Agenda
Public Policy Committee
January 18, 2019 – 8:30 am
State Bar of Michigan, Room 2

For those joining by phone, the conference call number is 1.877.352.9775, passcode 6516204165#.

Public Policy Committee……Dennis M. Barnes, Chairperson

A. Reports

1. Approval of November 16, 2018 minutes
2. Approval of December 3, 2018 minutes
3. Public Policy Report

B. Court Rules

1. ADM File No. 2017-27: Proposed Amendment of MCR 6.425

The proposed amendment of MCR 6.425 would make the rule consistent that requests for counsel must be filed within 42 days, as opposed to simply "made" or "completed and returned." It would also remove the requirement for a sentencing judge to articulate substantial and compelling reasons to deviate from the guidelines range, pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

Status:	02/01/19 Comment Period Expires.
Referrals:	10/18/18 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comments:	Criminal Jurisprudence & Practice Committee; Appellate Practice Section. Comment provided to the Court included in materials.
Liaison:	Hon. Cynthia D. Stephens

2. ADM File No. 2018-04: Proposed Amendments of MCR 7.212 and 7.312

The proposed amendments of MCR 7.212 and 7.312 would require amicus briefs to indicate certain information regarding the preparation of the brief and disclosure of monetary contributions. The proposal would be similar to Supreme Court Rule 37.6.

Status:	02/01/19 Comment Period Expires.
Referrals:	10/18/18 Civil Procedure & Courts Committee; Appellate Practice Section.
Comments:	Civil Procedure & Courts Committee.
Liaison:	Daniel D. Quick

3. Proposed Amendment to MCR 5.117 to Allow Limited Scope Representation in Probate Proceedings

Status:	Submitted to the Board for consideration by the Affordable Legal Services Committee
Comments:	Probate & Estate Planning Section.
Liaison:	Hon. Shauna L. Dunnings

C. Other

1. Non-Fee Generating Cases – Letter from Legal Services Association of Michigan

Comments:	Consumer Law Section; Family Law Section; Labor & Employment Law Section; Negligence Law Section; Real Property Law Section.
Liaison:	Travis W.Weber

D. Consent Agenda

To support the positions submitted by the Criminal Jurisprudence and Practice Committee and Criminal Law Section (if applicable) on each of the following items:

Model Criminal Jury Instructions

1. M Crim JI 3.11

The Committee proposes amending Paragraph (6) of M Crim JI 3.11, the Composite Instruction that explains the deliberative process to the jury. The amendment attempts to clarify the instruction, to reduce the court's housekeeping obligations to provide the names of different offenses that a jury may be considering, and to make it easier for judges to read. Deletions are in strike-through, and new language is underlined.

2. M Crim JI 3.29, 3.30, and 3.31

The Committee proposes amending M Crim JI 3.29, 3.30, and 3.31, the jury verdict forms used for multiple counts with and without insanity defenses and lesser offenses, because the current forms fail to provide a general "not guilty" option for each charged count. See *People v Wade*, 283 Mich App 462 (2009). Deletions are in strike-through, and new language is underlined.

3. M Crim JI 7.25

The Committee proposes a new instruction, M Crim JI 7.25, for use where a defendant interposes a self-defense claim to a felon-in-possession-of-a-firearm charge as permitted under *People v Dupree*, 486 Mich 693 (2010).

4. M Crim 11.38 and 11.38a

The Committee proposes amending M Crim JI 11.38 and 11.38a, the instructions for felon-in-possession-of-a-firearm charges to comport with the felony-firearm instruction, M Crim JI 11.34, by requiring that the possession of the firearm be "knowing," and to otherwise clarify the instructions. Deletions are in strike-through, and new language is underlined. (As the Use Notes to the instructions are lengthy and are irrelevant to the amendments, they are not published below and the superscript Use Note numbers in the instructions are not included.)

5. M Crim JI 14.2a

The Committee proposes a new instruction, M Crim JI 14.2a, where perjury is charged under MCL 750.423(2) – false declarations made under penalty of perjury (including in electronic media). The instruction is entirely new.

6. M Crim JI 15.18

The Committee proposes amending M Crim JI 15.18 and eliminating 15.19, the instructions for charges involving moving violations causing death or serious impairment of a body function under MCL 257.601d. The amendment follows the decision in *People v Czuprynski*, a published Court of Appeals opinion (No. 336883), finding M Crim JI 15.19 in error for failing to require proof that a moving violation was the cause of the serious impairment of a body function. The proposal combines the elements for both instructions in M Crim JI 15.18. Deletions are in strike-through, and new language is underlined.

7. M Crim JI 20.38c

The Committee proposes amending M Crim JI 20.38c, the instruction for possessing or accessing child sexually abusive activity, to clarify that it applies when the defendant possesses or accesses child sexually abusive material for viewing it himself or herself. Deletions are in strike-through, and new language is underlined.

8. M Crim JI 27.1 and 27.5
The Committee proposes amending M Crim JI 27.1, the jury instruction for embezzlement charged under MCL 750.174, and M Crim JI 27.5, the jury instruction for embezzlement charged under MCL 750.177 or 750.178 to accommodate statutory changes and clarify the instructions. Deletions are in strike-through, and new language is underlined.

9. M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g
The Committee proposes new instructions for crimes charged under MCL 750.49, pertaining to using animals for fighting or targets (or providing facilities for doing so or breeding such animals, etc.): M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g. These instructions are entirely new.

Minutes
Public Policy Committee
November 16, 2018 – 8:00 am

Committee Members: Dennis M. Barnes, Joseph J. Baumann, Andrew F. Fink, III, E. Thomas McCarthy, Jr., Richard D. McLellan, Victoria A. Radke, Hon. Cynthia D. Stephens, Travis W. Weber
Commissioner Guest: Jennifer M. Grieco
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Reports

1. Approval of September 26, 2018 minutes
The minutes were unanimously approved.

2. Public Policy Report
The Governmental Relations staff offered a written report.

B. Court Rules

1. ADM File No. 2016-27: Proposed Amendment of MRPC 7.2

The proposed amendment of MRPC 7.2 would require media lawyer advertisements to identify the name and contact information of at least one lawyer providing services. This proposal is being republished in light of the ABA's recent adoption of revisions of the model rules regarding attorney advertising.
The Civil Procedure & Courts Committee offered comments.
The committee voted unanimously (8) to support the language adopted by the Court on May 30, 2018.

2. ADM File No. 2016-05: Proposed Amendment of MCR 2.513

The proposed amendment of MCR 2.513 would explicitly provide that a court must orally recite its preliminary and final jury instructions for the jury (in addition to providing them in writing). The proposed amendment would clarify that even though a juror is entitled to a written set of instructions, the judge must still orally instruct the jury. This proposed amendment would conform the rule to the opinion issued by the Court in *People v Traver*.
The Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, and Criminal Law Section offered comments.
The committee voted unanimously (7) to support the proposed amendment to MCR 2.513.

3. ADM File No. 2018-21: Proposed Administrative Order to Require Courts to Establish Security Committees

This administrative order would direct courts to establish a standing courthouse security committee to be chaired by the chief judge or his/her designee. The attached appendix is a proposed model local administrative order developed by the SCAO.
The Civil Procedure & Courts Committee offered comments.
The committee voted unanimously (8) to support the order to require courts to establish security committees.

4. ADM File No. 2002-37: Proposed Amendments of MCR 1.109, 2.102, 2.104, 2.106, 2.107, 2.117, 2.119, 2.403, 2.503, 2.506, 2.508, 2.518, 2.602, 2.603, 2.621, 3.101, 3.104, 3.203, 3.205, 3.210, 3.302, 3.607, 3.613, 3.614, 3.705, 3.801, 3.802, 3.805, 3.806, 4.201, 4.202, 4.303, 4.306, 5.001, 5.104, 5.105, 5.107, 5.108, 5.113, 5.117, 5.118, 5.119, 5.120, 5.125, 5.126, 5.132, 5.162, 5.202, 5.203, 5.205, 5.302, 5.304, 5.307, 5.308, 5.309, 5.310, 5.311, 5.313, 5.402, 5.404, 5.405, 5.409, 5.501, and 5.784 and new rule 3.618

The proposed amendments are an expected progression necessary for design and implementation of the statewide electronic-filing system. These particular amendments will assist in implementing the goals of the project.
The Access to Justice Policy Committee, Alternative Dispute Resolution Section, Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, and Probate & Estate Planning Section offered comments.
The committee voted unanimously (8) to encourage the Court in its work developing and implementing a statewide electronic-filing system, take no position on the proposed amendments and comments received from committees and sections, and forward those comments to the Court. The committee also specifically authorizes the Alternative Dispute Resolution and Probate & Estate Planning Sections to advocate their positions.

C. <u>Legislation</u>
1. HB 6110 (Iden) Occupations; individual licensing and regulation; use of criminal record to determine eligibility for occupational licensing; restrict. Amends title & secs. 1, 2, 3, 4, 5, 6 & 7 of 1974 PA 381 (MCL 338.41 et seq.).
The Character & Fitness Committee offered comments.
The committee voted unanimously (7) with one abstention to continue to support the courts as the sole authority in the regulation of attorneys, including the determination of character & fitness, and, in the avoidance of all doubt, respectfully request that the legislature provide an exception specific to law licensing to HB 6110.

2. HB 6277 (LaFave) Courts; judges; judges to fully instruct jury of its authority; require. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 29b to ch. VIII.
The Criminal Jurisprudence & Practice Committee offered comments.
The committee voted unanimously (8) that the HB 6277 is *Keller* permissible in affecting the functioning of the courts.
The committee voted unanimously (7) with one abstention to oppose the bill.

3. SB 1092 (Jones) Courts; juries; postponement of jury service; allow for farmers during certain months. Amends sec. 1335 of 1961 PA 236 (MCL 600.1335).
The Civil Procedure & Courts Committee offered comments.
The committee voted unanimously (8) that the SB 1092 is *Keller* permissible in affecting the functioning of the courts.
The committee voted unanimously (7) with one abstention to oppose the bill.

4. SB 1103 (Jones) Civil procedure; small claims; general amendments related to e-filing provisions; provide for. Amends secs. 8401a, 8402, 8403, 8404, 8405, 8406, 8409, 8412, 8420 & 8423 of 1961 PA 236 (MCL 600.8401a et seq.).
The Civil Procedure & Courts Committee offered comments.
The committee voted unanimously (8) that the SB 1103 is *Keller* permissible in affecting the functioning of the courts.
The committee voted unanimously (6) with one abstention to support the bill.

