legal custody, or parenting time. Further, publishing a minor child's change in name can provide abusers with the identity of partners who have left an abuser.

With the noncustodial parent's name published, a noncustodial parent with some type of custody will have sufficient information to participate in the hearing, if desired.

Rule 3.613 Change of Name

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(~~A~~B) [Relettered (B) but otherwise unchanged.]

(B) No Publication of Notice; Confidential Record. Upon receiving a request establishing good cause, the court may order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause may include but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger with the fear of physical danger or harassment due to a change in name for gender affirmation or due to the threat of domestic violence establishing a presumption of good cause.

(1) Evidence of the possibility of physical danger or harassment must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger or harassment if the record is published or otherwise available with this sworn statement confidential and not available for public viewing.

(2) The court must issue an ex parte order granting or denying a request under this subrule. This order must be confidential and not available for public viewing.

(3) If a request under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change; and

(c) if a minor is the subject of the petition, notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice of hearing must not include the ~~current or~~ proposed name of the minor.

(4) If a request under this subrule is denied, the court must issue a written confidential order not available for public viewing that states the reasons for denying relief and advises the petitioner of the right to request a hearing regarding the denial, file a notice of dismissal, or proceed with the petition and publication of notice.

(5) If the petitioner does not request a hearing under subrule (4) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4) or file a notice of dismissal within 14 days of entry of the order denying the request, the court may set a time, date, and place of a hearing on the petition and proceed with ordering publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4) must be held on the record with attendance in the court room limited to only those who are parties to the case and any persons requested by the petitioner to be present.

(8) The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change.

(9) At the conclusion of the hearing under subrule (4), the court must state the reasons for granting or denying a request under this subrule and enter an appropriate order **with the written order confidential and not available for public.**

(~~B~~D) [Relettered (D) but otherwise unchanged.]

(~~C~~E) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) [Unchanged.]

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent shall be served with a notice of hearing by ~~publishing in a newspaper~~ alternate service as approved by the Court and filing a proof of service as provided by MCR 2.106(F) and (G). A notice provided under this subrule shall not include the minor child's proposed name. ~~Unless otherwise provided in this rule, T~~the

~~notice must be published one time at least 14 days before the date of the hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (AB). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.~~

(~~D~~) - (~~E~~)(F)-(G) [Relettered (F)-(G) but otherwise unchanged.]

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 5.16, directing the jury to consider testimony provided through videoconferencing technology. MCR 6.006(A)(2), (B)(4), and (C)(4) authorize the use of videoconferencing technology to take trial testimony in criminal proceedings "in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology." The language in the new instruction is based M Crim JI 2.13 (Notifying Court of Inability to Hear or See Witness or Evidence), M Crim JI 4.10 (Preliminary Examination Transcript), and M Civ JI 4.11 (Consideration of Deposition Evidence). This instruction is entirely new.

[NEW] M Crim JI 5.16 Testimony Provided Through Videoconferencing Technology

The next witness, [*identify witness*], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately.

Public Policy Position
Model Criminal Jury Instructions 5.16

Support

Explanation
The Committee voted unanimously to support the proposed Model Criminal Jury Instructions 5.16.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

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PROPOSED

The Committee proposes the following amendment to M Crim JI 16.5, for second-degree murder. In light of the Court of Appeals opinion in *People v Spears* (Docket No. 357848), holding that "without justification or excuse" is not an element of the offense of second-degree murder, it is proposed that paragraph (4) be deleted. Deletions are in strike-through. No new language was added.

[AMENDED] M Crim JI 16.5 Second-Degree Murder

(1) [The defendant is charged with the crime of / You may also consider the lesser charge of] second-degree murder.[1] To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant caused the death of [*name deceased*], that is, that [*name deceased*] died as a result of [*state alleged act causing death*].[2]

(3) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [*name deceased*], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions.[3]

~~[(4)Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.]~~[4]

Use Note

1. Where there is a question as to venue, insert M Crim JI 3.10, Time and Place (Venue).

2. Where causation is an issue, see the special causation instructions, M Crim JI

16.15-16.23.