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December 11, 2018

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

RE: ADM File No. 2016-27 – Proposed Amendment of Rule 7.2 of the Michigan Rules of Professional Conduct

Dear Clerk Royster:

At its November 16, 2018 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced rule amendment published for comment. In its review, the Board considered a recommendation from the Civil Procedure & Courts Committee. The Board voted unanimously to support the language previously adopted by the Court on May 30, 2018 as preferred over the language published for comment on September 27, 2018.

The May 30, 2018 language better achieves the Representative Assembly's objective in originally proposing amendments to MRPC 7.2, which was to protect the public by requiring lawyers and law firms to clearly identify themselves in advertisements. The May 30, 2018 rule amendment accomplishes this goal by providing clear language that informs lawyers and law firms of precisely the type of contact information that must be included in the advertisement. In addition, by specifically requiring a business address, the May 30, 2018 language allows the public to understand whether the legal services being advertised are in-state or out-of-state.

In contrast, the language published for comment on September 27, 2018 is less clear and would not necessarily provide the public with adequate information to determine the location of the lawyer or law firm offering services. For example, the September 27 language fails to identify (1) what types of advertisements qualify as "media advertising" and (2) the particular "contact information" that must be disclosed in the advertisement.

For these reasons, the Board prefers the language adopted by the Court on May 30, 2018 over the language published for comment on September 27, 2018.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President

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Lansing, MI 48909

RE: ADM File No. 2016-05 – Proposed Amendment of Rule 2.513 of the Michigan Court Rules

Dear Clerk Royster:

At its November 16, 2018 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced rule amendment published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, and Criminal Law Section. The Board voted unanimously to support the rule amendments because they make clear that courts must orally provide jury instructions.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President

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

RE: ADM File No. 2018-21 – Proposed Adoption of Administrative Order to Require Courts to Establish Security Committees

Dear Clerk Royster:

At its November 16, 2018 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed administrative order published for comment. In its review, the Board considered a recommendation from the Civil Procedure & Courts Committee. The Board voted unanimously to support the proposed administrative order. It is our hope that the security committees will establish policies to help to ensure the utmost safety within our courts, which is vital to maintaining access to courts for all.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President

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RE: ADM File No. 2002-37 – Proposed Amendments to the Michigan Court Rules for Implementation of the Statewide Electronic-Filing System

Dear Clerk Royster:

At its November 16, 2018 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced rule amendments published for comment. In its review, the Board considered recommendations from the Access to Justice Policy Committee, Alternative Dispute Resolution Section, Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, and Probate & Estate Planning Section.

After this review, the Board voted unanimously to support the Court's ongoing efforts to implement a statewide electronic-filing system. To assist the Court with this effort, the Board is providing the Court with the recommendations that it received from its committees and sections, along with a chart of their recommended amendments.

We thank the Court for the opportunity to comment on the proposed rule amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President

SBM Section and Committee Comments
ADM 2002-37: Electronic Filing

	MCR	Committee/ Section	Recommendation
1	General	ATJ Policy	**Comment.** The committee expresses concern for the breadth of these rule amendments and the number of amendments that appear to have nothing to do with electronic filing.
2	1.109(G)(3)	ATJ Policy	**Oppose.** The rule fails to set forth adequate protections for pro se litigants who may have limited or not access to technology of the internet. As with previously-proposed e-filing court rule amendments, the committee continues to recommend that any e-filing requirement provide exceptions for individuals (1) with no access to electronic devices; (2) who must travel a certain distance to access a public computer; (3) facing a lack of transcription of other limitations on the ability to travel; (4) facing safety issues; and (5) who are unable to access the internet due to age or disability.
3	2.107(C)(4)(a)	ATJ Policy	**Oppose use of text message for Alternative Electronic Service.** Under proposed rule, parties may agree to alternative electronic service, which may include email, text message or sending an email or text message to log into a secure website. Providing service by text message is problematic, particularly for low-income individuals who may not have continuous access to their phone service or electronic device. Further, it is unclear whether all electronic devices will be able to open the documents sent via text message, and litigants may not be aware of these limitations when initially agreeing to alternative electronic service.
4	2.107(C)(4)(c)(i)	Civil Procedure	**Propose Amendment.** Under this rule, if an attempt to serve via alternative electronic service is undeliverable, the filer is required to serve by regular mail under MCR 2.107(C)(3). The committee recommends that the rule be amended to also allow for service by delivery under MCR 2.107(C)(1) and (2) as follows: (i) Alternative electronic service is complete upon transmission . . . If alternative electronic service transmission is undeliverable, the entity responsible for serving the document must serve the document by regular mail under MCR 2.107(C)(3) **or by delivery under MCR 2.107(C)(1) or (2),** and include a copy of the return notice indicating that the electronic transmission was undeliverable.

	MCR	Committee/ Section	Recommendation
5	2.107(C)(4)(a)(iii)	Civil Procedure	**Propose Amendment to Clarify.** MCR 2.107(C)(4) references "alerts" to view documents; however, the term alert is not used in the permissible methods for alternative electronic service. To clarify the permissible methods for alternative electronic service, the committee recommends that MCR 2.107(C)(4)(a)(iii) be amended as follows (shown in bold): **Alert, consisting of ~~sending~~** an email or text message to log into a secure website to view notices and court papers.
6	2.107(C)(4)(h)	ATJ Policy	**Oppose 28-Day Notice Requirement to Withdraw from Alternative Electronic Service.** If litigants lose access to their cell phone or service plan, even if they file notice to withdraw from the alternative electronic service agreement, they will have to go 28-days without receiving court notices for their case. There is simply no reason that there has to be a 28-day waiting period for a withdrawal from alternative electronic service goes into effect. The withdrawal should happen immediately upon providing notice.
7	2.117	Civil Procedure	**Oppose Eliminating Requirement to Include Address and Telephone Number in Notice of Appearance.** The deletions proposed in MCR 2.117(A)(1) and (B)(2)(A) remove the requirement that the Notice of Appearance include the party's or the party's attorney's address and telephone number. While MCR 2.113(C) requires this information be included in the case caption to a pleading, requiring this information to also be included in the Notice of Appearance will make it more likely that parties will provide this basic and necessary information.
8	2.403(K)(1)	Litigation	**Propose Amendment.** MCR 2.403(N) prohibits disclosing to the court in a non-jury trial information concerning the case evaluation; however, if adopted, the proposed changes to MCR 2.403(K)(1) would allow the judge access to case evaluation information. This is problematic in non-jury trials because this information could affect the judge's impartiality as the trier of fact. To remedy this, the section proposes removal of the language that would require an ADR clerk to submit the case evaluation award to the court.
9	2.508(B)(1)	Civil Procedure	**Oppose Requiring Separate Document to Demand Jury Trial.** The committee opposes the proposed changes to MCR 2.508(B)(1) that would require that a demand for jury trial be filed as a separate document. Currently, parties are allowed to include the jury trial demand in the caption of the pleading. Michigan case law has established that as long as a party makes a clear jury demand and pays the requisite fees, the party is entitled to a jury trial.

	MCR	Committee/ Section	Recommendation
10	2.603(A)(1)	Civil Procedure	**Propose Amendment to Clarify.** The committee recommends the following amendment to (A)(1) to clarify that verified statements – not facts – are filed with the court: If a party against whom a judgment for affirmative relief is sought . . . , and that fact is ~~made to appear by affidavit or otherwise~~ **verified in the manner prescribed by MCR 1.109(D)(3) and filed with the court in a request** ~~**filed with the court in a request verified in the matter prescribed by MCR 1.109D)(3)**~~, the clerk must enter the default of that party.
11	3.104	Civil Procedure	**Oppose Amendment that Would Require Judgement Debtor – Rather than Clerk - in District Court to Serve Motion for an Installment Payment Order.** This change raises a number of issues. First, the judgment debtor is not required to file any proof of service that he or she actually served the judgment creditor. Second, if the judgment creditor – who often are pro se in district court – does not raise a timely objection to the motion, it is automatically entered, even if the judgment creditor never received notice of the motion, creating more paperwork and confusion for the court and the parties. For these reasons, the committee opposes the proposed deleted language in MCR 3.104(A).
12	3.104	Civil Procedure	**Amendment to Clarify.** All references to "plaintiff" should be changed to "judgment creditor" and all references to "defendant" be changed to "judgment debtor" in MCR 3.104.
13	4.201(D)	ATJ Policy	**Oppose Removal of Mailing Requirement in Landlord-Tenant Proceedings.** Currently, the rule requirements summons and complaint to be both mailed and served in another way upon tenant. The rule amendment proposes removing mailing requirement. While the mail requirement could be eliminated if the plaintiff serves the summons and complaint as provided in MCR 2.105, the mailing requirement should not be eliminated if the plaintiff serves the defendant by delivering to a household member or posting. The mailing requirement is a safeguard against the reduced quality of alternatives to service allowed under (D)(2)-(3), namely delivering to a household member or posting.

	MCR	Committee/ Section	Recommendation
14	5.107(B)	ATJ Policy	**Oppose Amendments to the Exceptions for Having to Serve Interested Parties.** Currently, MCR 5.107 requires petitioners to serve interested parties certain documents; however, under subsection (B), service is not required if the interested person "whose address or whereabouts, on diligent inquiry, is unknown or on an unascertained or unborn person." The proposed amendments to MCR 5.107(B) would provide a third exception – previous mailings to the last known address have been returned at least two times as undeliverable – to the exception for serving an interested party. While undeliverable mail may be used to help establish that a petitioner has made a diligent inquiry of an interested person's address, the committee does not believe that two attempts at mailing is sufficient, in and of itself, to excuse a petitioner from serving an interested party.
15	5.107(B)	Probate	**Oppose Amendments to the Exceptions for Having to Serve Interested Parties.** Section opposes allowing people to opt out of serving interested parties by mailing to last known address twice and having it returned as undeliverable twice.
16	5.113(A)	Probate	**Oppose Requiring Documents to be filed on a SCAO Form.** Section opposes the deletion of "substantially in the" and the addition of "filed on a".
17	5.307(A)	Probate	**Oppose Proposed Amendments.** Section opposes the change that would require the personal representative to file with the court the information necessary for the probate inventory fee. Currently, the rule requires that the personal representative submit to the court the information necessary for computation of the probate inventory fee. Specifically, section opposes the deletion of "submit to," the addition of "file with," and the deletion of "computation of".
18	5.307(C)	Probate	**Oppose Proposed Amendments.** Similar to the changes in 5.307(A), Section opposes the proposed changes to the notice to the personal representative what must be filed/submitted to the court re probate inventory fee. Specifically, section opposes the deletion of "submit to" and the addition of "file the inventory with").

Public Policy Position
ADM 2002-37
e-filing

The Access to Justice Policy Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed herein is that of the Access to Justice Policy only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's ongoing efforts to implement a statewide electronic-filing system, and authorize Committees and Sections to provide their comments to the Court.

The Access to Justice Policy Committee has a public policy decision-making body with 24 members. On October 30, 2018, the Committee adopted its position after an electronic discussion and vote. 17 members voted in favor of the Committee's position on ADM File No. 2002-37, 0 members voted against this position, 1 member abstained, 6 members did not vote.

Oppose and Recommend Amendments

Explanation

As the Court continues its efforts to implement a statewide e-filing system, it must ensure that pro se litigants with limited or unreliable access to technology are still able to access the courts. These rules fail to provide adequate protections for these individuals in a number of ways. For this reason, the committee opposes ADM 2002-37 and proposes a number of amendments to improve the rules and ensure that the implementation of e-filing does not impede access to the courts.

1. **The Scope of E-Filing Needs to Protect Pro Se Litigants Without Adequate Access to the Internet.**

MCR 1.109(G) sets forth the scope and applicability of e-filing. While subsection (G)(3)(f) provides separate e-filing requirements for attorneys and pro se filers, the rule fails to explicitly provide protections for pro se filers without reliable and adequate access to technology and the internet. As proposed, subsection (G)(3)(f) states that "[a]ll other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by the State Court Administrative Office under AO 2018-XX." It is, however, unclear what, if any, protections for pro se litigants SCAO requires for approval of electronic filing systems.

As recommended with previously-proposed e-filing court rule amendments, the committee continues to recommend that any e-filing requirement provide exceptions for individuals (1) with no access to electronic devices; (2) who must travel a certain distance to access a public computer; (3) facing a lack

of transcription of other limitations on the ability to travel; (4) facing safety issues; and (5) who are unable to access the internet due to age or disability.

2. The Scope of Alternative Electronic Service Is Too Broad.

MCR 2.107(C)(4) provides that parties may agree to alternative electronic service, which may include email, text message or sending an email or text message to log into a secure website. Providing service by text message is problematic, particularly for low-income individuals who may not have continuous access to their phone service or electronic device. Further, it is unclear whether all electronic devices will be able to open the documents sent via text message, and litigants may not be aware of these limitations when initially agreeing to alternative electronic service.

While parties are allowed to withdraw from the agreement, they must provide 28-days' notice before the withdrawal goes into effect. If litigants lose access to their cell phone or service plan, even if they file notice to withdraw from the alternative electronic service agreement, they will have to go 28-days without receiving court notices for their case. There is simply no reason that there has to be a 28-day waiting period for a withdrawal from alternative electronic service goes into effect. The withdrawal should happen immediately upon providing notice.

For these reasons, the committee recommends that the option for text messaging be removed from the Alternative Electronic Service options under MCR 2.107(C)(4)(a) and the 28-day waiting period be removed from withdrawing from an Alternative Electronic Service agreement under MCR 2.107(C)(4)(h).

3. MCR 4.201(D) Should Not Remove Mailing Requirement in Landlord-Tenant Proceedings when Alternative Service Methods of Delivering to Household Member or Posting Is Used.

Currently, in summary landlord-tenant proceedings, to perfect service of process, a plaintiff must (a) mail the defendant the summons and complaint and (b) serve on the defendant by (1) a method provided in MCR 2.105; (2) delivering the papers at the premises to a member of defendant's household; or (3) after diligent attempts at personal service have been made, securely attaching the papers to the main entrance of the tenant's dwelling unit.

While the mail requirement could be eliminated if the plaintiff serves the summons and complaint as provided in MCR 2.105, the mailing requirement should not be eliminated if the plaintiff serves the defendant by delivering to a household member or posting. The mailing requirement is a safeguard against the reduced quality of alternatives to service allowed under (D)(2)-(3), namely delivering to a household member or posting.

4. Exceptions to Serving Documents under MCR 5.107 Should Not Be Amended.

Currently, MCR 5.107 requires petitioners to serve interested parties certain documents; however, under subsection (B), service is not required if the interest person "whose address or whereabouts, on diligent inquiry, is unknown or on an unascertained or unborn person." The proposed amendments to MCR 5.107(B) would provide a third exception – previous mailings to the last known address have been returned at least two times as undeliverable – to the exception for serving an interested party.

While undeliverable mail may be used to help establish that a petitioner has made a diligent inquiry of an interested person's address, the committee does not believe that two attempts at mailing is sufficient, in and of itself, to excuse a petitioner from serving an interested party.

5. **Provisions Unrelated to Electronic Filing**

The committee would also like to express its concern for the breadth of these rule amendments and the number of amendments that appear to have nothing to do with electronic filing.

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

Contact Persons:
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Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2002-37

The Alternative Dispute Resolution Section is a voluntary membership section of the State Bar of Michigan, comprised of 677 members. The Alternative Dispute Resolution Section is not the State Bar of Michigan and the position expressed herein is that of the Alternative Dispute Resolution Section only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's ongoing efforts to implement a statewide electronic-filing system, and authorize Committees and Sections to provide their comments to the Court.

The Alternative Dispute Resolution Section has a public policy decision-making body with 7 members. On November 1, 2018, the Section adopted its position after an electronic discussion and vote. 7 members voted in favor of the Section's position on ADM File No. 2002-37, 0 members voted against this position, 0 members abstained, 0 members did not vote.

Support

Contact Person: William D. Gilbridge, Jr.
Email: wdgilbridge@abbottnicholson.com

Position Adopted: November 1, 2018 via unanimous electronic vote of Executive Committee with ratification anticipated at December 2018 council meeting.

Public Policy Position
ADM File No. 2002-37

The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed herein is that of the Civil Procedure & Courts Committee only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's ongoing efforts to implement a statewide electronic-filing system, and authorize Committees and Sections to provide their comments to the Court.

The Civil Procedure & Courts Committee has a public policy decision-making body with 27 members. On November 3, 2018, the Committee adopted its position after a discussion and vote at a scheduled meeting. The committee took separate votes on each recommendation, and the committee's votes are indicated at the end of the discussion for each recommendation.

Support with Recommendations

Explanation
The Civil Procedure & Courts Committee continues to support the Michigan Supreme Court's efforts to implement a statewide e-filing system. The committee recommends a number of amendments to clarify the proposed rules.

MCR 2.107(C)(4): Alternative Electronic Service.

MCR 2.107(C)(4) references "alerts" to view documents; however, the term alert is not used in the permissible methods for alternative electronic service. To clarify the permissible methods for alternative electronic service, the committee recommends that MCR 2.107(C)(4)(a)(iii) be amended as follows (shown in bold):

> **Alert, consisting of ~~sending~~** an email or text message to log into a secure website to view notices and court papers.

This recommendation was unanimously supported by the committee.

Under proposed MCR 2.107(C)(4)(i), if an attempt to serve via alternative electronic service is undeliverable, the filer is required to serve by regular mail under MCR 2.107(C)(3). The committee recommends that the rule be amended to also allow for service by delivery under MCR 2.107(C)(1) and (2) as follows (shown in bold):

> (i) Alternative electronic service is complete upon transmission . . . If alternative electronic service transmission is undeliverable, the entity responsible for serving the document must serve the document by regular mail under MCR 2.107(C)(3) **or by delivery under MCR 2.107(C)(1) or (2)**, and include a copy of the return notice indicating that the electronic transmission was undeliverable.

This recommendation was unanimously supported by the committee.

MCR 2.117: Appearances

The committee opposes the deletions proposed in MCR 2.117(A)(1) and (B)(2)(A), removing the requirement that the Notice of Appearance include the party's or the party's attorney's address and telephone number. While MCR 2.113(C) requires this information be included in the case caption to a pleading, requiring this information to also be included in the Notice of Appearance will make it more likely that parties will provide this basic and necessary information.

This recommendation was supported by the committee 21-1.

MCR 2.508: Jury Trial of Right

The committee opposes the proposed changes to MCR 2.508(B)(1) that would require that a demand for jury trial be filed as a separate document. Currently, parties are allowed to include the jury trial demand in the caption of the pleading. Michigan case law has established that as long as a party makes a clear jury demand and pays the requisite fees, the party is entitled to a jury trial.

This recommendation was supported by the committee 21-1.

MCR 2.603: Default and Default Judgment

The committee recommends the following amendment to (A)(1) to clarify that verified statements – not facts – are filed with the court:

> If a party against whom a judgment for affirmative relief is sought . . . , and that fact is ~~made to appear by affidavit or otherwise~~ **verified in the manner prescribed by MCR 1.109(D)(3) and filed with the court in a request** ~~**filed with the court in a request verified in the matter prescribed by MCR 1.109D)(3)**~~, the clerk must enter the default of that party.

This recommendation was unanimously supported by the committee.

MCR 3.104: Installment Payment Order

The committee opposes the amendment that would require a judgment debtor – rather than the clerk – in district court to serve the judgment creditor with a copy of the judgment debtor's motion for an installment payment order.

This change raises a number of issues. First, the judgment debtor is not required to file any proof of service that he or she actually served the judgment creditor. Second, if the judgment creditor – who often are pro se in district court – does not raise a timely objection to the motion, it is automatically entered, even if the judgment creditor never received notice of the motion, creating more paperwork

and confusion for the court and the parties. For these reasons, the committee opposes the proposed deleted language in MCR 3.104(A).

In addition, the committee recommends that all references to "plaintiff" be changed to "judgment creditor" and all references to "defendant" be changed to "judgment debtor" in MCR 3.104.

This recommendation was unanimously supported by the committee.

Position Vote:
Voted For position: 22[1]
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

[1] The committee took separate votes on each recommendation, and the committee's votes are indicated at the end of the discussion for each recommendation.

Public Policy Position
ADM File No. 2002-37

The Criminal Jurisprudence & Practice Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed herein is that of the Criminal Jurisprudence & Practice Committee only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's ongoing efforts to implement a statewide electronic-filing system, and authorize Committees and Sections to provide their comments to the Court.

The Criminal Jurisprudence & Practice Committee has a public policy decision-making body with 17 members. On October 26, 2018, the Committee adopted its position after a discussion and vote at a scheduled meeting. 11 members voted in favor of the Committee's position on ADM File No. 2002-37, 1 member voted against this position, 0 members abstained, 5 members did not vote.

Explanation

The committee supports the adoption of the rules that apply to criminal proceedings and takes no position on the other proposed amendments.

Position Vote:

Voted For position: 11
Voted against position: 1
Abstained from vote: 0
Did not vote: 5

Contact Persons:

Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

Public Policy Position
ADM File No. 2002-37

The Litigation Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,316 members. The Litigation Section is not the State Bar of Michigan and the position expressed herein is that of the Litigation Section only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's ongoing efforts to implement a statewide electronic-filing system, and authorize Committees and Sections to provide their comments to the Court.