3. Second-degree murder is not a specific intent crime. *People v Langworthy*, 416 Mich 630; 331 NW2d 171 (1982).

~~4. Paragraph (4) may be omitted if there is no evidence of justification or excuse, and the jury is not being instructed on manslaughter or any offense less than manslaughter. Justification or excuse instructions may be inserted here, but they are more commonly given at a later time.~~

Public Policy Position
Model Criminal Jury Instructions 16.5

Support

Explanation
The Committee voted to support the Model Criminal Jury Instructions 16.5, contingent upon the outcome of the application for leave to appeal presently pending before the Michigan Supreme Court in *People v Spears* (Docket No. 357848).

Position Vote:
Voted For position: 17
Voted against position: 3
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

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PROPOSED

The Committee proposes a new jury instruction, M Crim JI 23.10a (failure to return rental property), for the crime found at MCL 750.362a. This instruction is entirely new.

[NEW] M Crim JI 23.10a Failure to Return Rental Property

(1) [The defendant is charged with / You may also consider the lesser offense of[1]] failure to return rental property with [a value of $20,000 or more / a value of $1,000 or more but less than $20,000 / a value of $200 or more but less than $1,000 / some value less than $200]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a written lease or rental agreement for [*identify property leased*] between [*identify complainant*] and the defendant.

(3) Second, that the [*identify property leased*] was given or delivered to the defendant according to the agreement.

(4) Third, that the agreement called for the return of the [*identify property leased*] at a specific time and place.

(5) Fourth, that [*identify complainant or agent*] sent a written notice by registered or certified mail to the defendant at [his / her] last known address directing the defendant to return the property by [*specify date*].

(6) Fifth, that the defendant refused to return the [*identify property leased*] or willfully failed to return it by that date.

(7) Sixth, that the defendant intended to defraud [*identify complainant*].

(8) Seventh, that the [*identify property leased*] had [a value of $20,000 or more / a value of $1,000 or more but less than $20,000 / a value of $200 or more but less than $1,000 / some value less than $200].

[(9) You may add together the value of all property leased in a 12-month period when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.][2]

Use Note

1. Use this where the value of the leased property is in dispute and the instruction is read as a lesser offense.

2. Use this paragraph only where applicable.

Public Policy Position
Model Criminal Jury Instructions 23.10a

Support

Explanation
The Committee voted unanimously to support the proposed Model Criminal Jury Instructions 23.10a.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

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==========

PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 25.8, to cover criminal activity for trespassing at a key facility under MCL 750.552c. This instruction it entirely new.

[NEW] M Crim JI 25. 8 Trespassing on Key Facility Property

(1) The defendant is charged with the crime of trespassing on the property of a key facility. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was intentionally on the premises of or in a structure that was part of [*identify key facility*][1], which is a key facility.

(3) Second, that the [*identify key facility*] was completely enclosed by a physical barrier, which could include a water barrier that would prevent pedestrian access.

(4) Third, that there were signs prohibiting entry to the key facility at every point where access could be gained to the facility that were at least 50 square inches in size with letters at least 1 inch high.

[*Select the appropriate fourth element*:]

(5) Fourth, that the defendant did not have permission or authority to [enter / remain at / enter and remain at] the facility.

[*Or*]

(5) Fourth, that the defendant [entered / remained / entered and remained] on the property without permission or authority after being instructed to leave the facility.

[(6) Fifth, that the defendant was not present on the premises of the key facility as part of a lawful assembly or a peaceful and orderly petition for the redress of grievances, such as a labor dispute between an employer and its employees.][2]

Use Note

1. The list of *key facilities* is found at MCL 750.552c(1)(a) through (*l*):

(a) A chemical manufacturing facility.
(b) A refinery.
(c) An electric utility facility, including, but not limited to, a power plant, a power generation facility peaker, an electric transmission facility, an electric station or substation, or any other facility used to support the generation, transmission, or distribution of electricity. Electric utility facility does not include electric transmission land or right-of-way that is not completely enclosed, posted, and maintained by the electric utility.
(d) A water intake structure or water treatment facility.
(e) A natural gas utility facility, including, but not limited to, an age station, compressor station, odorization facility, main line valve, natural gas storage facility, or any other facility used to support the acquisition, transmission, distribution, or storage of natural gas. Natural gas utility facility does not include gas transmission pipeline property that is not completely enclosed, posted, and maintained by the natural gas utility.
(f) Gasoline, propane, liquid natural gas (LNG), or other fuel terminal or storage facility.
(g) A transportation facility, including, but not limited to, a port, railroad switching yard, or trucking terminal.
(h) A pulp or paper manufacturing facility.
(i) A pharmaceutical manufacturing facility.
(j) A hazardous waste storage, treatment, or disposal facility.
(k) A telecommunication facility, including, but not limited to, a central office or cellular telephone tower site.
(l) A facility substantially similar to a facility, structure, or station listed in subdivisions (a) to (k) or a resource required to submit a risk management plan under 42 USC 7412(r).