The Litigation Section has a public policy decision-making body with 21 members. On December 3, 2018, the Section adopted its position after an electronic discussion and vote. 14 members voted in favor of the Section's position on ADM File No. 2002-37, 0 members voted against this position, 0 members abstained, 7 members did not vote.

Support with Recommended Amendments

Explanation:
The Litigation Section submits the following comment with respect to the proposed change to MCR 2.403(K)(1), Case Evaluation. The proposed change directly conflicts with the provisions of MCR 2.403(N) prohibiting disclosure to the court in non-jury trial of the case evaluation award amount and identifying which parties accepted or rejected the award. With the proposed language, there is potential for a district/circuit court judge to learn the amount of the case evaluation award and what parties accepted or rejected the award. This could potentially affect a judge's impartiality as the trier of fact in non-jury trials.

Under the current MCR 2.403(K)(1), the case evaluation panel issues a case evaluation award and notifies the attorneys for each party of the award. After the acceptance or rejection date, MCR 2.403(N)(4) directs the ADR clerk to file the outcome of the parties' acceptances and rejections "in a sealed envelope for filing with the clerk of the court." Importantly, in the event of a non-jury trial, MCR 2.403(N)(4) requires that the sealed envelope containing the case evaluation outcome "not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment."

The proposed changes to MCR 2.403(K)(1) adds language requiring the panel to "submit the evaluation to the court" within 14 days after the case evaluation hearing (and 14 days before the acceptance or rejection date). This proposed language is not conditioned or limited to the type of trial selected by the parties at the beginning of the case and directly conflicts with MCR 2.403(N)(4) when the case is to proceed to a non-jury trial.

The Litigation Section recommends removal of the proposed language in MCR 2.403(K) that would require an ADR clerk to submit the case evaluation award to the court.

Contact Person: Andrew Stevens
Email: astevens@lmdlaw.com

Public Policy Position
ADM File No. 2002-37

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,253 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's ongoing efforts to implement a statewide electronic-filing system, and authorize Committees and Sections to provide their comments to the Court.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On October 13, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 18 members voted in favor of the Section's position on ADM File No. 2002-37, 0 members voted against this position, 0 members abstained, 5 members did not vote.

Oppose specific revisions

Explanation:
The Probate and Estate Planning Section objects to the proposed revisions to MCR 5.107(B)(1) (specifically, the addition of "previous mailings to the last known address have been returned at least two times as undeliverable"); 5.113(A) (specifically, the deletion of "substantially in the" and the addition of "filed on a"), 5.307(A) (specifically, the deletion of "submit to," the addition of "file with," and the deletion of "computation of"), and 5.307(C) (specifically, the deletion of "submit to" and the addition of "file the inventory with").

Contact Person: David Skidmore
Email: dskidmore@wnj.com

Agenda
Public Policy Committee
December 3, 2018 – 4:00 pm
Teleconference Only

Committee Members: Dennis M. Barnes, Joseph J. Baumann, Kim Warren Eddie, Andrew F. Fink, III, E. Thomas McCarthy, Jr., Daniel D. Quick, Victoria A. Radke, Hon. Cynthia D. Stephens
SBM Staff: Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI: Marcia Hune

A. <u>Legislation</u>

1. Loser-Pay Legislation

SB 1182 (Shirkey) Civil procedure; costs and fees; attorney fees; require award to prevailing party. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 2443.

SB 1183 (Shirkey) Civil procedure; costs and fees; attorney fee awards in frivolous civil actions; modify. Amends secs. 2445 & 2591 of 1961 PA 236 (MCL 600.2445 & 600.2591) & adds sec. 2446.

The Civil Procedure & Courts Committee, Appellate Practice Section, Business Law Section, Consumer Law Section, Family Law Section, Litigation Section, Negligence Law Section, and Probate & Estate Planning Section recommended opposition.

The committee voted 7 to 1 that the legislation is *Keller* permissible in the availability of legal services to society. The committee voted unanimously (8) that the legislation is *Keller* permissible in affecting the functioning of the courts.

The committee voted 6 to 2 to oppose the bills. These bills go against years of case-law and, if passed, put Michigan at odds with the rest of the country. The language in this legislation is vague and overly broad; people should be aware of this proposed change and be given opportunity to comment and propose amendments.

SBM STATE BAR OF MICHIGAN

To: Board of Commissioners

From: Governmental Relations Division Staff

Date: January 10, 2019

Re: Governmental Relations Update

This memo includes updates on legislation and court rules on which the State Bar has taken positions.

2017-2018 Legislature
The 99th Legislature ended with a 20-plus hour voting session on Friday, December 21, 2018. The governor signed 342 bills and vetoed 56. The 2017-2018 Legislature Session resulted slightly less than one thousand public acts: 267 in 2017, and 689 in 2018.

SBM tracked several bills during the lame duck session, including those listed below:

HB 6110 – Good Moral Character
SBM position: Amend the bill to exempt the licensing of attorneys because the Supreme Court has sole authority over attorney licensure under the Michigan Constitution.
SBM staff, working with the Board of Law Examiners, successfully had the bill amended in the Senate Regulatory Reform Committee to exclude the BLE from the licensing boards or agencies to which the bill applied. Despite being reported with a unanimous vote from the Senate committee, the bill never received a vote on the Senate floor.
Next steps: The sponsor of the bill, Representative Brandt Iden, intends to reintroduce the package of bills in the new session. SBM staff will advocate for the bill to be introduced with the exemption in the Good Moral Character Act, or with an amendment to the Revised Judicature Act that eliminates the cross-reference to the Good Moral Character Act.

SB 1087 – Payee Notification
SBM position: Support. (The bill was initiated by the State Bar through action by the Board of Commissioners and the Representative Assembly.)
This bill, requiring notice to claimants of disbursements of settlements was introduced in September. Alecia Ruswinckel testified before the Senate Insurance Committee on behalf of the State Bar in support of the bill, and it was reported out of the committee unanimously despite being opposed by the insurance industry. However, the bill never received a vote on the Senate floor.
Next steps: SBM staff will work to find a new sponsor to reintroduce this legislative session.

SB 1182 & SB 1183 – "Loser Pay" Legislation
SBM position: Oppose
After the Board took a position opposing these bills, the bills were unable to gain any traction in the Senate.
Next steps: The sponsor of the bills intends to reintroduce them in the new legislative session.

Court Rules

ADM File No. 2002-37/2018-20 – Amendment of MCR 2.002

In April 2018, the Representative Assembly approved amendments to MCR 2.002 to improve the consistency in the fee waiver process. In response, the Michigan Supreme Court published for comment two alternative rule amendments – Alternative A which was proposed by the State Court Administrative Office (SCAO) and Alternative B which was proposed by SBM. In response, the Board of Commissioners proposed Alternative C, which combined the procedures in Alternative A with the substance of Alternative B.

The Court then informally sought SBM's feedback on an Alternative D, which proposed a new multi-step fee waiver process, which, among other things, required the clerk to authorize the fee waiver if the applicant provided basic information that he or she qualified, but allowed a judge seven days to order a hearing to require the applicant to verify the statements made in the application. After considering recommendations from the Consistent Fee Waiver Workgroup, the Access to Justice Policy Committee, and the Civil Procedure & Courts Committee, the Executive Committee voted to continue supporting Alternative C, as it better addressed the inconsistencies experienced by low-income litigants during the fee waiver application process.

On December 3, 2018, the Court adopted amendments to MCR 2.002. The Court adopted many of the amendments proposed in Alternative C. The Court, however, changed the definition of "indigency" to 125% of the Federal Poverty Guidelines (FPG), instead of 200% of FPG. In addition, the Court altered the review process for fee waiver applications that have been denied, allowing applicants a de novo review of their fee waiver applications.

While the rule amendment was effective on January 1, 2019, the Court later reached out to SBM to discuss some technical fixes to MCR 2.002, and SBM worked with the Court to clarify that the language in Section E that judges are required to waive fees if an applicant's income is under 125% of FPG and that judges have discretion to waive fees if the applicant's income is at or above 125% of FPG and the applicant can demonstrate financial hardship, which is consistent with the language initially approved by the Representative Assembly. These changes are expected to be presented to the Justices at an upcoming administrative conference.

ADM File No. 2015-20 – Amendment of MCR 8.110

On June 21, 2017, the Court published for comment rule amendments that expanded the grounds upon which a chief judge could report actions of a judge to SCAO for the purpose of initiating corrective action to any action by a judge "that raises the questions regarding the propriety of the judge's continued service."

The Board opposed this rule proposal based on the concerns raised by the Michigan District Judges Association over the "vagueness of the standards of 'propriety,' 'good faith,' and 'fitness" leading to due process challenges.

On December 5, 2018, the Court adopted different amendments to MCR 8.110. The Court declined to adopt the language that the Board opposed and instead adopted a new subsection (5) that allows a chief judge to "relieve the judge from presiding over some or all of the judge's docket with approval of the state court administrator."

The rule amendment was effective on January 1, 2019

ADM File No. 2016-46 – Amendment of Rule 15 of the Rules Concerning the State Bar of Michigan
On September 22, 2016, the Representative Assembly approved amendments to Rule 15 of the Rules Concerning the State Bar of Michigan that would increase the fees related to the Character & Fitness evaluation for admission to the Bar. On December 20, 2017, the Court published the proposed rule amendment for comment. On December 12, 2018, the Court adopted SBM's proposed Character & Fitness fee increases.

The rule amendment was effective on January 1, 2019.

ADM File No. 2018-19 – Amendment of the Civil Discovery Rules
In April 2018, the Civil Discovery Rule Review Special Committee proposed to the Representative Assembly comprehensive changes to the civil discovery rules. With only minor amendments, the Representative Assembly approved the proposal with overwhelming support.

On November 28, 2018, the Court published for comment the rule amendments as proposed by SBM and published the Special Committee's Report explaining the purpose for the rule amendments.

The comment period expires on March 1, 2018.

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2018

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

ADM File No. 2017-27

Proposed Amendment of
Rule 6.425 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 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 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.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(d) [Unchanged.]

(e) if the sentence imposed is not within the guidelines range, articulate the ~~substantial and compelling~~ reasons justifying that specific departure, and

(f) [Unchanged.]

(2)-(3) [Unchanged.]

(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be ~~made~~filed with the court within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be ~~made~~filed with the court within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be ~~completed and returned to~~filed with the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer.

(4) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.425 would make the rule consistent that requests for counsel must be filed within 42 days, as opposed to simply "made" or "completed and returned." It would also remove the requirement for a sentencing judge to articulate substantial and compelling reasons to deviate from the guidelines range, pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an 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 sent to the Supreme Court Clerk in writing or electronically by February 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

October 17, 2018

Clerk

Public Policy Position
ADM File No. 2017-27

Support with Amendments

Explanation
The committee voted unanimously (11) to support the proposed amendment to MCR 6.425 removing "substantial and compelling" from (E)(1)(e) pursuant to *People v Lockridge*, 498 MICH 358; 870 NW2d 502 (2015).

The committee voted 9 to 2 to support the proposed amendments to Rule 6.425(F)(1) through (F)(3), changing "made" and "completed and returned" to "filed with the court," with the additional language suggested in (F)(3) and (F)(4) as suggested by the State Appellate Defender Organization (SADO) and presented below:

> (3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be ~~completed and returned to~~ filed with the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so.
>
> (4) A request for counsel must be deemed filed on the date on which it is received by the court, but if a request is received more than 42 days after sentencing, and if the defendant is incarcerated in a prison or jail, the request must be deemed filed on the date of deposit in the outgoing mail at the prison or jail in which the defendant is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid.
>
> (5) [Renumbered from (4) but otherwise unchanged.]

Although the committee found the use of the word "file," as proposed by the Court to be clearer than the alternative proposed by SADO, the committee did agree with SADO that other amendments to the rule would provide greater clarity, consistency, and protection of appellate rights. The amendment to (F)(3) would make it clear that defendants could file a request for counsel form at sentencing, which is current practice by most, but not all, judges. The amendment to (F)(4) would incorporate the prisoner mailbox rule into MCR 6.425.

Position Vote Regarding (E)(1)(e):
Voted For position: 11
Voted against position: 0
Abstained from vote: 0
Did not vote: 6

Position Vote Regarding (F)(1)-(4):
Voted For position: 9
Voted against position: 2
Abstained from vote: 0
Did not vote: 6

Contact Persons:
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

Public Policy Position
ADM File No. 2017-27

Oppose

Explanation
The Appellate Practice Section Council of the State Bar of Michigan opposes the proposed changes to MCR 6.425(F) under ADM File No. 2017-27. The Council endorses and adopts the positions articulated in the December 3, 2018 letter by the State Appellate Defender Office and Michigan Appellate Assigned Counsel System.

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

Contact Person: Bridget Brown Powers
Email: bbrownpowers@brownpowers.com

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December 3, 2018

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

Re: ADM File No. 2017-27, Proposed Amendment of MCR 6.425

Dear Mr. Royster:

On behalf of the State Appellate Defender Office (SADO) and the Michigan Appellate Assigned Counsel System (MAACS), I am writing in opposition to the proposed changes to MCR 6.425(F), which would require indigent criminal defendants to "file" a request for appointed appellate counsel, rather than simply "return[it] to the court." While we appreciate the Court's desire to give greater certainty and consistency to the process for requesting appellate counsel, we fear that the proposed change would unnecessarily impede indigent defendants' access to appellate counsel and the courts.

A. The Court should not amend MCR 6.425(F) as proposed

As written, MCR 6.425(F) provides in part that a request for the appointment of appellate counsel "must be *made* within 42 days after sentencing," and "must be *completed and returned to the court* within 42 days after sentencing." MCR 6.425(F)(1)(c), (F)(2)(c), (F)(3) (emphasis added). As this language seems to acknowledge, a request for appellate counsel might be submitted to the trial court in a number of ways. While some defendants mail or hand-deliver the form to the clerk's office for filing, many others simply tender the form to court staff at the sentencing hearing or mail the form to the trial judge later. Others mistakenly mail the form to MAACS, and MAACS transmits the form to the trial court.

We believe this flexibility is appropriate. The vast majority of requests for counsel are submitted by incarcerated indigent defendants—many of whom are in transit between facilities, lack simple access to stamps or envelopes, and lack the knowledge or experience to ensure proper "filing" through the mail.

The problem, as the Court seems to recognize, is that some requests for counsel that are "returned to the court" are not actually filed on the record. Indeed, a document is "filed with the court" only when it is "filed with the clerk of the court in accordance with MCR 1.109(D)," or when "the judge to whom the case is assigned . . . accept[s] materials for filing when circumstances warrant." MCR 1.109(C). As such, many requests for appellate counsel are not properly filed under the existing court rule—whether because the judge has refused to accept the request at sentencing, or the request arrives by mail in chambers instead of the clerk's office, or court staff neglect to file the request upon receipt. Any of these scenarios would increase the likelihood of a request for counsel being misplaced or otherwise not promptly adjudicated as required under MCR 6.425(G). This is a real and persistent problem; for all the misplaced or unadjudicated requests that come to the attention of MAACS[1] or this Court[2] because of defendants' persistence, there may be untold more that never see the light of day.

But by requiring indigent defendants to "file" their requests with the clerk rather than simply "returning" them to the court, the proposal risks exacerbating rather than solving this problem. It is frequently very difficult for an incarcerated indigent defendant to "file" papers properly with the court clerk, so the proposal could cause even more requests to be returned, denied, or simply ignored due to technical filing defects. If the problem with the existing rule is that it risks some requests for counsel going unfiled and unresolved, the proposal would increase this risk to a virtual certainty.

---

[1] Particularly since the counsel request form (CC 265) was amended in 2017 to instruct defendants to write MAACS if they experience problems, MAACS frequently receives letters from defendants inquiring about the status of their requests. Typically, MAACS is able to work with the trial courts to resolve these matters.

[2] See, e.g., *People v Brown*, 500 Mich 1018; 896 NW2d 797 (2017) ("It is unclear . . . whether the failure to perfect an appeal of right was solely the fault of the defendant's trial counsel, who promised in open court to file the necessary paperwork . . . but failed to fulfill that promise . . . , or whether trial counsel filed the paperwork and the trial court failed to process it. Regardless, it is clear that the failure to perfect an appeal of right is not attributable to the defendant."); *People v Dewey*, ___ Mich ___; 918 NW2d 523 (2018) ("The defendant made a timely request for the appointment of appellate counsel but, through no fault of his own, counsel was not appointed, and the defendant was deprived of a claim of appeal."); *People v Rice*, 500 Mich 998; 895 NW2d 531 (2017) (same); *People v Harris*, 501 Mich 922; 903 NW2d 565 (2017) (same); *People v Reid*, 502 Mich 935; 915 NW2d 461 (2018) ("The defendant, through no fault of his own, was deprived of the opportunity to have appointed appellate counsel file a timely motion to withdraw the plea and application for leave to appeal due to the trial court's failure to timely respond to the defendant's . . . request for counsel . . . .").

To ensure defendants' continued ability to request appellate counsel without unnecessary hindrance and without sacrificing the right to appellate review and counsel, we ask the Court not to require that indigent criminal defendants "file" requests for counsel under MCR 6.425(F).

B. The Court should require trial courts to accept requests for counsel that are tendered at sentencing or thereafter

While the Court should not amend MCR 6.425(F) by imposing a more rigid "filing" requirement, it should consider other changes to the rule that would provide greater clarity, consistency, and protection of appellate rights.

First, the Court should amend MCR 6.425(F)(1)(c) and (F)(2)(c), as well as MCR 6.425(G)(1)(d) and (G)(1)(e), to be consistent with MCR 6.425(F)(3) and clarify that a defendant's request for counsel must be "completed and returned to the court" rather than "made" or "filed."

Second, the Court should make clear that the "court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so." While this appears to be the practice of most trial courts already, some judges will not accept a request for appellate counsel at sentencing. Given that the counsel request form (CC 265) was recently shortened to simplify the financial statement and omit the notary requirement, it would not significantly delay the proceeding for a trial court to accept the form at sentencing. In the interests of reliability, consistency, and judicial economy, all defendants should be given an opportunity to tender a request for appellate counsel at sentencing.

Third, to ensure that requests for counsel are made part of the record and adjudicated upon receipt, the Court should clarify that a request for appellate counsel "must be deemed filed on the date on which it was received by the court." This will place the responsibility of ensuring proper filing, including a record of the effective filing date, with the entity that is most capable of carrying out that role—the trial court itself.

C. The Court should incorporate the prisoner mailbox rule into MCR 6.425

While clarifying the manner in which requests for appellate counsel are tendered and accepted, the Court should take this opportunity to incorporate the prisoner mailbox rule into MCR 6.425(F), where it would serve its purpose most effectively and apply to requests for appellate counsel in plea appeals.

The prisoner mailbox rule provides that if "a claim of appeal" (under MCR 7.204(A)(2)(e)) or "an application for leave to appeal" (under MCR 7.205(A)(3)) is "received by the court after the [filing deadline], and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim

as a pro se party, the claim shall be deemed presented for filing on the date of deposit . . . in the outgoing mail. . . .” Under the respective rules, this provision is virtually identical for claims and applications. But in practice, it means very different things.

A trial-convicted defendant perfects a claim of appeal by submitting a timely request for appellate counsel to the trial court. See MCR 6.425(G)(1)(e) (“[I]f the defendant’s request for a lawyer was made within the time for filing a claim of appeal, the order [appointing counsel] must be entered on an approved form entitled ‘Claim of Appeal and Appointment of Counsel.’ Entry . . . constitutes a timely filed claim of appeal . . . .”). Thus, by implication, MCR 7.204(A)(2)(e) is effectively incorporated into MCR 6.425, and a trial-convicted defendant should get the benefit of the mailbox rule if he mails his request for counsel from a Michigan Department of Corrections facility to the trial court on day 42.

But a plea-convicted defendant may get no such relief; although the trial court is encouraged to “liberally grant” a request mailed on day 42 since there remains time to file an application for leave to appeal, see MCR 6.425(G)(1)(d), the mailbox rule would not technically apply because the request for counsel does not itself function as an application for leave to appeal.

Since the Court is reviewing MCR 6.425(F) for other purposes, the time may be appropriate to remedy this inequity and continue the Court’s recent expansion of the prisoner mailbox rule to cover other types of trial court pleadings. See MCR 6.310(C)(5); MCR 6.429(B)(5); MCR 6.431(A)(5).