2. MCL 750.552c(4) exempts persons present at a "key facility" from the statute if they are part of a "lawful assembly or a peaceful and orderly petition for the redress of grievances, including, but not limited to, a labor dispute between an employer and its employees." This appears to be an affirmative defense requiring some supporting

evidence. Read this paragraph only where the defendant asserts the defense and there is evidence to support it.

Public Policy Position
Model Criminal Jury Instructions 25.8

Support

Explanation
The Committee voted unanimously to support the proposed Model Criminal Jury Instructions 25.8.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

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PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 38.5, to cover the crime of Using the Internet to Disrupt Government or Public Institutions under MCL 750.543p. This instruction is entirely new.

[NEW] M Crim JI 38.5 Using the Internet to Disrupt Government or Public Institutions

(1) The defendant is charged with the crime of using the Internet to disrupt government or public institutions. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used [the Internet / a telecommunications device or system / an electronic device or system][1] in a way that disrupted the functioning of [public safety / educational / commercial / governmental] operations. To disrupt operations means to interrupt the normal functioning of those institutions.

(3) Second, that when the defendant disrupted [public safety / educational / commercial / governmental] operations, [he / she] intended to commit [a felony / the felony offense of (*identify specific offense and provide elements*)].

(4) Third, that the defendant acted willfully and deliberately. This means that [his / her] conduct was intentional and not the result of an accident and that [he / she] considered the pros and cons of committing the crime, thought about it, and chose [his / her] actions before [he / she] did it.

(5) Fourth, that the defendant knew or had reason to know that [his / her] action [would be likely to cause serious injury or death / would cause a person to be restrained to be held for ransom, as a shield or hostage, for sexual conduct, for servitude, or for child sexually abusive activity / would conceal a child from his or her parent or guardian) [2]].

(6) Fifth, that through or by [his / her] action, the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion.

Use Note

1. These terms are defined in 47 USC 230(f)(1), MCL 750.145d(9)(f), 750.540c(9) and 750.219a(6)(b).

2. See MCL 750.543b(b) citing the kidnapping statutes, MCL 750.349 and 750.350.

Public Policy Position
Model Criminal Jury Instructions 38.5

Support

Explanation
The Committee voted unanimously to support the proposed Model Criminal Jury Instructions 38.5.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

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PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 40.12, to address the crime of failing to report a dead body under MCL 333.2841. This instruction is entirely new.

[NEW] M Crim JI 40.12 Failure to Report a Dead Body

(1) The defendant is charged with the crime of failing to report a dead body. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify deceased person*] died on or before [*date of offense*].

(3) Second, that the defendant discovered [*identify deceased person*]'s body.

(4) Third, that the defendant knew or had reason to know that [*identify deceased person*] was dead on discovering the body.

(5) Fourth, that the defendant failed to inform a law enforcement agency, a funeral home, or a 9-1-1 operator that [he / she] discovered the body.

[(6) Fifth, that the defendant did not know or have reason to know that a law enforcement agency, a funeral home, or a 9-1-1 operator had already been informed of the presence of the dead body.1]

Use Note

1. The Committee on Model Criminal Jury Instructions believes that a claim that the defendant knew or had reason to know that a law enforcement agency, a funeral

home, or a 9-1-1 operator had already been informed of the location of the body is an affirmative defense, requiring evidence to support the claim. Read this paragraph only where the defendant asserts the defense and there is evidence to support the claim.

Public Policy Position
Model Criminal Jury Instructions 40.12

Support

Explanation
The Committee voted unanimously to support the proposed Model Criminal Jury Instructions 40.12.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
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