Finally, when incorporating the prisoner mailbox rule into MCR 6.425(F), the Court should modify the existing language of the rule by replacing “inmate” with “incarcerated” and “defendant”; “Michigan Department of Corrections” and “correctional institution” with “prison or jail”; “pro se” with “pro per” (where necessary, but not in MCR 6.425(F)); “shall” with “must”; and “presented for filing” with “filed.” Other portions may be deleted as unnecessary. To ensure consistent use of the most appropriate language, these slight modifications should also be adopted in MCR 7.204(A)(2)(e), MCR 7.205(A)(3), MCR 6.310(C)(5), MCR 6.429(B)(5), and MCR 6.431(A)(5).[3]

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[3] For ease of reference, the existing prisoner mailbox rule under MCR 7.204(A)(2)(e) is provided here, along with the suggested modifications:

> If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is ~~an inmate in the custody of the Michigan Department of Corrections~~incarcerated in a prison or jail and has submitted the claim as a pro ~~se~~per party, the claim ~~shall~~must be deemed ~~presented for filing~~filed on the date of deposit of the claim in the outgoing mail at the ~~correctional institution~~prison or

D. The Court should adopt the following alternate changes to MCR 6.425(F) and (G)

For the reasons explained above, we suggest the following amendments to MCR 6.425(F) and (G):

(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be ~~made~~completed and returned to the court within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a)-(b) [Unchanged.]

(c) the request for a lawyer must be ~~made~~completed and returned to the court within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so.

(4) A request for counsel must be deemed filed on the date on which it is received by the court, but if a request is received more

---

jail in which the ~~inmate~~defendant is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. ~~The exception applies to claims of appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

than 42 days after sentencing, and if the defendant is incarcerated in a prison or jail, the request must be deemed filed on the date of deposit in the outgoing mail at the prison or jail in which the defendant is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid.

(5) [Renumbered from (4) but otherwise unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer's Responsibilities.

(1) Appointment of Lawyer and Preparation of Transcript.

(a)-(c) [Unchanged.]

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is ~~filed~~completed and returned to the court within 42 days after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. A denial of counsel must include a statement of reasons.

(e) In a case involving a conviction following a trial, if the defendant's request for a lawyer was ~~made~~completed and returned to the court within the time for filing a claim of appeal, the order must be entered on an approved form entitled "Claim of Appeal and Appointment of Counsel." Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(f)-(g) [Unchanged.]

Thank you for considering these suggestions, and please do not hesitate to contact me if you have any questions.

Sincerely,

Bradley R. Hall
MAACS Administrator

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2018

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

ADM File No. 2018-04

Proposed Amendments of
Rules 7.212 and 7.312 of
the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.212 and 7.312 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 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.]

Rule 7.212 Briefs

(A)-(G) [Unchanged.]

(H) Amicus Curiae.

(1)-(2) [Unchanged.]

(3) Except for briefs presented on behalf of amicus curiae listed in MCR 7.312 (H)(2), a brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(I)-(J) [Unchanged.]

Rule 7.312 Briefs and Appendixes in Calendar Cases

(A)-(G) [Unchanged.]

(H) Amicus Curiae Briefs and Argument.

(1)-(3) [Unchanged.]

(4) Except for briefs presented on behalf of amicus curiae listed in subrule (H)(2), a brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

(54) [Renumbered but otherwise unchanged.]

(I)-(J) [Unchanged.]

Staff Comment: The proposed amendments of MCR 7.212 and 7.312 would require amicus briefs to indicate certain information regarding the preparation of the brief and disclosure of monetary contributions. The proposal would be similar to Supreme Court Rule 37.6.

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 sent to the Supreme Court Clerk in writing or electronically by February 1, 2019 at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

October 17, 2018

Clerk

Public Policy Position
ADM File No. 2018-04

Support

Explanation
The Civil Procedure & Courts Committee supports the added disclosure requirements for amicus briefs proposed in ADM 2018-04.

The committee recommends a minor amendment to the rule. In the second line of MCR 7.212(H)(3) and 7.312(H)(4), the word "rule" should be changed to "subrule."

Position Vote:
Voted For position: 20
Voted against position: 2
Abstained from vote: 0
Did not vote: 5

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Members of Board of Commissioners

From: Affordable Legal Services Committee
Candace Crowley, Senior Consultant
Kathryn L. Hennessey, Public Policy Counsel

Date: January 8, 2019

Re: Proposed Amendments to MCR 5.117 to Allow Limited Scope Representation in Probate Proceedings

---

The Affordable Legal Services Committee (Committee) seeks the Board of Commissioner's approval of a court rule amendment to explicitly allow limited scope representation (LSR) in probate proceedings and civil actions pending in probate court.

On September 22, 2016, the Unbundling Workgroup presented to the Representative Assembly a rule proposal to allow LSR in civil proceedings, and the Representative Assembly approved the proposal with overwhelming support. Effective January 1, 2018, the Michigan Supreme Court adopted these rule amendments. The order adopting the amendments is included as Attachment 1.

In 2018, when reviewing SBM-proposed LSR forms, the Michigan Supreme Court brought to SBM's attention that the rules do not extend to probate proceedings. To remedy this oversight, Professor Christopher G. Hastings, a lead member of the Unbundling Workgroup, worked with SBM staff and determined that MCR 5.117 should be amended to allow LSR in probate proceedings and to clarify that LSR is available in civil actions pending in probate court.

Prof. Hastings drafted initial amendments to MCR 5.117, and SBM staff sought feedback from the Probate Section and a number of members with expertise in probate practice, including practitioners, judges, and court administrators. The feedback received was overwhelmingly positive and is included as Attachment 2.[1]

At its November 2018 meeting, the Committee considered a draft rule amendment incorporating much of the feedback received and voted unanimously to support the rule proposal.

The workgroup intended the original proposal to apply to all civil proceedings, including probate. Due to an oversight, the original amendments did not include amendments to MCR 5.117, which is required to ensure that LSR is available in probate proceedings and civil actions pending in probate court. Therefore, to correct this oversight and further the policy set forth by the Representative Assembly when it supported the original rule proposal, the Committee seeks the Board's approval of the proposed changes to MCR 5.117, which are detailed in redline below.

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[1] In addition to the feedback attached, we also received feedback over the telephone from Hon. Benjamin Bolser and Shaheen Imami.

RULE 5.117 APPEARANCE BY ATTORNEYS

(A) Representation of Fiduciary. An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.

(B) Appearance.

(1) In General. An attorney may appear generally by an act indicating that the attorney represents an interested person in the proceeding. A limited appearance may be made by an attorney for an interested person in a civil action or a proceeding as provided in MCR 2.117(B)(2)(c), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons. An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person.

(2) Notice of Appearance. If an appearance is made in a manner not involving the filing of a paper served with the court or if the appearance is made by filing a paper which is not served on the interested persons, the attorney must promptly file a written appearance and serve it on the interested persons whose addresses are known and on the fiduciary. The attorney's address and telephone number must be included in the appearance.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the client.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court-ordered conference or trial if it is within the scope of the appearance.

(C) Duration of Appearance by Attorney.

(1) In General. Unless otherwise stated in the appearance or ordered by the court, an attorney's appearance applies only in the court in which it is made or to which the action is transferred and only for the proceeding in which it is filed.

(2) Appearance on Behalf of Fiduciary. An appearance on behalf of a fiduciary applies until the proceedings are completed, the client is discharged, or an order terminating the appearance is entered.

(3) Termination of Appearance on Behalf of a Personal Representative. In unsupervised administration, the probate register may enter an order terminating an appearance on behalf of a personal representative if the personal representative consents in writing to the termination.

(4) Other Appearance. An appearance on behalf of a client other than a fiduciary applies until a final order is entered disposing of all claims by or against the client, or an order terminating the appearance is entered.

(5) Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons.

(6~~5~~) Substitution of Attorneys. In the case of a substitution of attorneys, the court in a supervised administration or the probate register in an unsupervised administration may enter an order permitting the substitution without prior notice to the interested persons or fiduciary. If the order is entered, the substituted attorney must give notice of the substitution to all interested persons and the fiduciary.

(D) Right to Determination of Compensation. An attorney whose services are terminated retains the right to have compensation determined before the proceeding is closed.

ATTACHMENT 1

Order

Michigan Supreme Court
Lansing, Michigan

September 20, 2017

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

ADM File No. 2016-41

Amendment of Rules 1.0, 1.2, 4.2 and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.0, 1.2, 4.2 and 4.3 of the Michigan Rules of Professional Conduct, and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules are adopted, effective January 1, 2018.

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

Rule 1.0 Scope and Applicability of Rules and Commentary

(a)-(c) [Unchanged.]

Preamble: A Lawyers Responsibilities [Unchanged until section entitled "Terminology."]

Terminology.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. [To be inserted after term "Belief" and before term "Consult."]

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. [To be inserted after term "Fraud" and before term "Knowingly."]

Rule 1.2 Scope of Representation

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the ~~objectives~~ scope of ~~the~~ a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the ~~client consents after consultation~~ limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

(1) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)."

(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.

(c)-(d) [Unchanged.]

Comment: [To be added following the paragraph entitled "Services Limited in Objectives or Means," and before the paragraph entitled "Illegal, Fraudulent and Prohibited Transactions."]

Reasonable under the Circumstances. Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney's obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to

ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.

Rule 4.2 Communication with a Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) An otherwise self-represented person receiving limited representation in accordance with Rule 1.2(b) is considered to be self-represented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation. Oral communication shall be made first to the limited scope representation lawyer, who may, after consultation with the client, authorize oral communications directly with the client as agreed.

(c) Until a notice of termination of limited scope representation comporting with MCR 2.117(B)(2)(c) is filed, or other written communication terminating the limited scope representation is provided, all written communication, both court filings and otherwise, shall be served upon both the client and the limited scope representation attorney.

Rule 4.3 Dealing with a~~n Unr~~ Self-Represented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the ~~un~~self-represented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) Clients receiving representation under a notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation are not self-represented persons for matters within the scope of the limited appearance, until a notice of termination of limited appearance representation comporting with MCR 2.117(B)(2)(c) is filed or other written communication terminating the limited scope representation is in effect. See Rule 4.2.

Rule 2.107 Service and Filing of Pleadings and Other Papers

(A) [Unchanged.]

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(c) [Unchanged.]

(d) The court may order service on the party~~.~~;

(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every paper later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.

(2)-(3) [Unchanged.]

(C)-(G) [Unchanged.]

Rule 2.117 Appearances

(A) [Unchanged.]

(B) Appearance by Attorney.

(1) [Unchanged.]

(2) Notice of Appearance.

(a)-(b) [Unchanged.]

(c) Pursuant to MRPC 1.2(b), a party to a civil action may appear through an attorney for limited purposes during the course of an action, including, but not limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

(i) The attorney files and serves a notice of limited appearance with the court before or during the relevant action or proceeding, and all parties of record are served with the limited entry of appearance; and

(ii) The notice of limited appearance identifies the limitation of the scope by date, time period, and/or subject matter.

(d) An attorney who has filed a notice of limited appearance must restrict activities in accordance with the notice or any amended limited appearance. Should an attorney's representation exceed the scope of the limited appearance, opposing counsel (by motion), or the court (by order to show cause), may set a hearing to establish the actual scope of the representation.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or a confirming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1) [Unchanged.]

(2) Unless otherwise stated in this rule, a~~A~~n attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court.

(3) An attorney who has filed a notice of limited appearance pursuant to MCR 2.117(B)(2)(c) and MRPC 1.2(b) may withdraw by filing a notice of withdrawal from limited appearance with the court, served on all parties of record, stating that the attorney's limited representation has concluded and the attorney has taken all actions necessitated by the limited representation, and providing to the court a current service address and telephone number for the self-represented litigant. If the notice of withdrawal from limited appearance is signed by the client, it shall be effective immediately upon filing and service. If it is not signed by the client, it shall become effective 14 days after filing and service, unless the self-represented client files and serves a written

objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services.

(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other papers without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a paper.

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A)-(C) [Unchanged.]

(D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except

(1) as otherwise provided by rule or statute,

(2) when it clearly appears that they apply to civil actions only, ~~or~~

(3) when a statute or court rule provides a like or different procedure~~.~~, or

(4) with regard to limited appearances and notices of limited appearance.

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

(E) [Unchanged.]

Staff Comment: The amendments of Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules were submitted to the Court by the State Bar of Michigan Representative Assembly. The rules are intended to provide guidance for attorneys and clients who would prefer to engage in a limited scope representation. The rules allow for such an agreement "preferably in writing," and enable an attorney to file a notice of LSR with the court when the representation is undertaken as well as a termination notice when the representation has ended. The rules also explicitly allow attorneys to provide document preparation services for a self-represented litigant without having to file an appearance with the court.

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

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, 2017

Clerk

ATTACHMENT 2

From: Melisa Mysliwiec <mmysliwiec@fraserlawfirm.com>
To: Kathryn Hennessey <KHENNESSEY@michbar.org>, "mlentz@bodmanlaw.com" <mlentz@bodmanlaw.com>
Date: 11/19/2018 10:26 AM
Subject: RE: Probate Section: Limited Scope Proposed Amendments to MCR 5.117

Katie,

While not available online yet, the Probate and Estate Planning Council took the following public policy position with respect to extending limited scope representation (LSR) to probate matters:

1. Whether LSR should be extended to probate proceedings? Yes

2. As to the proposed amendments to MCR 5.117 suggested by the State Bar of Michigan LSR Workgroup:

   The proposed amendment to 5.117(B)(1) states that "a limited appearance may be made only as provided in 2.117(B)(2)(c)," but 2.117(B)(2)(c) only applies to a "party in a civil action," so LSR doesn't seem to be extended to interested persons in probate proceedings, which seems to be the intent. Additionally, 2.117(B)(2)(c) requires that notice be provided to "all parties of record," which should be changed to address interested persons under Chapter 5.

   To make it clear that LSR is available in both proceedings and civil actions and that notice it to be given to interested persons, we suggest the proposed amendment to MCR 5.117(B)(1) be modified to say:

   > (1) In General. An attorney may appear generally by an act indicating that the attorney represents an interested person in the proceeding. A limited appearance may be made ~~only~~ BY AN ATTORNEY FOR AN INTERESTED PERSON IN A CIV ACTION OR A PROCEEDING as provided in MCR 2.117(B)(2)(c), EXCEPT THAT ANY REFERENCE TO PARTIES O RECORD IN MCR 2.117(B)(2)(c) SHALL INSTEAD REFER TO INTERESTED PERSONS. An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person.

3. The Section's preference for Option 1 or Option 2 for MCR 5.117(C) as suggested by the State Bar of Michigan LSR Workgroup:

   We prefer Option 2, but for the same reasons described above, we suggest that it be modified as follows:

   > (5) Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), EXCEPT THAT ANY REFERENCE TO PARTIES OF RECORD IN MCR 2.117(B)(2)(c) SHALL INSTEAD REFER TO INTERESTED PERSONS.

If you have any questions or concerns, please don't hesitate to contact myself or Meg Lentz. Thank you for reaching out to the Section for feedback, Katie! Have a Happy Thanksgiving!

Melisa
(Chair of the Court Rules, Form, and Proceedings Committee)

Melisa M. W. Mysliwiec | Attorney | Fraser Trebilcock
p: 616.301.0800 f: 517.482.0887
a: 125 Ottawa Avenue NW, Suite 153, Grand Rapids, MI 49503
w: fraserlawfirm.com

From: Kathryn Hennessey <KHENNESSEY@michbar.org>
Sent: Wednesday, November 07, 2018 3:02 PM
To: mlentz@bodmanlaw.com
Cc: Melisa Mysliwiec <mmysliwiec@fraserlawfirm.com>
Subject: RE: Probate Section: Limited Scope Proposed Amendments to MCR 5.117

Attached please find a memo along with draft proposed rule amendments to MCR 5.117, which would allow limited scope representation for probate proceedings.

We would really appreciate the Probate & Estate Planning Section's feedback on this draft by Monday, November 19. Our Affordable Legal Services

From: "Elizabeth L. Luckenbach" <ELuckenbach@dickinson-wright.com>
To: Kathryn Hennessey <KHENNESSEY@michbar.org>
Date: 10/25/2018 1:37 PM
Subject: RE: State Bar of Michigan: Probate Limited Scope Representation

Hi Katie,

I think the modifications are perfect. It's clean and simple, which should make it easier for approval ☺

Liz

Elizabeth L. Luckenbach Member

2600 W. Big Beaver Rd.
Suite 300
Troy MI 48084
Profile V-Card

Phone 248-205-5640
Fax 844-670-6009
Email ELuckenbach@dickinsonwright.com

DICKINSON WRIGHT PLLC
ARIZONA CALIFORNIA FLORIDA KENTUCKY MICHIGAN NEVADA OHIO TENNESSEE TEXAS WASHINGTON D.C. TORONTO

From: Kathryn Hennessey <KHENNESSEY@michbar.org>
Sent: Monday, October 22, 2018 3:16 PM
To: Elizabeth L. Luckenbach <ELuckenbach@dickinson-wright.com>
Subject: Re: State Bar of Michigan: Probate Limited Scope Representation

Hi Liz,

Thank you so much for taking the time to talk with me today about the possibility of amending MCR 5.117 to allow for limited scope representation in probate proceedings and civil actions.

Attached are proposed changes in redline form, with the relevant civil LSR rules copied at the end of the document for ease of reference. Please let me know your thoughts on these. If you can get me your comments by Friday, November 2, 2018, I'd really appreciate it. I'd like to get a revised proposal to the Probate Section for its November meeting.

Thank you again for all of your help with this project!

Best,
Katie

p.s. I forgot to mention on the phone, but I've been told by the Court to expect the civil discovery rule amendments to be published for comment in October or November.

Kathryn Loncarich Hennessey
Public Policy Counsel

STATE BAR OF MICHIGAN
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012
T: (517) 346-6359
khennessey@michbar.org
www.michbar.org

From: "Aguilar, Kathleen Hogan" <aguilark@millerjohnson.com>
To: Kathryn Hennessey <khennessey@michbar.org>
Date: 11/9/2018 1:23 PM
Subject: RE: Probate Limited Scope Representation Rule Amendment

Hi Kathryn:

I took a look at the proposal. I certainly think Chris' additions to MCR 5.117 accomplish the objective. He (of course) did a thorough and excellent job and I don't have anything to add to his work.

I discussed the proposal with the rest of our estate planning group. The general consensus is that it could be a useful tool from time to time, but we see the primary usefulness coming in the pro-bono context. There have been times where attorneys are a little reluctant to provide pro-bono probate assistance because it is not always easy to disentangle if the matter goes beyond what is originally contemplated.

I hope that's a little helpful!

Katie

Kathleen Hogan Aguilar
Attorney at Law
Miller Johnson
45 Ottawa Ave. SW, Suite 1100, Grand Rapids MI 49503
D: 616.831.1763 | aguilark@millerjohnson.com | vcard

From: Kathryn Hennessey <khennessey@michbar.org>
Sent: Sunday, November 4, 2018 11:49 AM
To: Aguilar, Kathleen Hogan <aguilark@millerjohnson.com>
Subject: Re: Probate Limited Scope Representation Rule Amendment

No need to apologize at all - I completely understand! Yes, if you can give me feedback by the end of the week that would still be helpful. Thank you again for helping me with this project!!

Sent from my iPhone

On Nov 4, 2018, at 9:53 AM, Aguilar, Kathleen Hogan <aguilark@millerjohnson.com> wrote:

> Hi Kathryn:
>
> I am so sorry that I haven't gotten to looking at the proposal. If I can look at it this week and get thoughts to you by the end of the week, is that still helpful?
>
> Thanks,
> Katie
>
> **Kathleen Hogan Aguilar**
> Attorney at Law
> **Miller Johnson**
> 45 Ottawa Ave. SW, Suite 1100, Grand Rapids MI 49503
> D: 616.831.1763 | aguilark@millerjohnson.com | vcard
>
> ---
>
> **From:** Kathryn Hennessey <KHENNESSEY@michbar.org>
> **Sent:** Monday, October 22, 2018 4:41 PM
> **To:** Aguilar, Kathleen Hogan <aguilark@millerjohnson.com>
> **Subject:** SBM: Probate Limited Scope Representation Rule Amendment

From: "Barbara BakerOmerod" <bbo@attybbo.com>
To: "Kathryn Hennessey" <KHENNESSEY@michbar.org>
Date: 11/2/2018 1:09 PM
Subject: Re: SBM: Probate Limited Scope Representation Rule Amendment

HI Katie,

I like the idea of limited scope representation in Probate Court. I really don't have anything profound to say about it. Of course I believe that the best representation is accomplished with an ongoing professional relationship. Some people can't afford to pay an attorney to be involved for the duration of a Probate matter.

The risk of paying for non-attorney "legal" services is great. It can be more expensive than real attorney services and the information can be damaging to the case.

If a client just wants to hire an attorney to handle hearings or draft documents that could be accomplished with the limited scope representation. It will be nice to have court rules that get the court and everyone on the same page as to what is allowed.

I hope that is helpful.

Thanks,
Barbara

Attorney Barbara BakerOmerod
312 N. Water Street
Owosso, MI 48867
989-723-8222
989-723-8223 fax
bbo@attybbo.com

From: Kathryn Hennessey
Sent: Monday, October 22, 2018 4:37 PM
To: bbo@attybbo.com
Subject: SBM: Probate Limited Scope Representation Rule Amendment

Dear Ms. BakerOmerod:

I am public policy counsel for the State Bar of Michigan, and I was hoping you could lend us your probate expertise for a small project that we're working on.

As you may be aware, the Michigan Supreme Court recently enacted rules allowing limited scope representation (LSR) in civil proceedings, and we would like to extend LSR to proceedings and civil actions in probate courts. Chris Hastings, who worked on the original LSR rule proposal, spoke highly of you and suggested that I contact you.

LSR allows attorneys to provide discrete legal services to clients as a more affordable option than full representation. Based on a State Bar proposal, the Michigan Supreme Court adopted rule amendments, effective January 1, 2018, to provide attorneys with clearer direction on how to provide limited scope representation in civil and domestic relations proceedings. The order adopting the rule amendments is available here: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2016-41_2017-09-20_FormattedOrder_AmendtOfMRPC1.0-1.2-4.2-4.3-MCR2.107-2.117-6.001.pdf

Here is a short article providing an overview of the rules: https://www.michbar.org/news/newsdetail/nid/5507

I do not believe that these newly adopted rules would apply to probate proceedings because MCR 5.117 specifically deals with appearance of attorneys and duration of representation in probate proceedings.

Chris has drafted proposed amendments to MCR 5.117 to extend LSR to probate proceedings and actions, and I would love to get your feedback on this rule proposal. Attached please find a redline, along with the relevant LSR rules for civil actions. Also, if you have any thoughts on whether LSR would be helpful to have for probate, I'd like to hear that feedback as well.

If you can respond to me with your feedback by Friday, November 2, 2018, I'd really appreciate it. I'd like to present this rule amendment to the Probate Section at its November meeting.

Thank you in advance for sharing your expertise and time with us on this project. If you have any questions at all, please let me know.

Best,
Katie

From: "Strander, George" <GStrander@ingham.org>
To: "Kathryn Hennessey (KHENNESSEY@michbar.org)" <KHENNESSEY@michbar.org>
Date: 11/2/2018 1:27 PM
Subject: 5.117 idea

Katie, here's one approach.

Since limited appearances are referenced at (B)(1), I guess nothing needs to be added to (C)(1). Moving on to the rest of (C), I would remove the suggested added language at (3) and (4), and add a new (5) [renumbering the Substitution section as (6)]:

(5) Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3).

I hope this helps.

George

Public Policy Position
Proposed Amendments to MCR 5.117

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,280 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On November 17, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 15 members voted in favor of the Section's position on the proposed amendments of MCR 5.117, 0 members voted against this position, 0 members abstained, 7 members did not vote.

SUPPORT WITH AMENDMENTS

Explanation:
The Probate and Estate Planning Section supports amending the Michigan Court Rules to make clear that the limited scope representation rules apply to probate proceedings; amending MCR 5.117(B)(1) to provide: "In General. An attorney may appear generally by an act indicating that the attorney represents an interested person in the proceeding. A limited appearance may be made only BY AN ATTORNEY FOR AN INTERESTED PERSON IN A CIVIL ACTION OR A PROCEEDING as provided in MCR 2.117(B)(2)(c), EXCEPT THAT ANY REFERENCE TO PARTIES OF RECORD IN MCR 2.117(B)(2)(c) SHALL INSTEAD REFER TO INTERESTED PERSONS. An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person."; and amending MCR 5.117(C)(5) to provide: "Limited Scope Appearances. Notwithstanding other provisions in this section, limitED appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), EXCEPT THAT ANY REFERENCE TO PARTIES OF RECORD IN MCR 2.117(B)(2)(c) SHALL INSTEAD REFER TO INTERESTED PERSONS."

Contact Person: David Skidmore

Email: dskidmore@wnj.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
Kathryn Hennessey, Public Policy Counsel

Date: January 8, 2019

Re: Legal Services of Michigan List of Non-Fee-Generating Cases

---

Background

The Legal Services Association of Michigan (LSAM) is a support organization for legal services programs in Michigan, including all six Legal Services Corporation (LSC) funded programs. Pursuant to 45 CFR 1609, LSC grantees are prohibited from accepting cases that private attorneys regularly accept for a fee. To ensure that LSAM members are only accepting non-fee-generating cases, they can either (1) develop an understanding with the State Bar of Michigan (SBM) that certain categories of cases are non-fee-generating or (2) provide documentation in each file that a referral was attempted but unsuccessful. 45 CFR 1609.3. LSAM seeks to renew its understanding with SBM on an updated list of non-fee-generating cases. This understanding was last updated in 2010.

***Keller* Considerations**

According to LSAM, the understanding on a list of non-fee-generating cases will help LSAM "avoid file-by-file documentation and fruitless referrals to private attorneys in hundreds of cases each year." By SBM and LSAM entering into an understanding, members of LSAM will be able to run more efficiently, and thus increase the availability of legal services to society.

***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

The LSAM request that SBM update its understanding with LSAM on a list of non-fee-generating cases satisfies the *Keller* requirements and may be considered on its merits.

LEGAL SERVICES ASSOCIATION OF MICHIGAN

September 12, 2018

Juan Salazar
Co-chair
89 Ionia Ave., NW
Suite 400
Grand Rapids, MI 49503

Ann Routt
Co-chair
420 North 4th Avenue
Ann Arbor, MI 48104

Kenneth Penokie
Secretary/Treasurer

Lorray Brown
Valerie Newman
Co-Chairs
Justice Policy Initiative
State Bar of Michigan
306 Townsend St.
Lansing, MI 48909

Re: 45 CFR 1609

Dear Lorray and Valerie,

We're writing to you on behalf of the Legal Services Association of Michigan (LSAM).

As you know, several LSAM members are funded in part by the Legal Services Corporation ("LSC"). One of the LSC regulations, 45 CFR 1609, prohibits LSC grantees from accepting cases that private attorneys regularly accept for a fee. As you know, all LSC grantees have systems in place to assure that any cases that can be directly referred to private lawyers are referred.

Beginning in 1998, LSC adopted a regulation relating to possible fee generating cases. Under the LSC system, programs are required to either: (1) develop an understanding with the Bar that certain categories of cases are non-fee-generating; or (2) provide documentation in each file that a referral to a private attorney was attempted but was unsuccessful. The LSC policy is problematic under Michigan law, since Michigan provides for a nominal attorney fee (usually under $40) in almost every case, see MCL 600.2441. Thus, virtually every case in which an attorney appears for a Plaintiff or a Defendant in any Michigan court could be a "potentially fee generating case".

In 1998, LSAM developed an understanding with the State Bar that the following categories of cases were "non-fee-generating". We've updated these understandings from time to time—most recently in 2010. We're writing to again renew these understandings. LSAM reviewed and discussed possible revisions to the 2010 list at its July 2018 meeting.

(1) In general, civil cases where the only fee is a statutory attorney fee under $200 are not fee generating cases.

(2) Eviction and foreclosure prevention cases including summary proceedings actions, lock out actions, and Circuit Court suits to prevent foreclosure are not fee generating cases. These suits may be handled even if a damage claim or counterclaim may be filed on behalf of the legal

services client. Non-fee-generating real property and personal property cases also include Probate Court and quiet title actions where the primary goal of the litigation is to preserve a home or personal property (such as a mobile home or an automobile) for a low income client.

(3) Domestic violence cases and other family law cases (e.g., Personal Protection Order cases, child support enforcement or defense or custody cases, Indian Child Welfare Act cases) for low income individuals. These cases may be handled even if a money or property claim may be made.

(4) Cases seeking benefits through needs-based public benefits programs.

(5) Consumer cases where the primary object of the case is to prevent attachment or garnishment of an individual's income or bank account or cases that challenge a policy or practice affecting numerous low income consumers.

(6) The defense of tort or general civil litigation claims on behalf of low income persons—even when that defense might include a money counterclaim or a claim under a fee shifting statute.

(7) Wage claim cases or other affirmative damage suits where the amount of wages or damages claimed by each individual client is under $10,000.

We'd note that these categories of cases include cases in all Michigan Courts, in the federal courts in Michigan, and in tribal courts in Michigan. These general principals—cases for low income persons or families where there is no expectation of significant monetary damages—apply across all courts.

We're sure you understand that the purpose of this policy is to avoid file-by-file documentation and fruitless referrals to private lawyers in hundreds of cases each year. As you know, before a case is accepted for staff representation, it is screened for client and case eligibility. Any case that a program feels can be referred—through LRIS or through a pro bono or a low bono program—is referred.

We would appreciate it if you would, on behalf of the Bar, acknowledge your agreement that the case categories described above are cases that private attorneys do not normally accept. If you feel that should be reviewed by a different Bar committee, please refer us to the appropriate committee. If you have any questions or if you would like to meet to discuss this, please contact either of us.

Sincerely,

Juan Salazar
Chair

Ann Routt
Chair

Public Policy Position
LSAM Non-Fee Generating Case List

Support

Position Vote:
Voted For position: 10
Voted against position: 0
Abstained from vote: 2
Did not vote: 2

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Public Policy Position
LSAM Non-Fee Generating Case List

Support

Explanation:
The e-vote on the motion to support the Legal Services Association of Michigan (LSAM), proposing a list of non-fee generating cases, for purposes of their understanding with SBM, passed, 21-0 in favor of the motion.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Shelley A. Kester
Email: sak@wilsonkester.com

Public Policy Position
LSAM Non-Fee Generating Case List

Support with Recommended Amendments

Explanation
The LELS council agreed with the list generated by LSAM of non-fee generating cases. With respect to #7 - wage claim cases or other affirmative damage suits where the amount of wages or damages claimed by each individual client is under $10,000 - we agree that these are cases that private attorneys do not normally accept. However, if there are multiple plaintiffs each with a wage claim under $10,000 it is possible that the private bar would take on a multi-plaintiff case of this sort. So we would limit #7 to single-plaintiff cases.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

***Keller* Explanation**
The availability of legal services to society.

Contact Person: Jennifer Salvatore
Email: salvatore@spplawyers.com

Public Policy Position
LSAM Non-Fee Generating Case List

Support

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Madelyne Lawery
Email: neglawsection@comcast.net

Public Policy Position
LSAM Non-Fee Generating Case List

Support with Recommended Amendments

Explanation:
Support the State Bar in agreeing with LSAM to the list of Non-Fee Generating Cases provided the first sentence of paragraph (2) is amended to read as follows: "Eviction and foreclosure prevention cases including summary proceedings actions, lock out actions, and Circuit Court suits to prevent foreclosure for low- income clients are not fee generating cases."

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Nicholas P. Scavone, Jr.
Email: nscavone@bodmanlaw.com

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by April 1, 2019. Comments may be sent in writing to Samuel R. 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 .

==========

PROPOSED

The Committee proposes amending Paragraph (6) of M Crim JI 3.11, the Composite Instruction that explains the deliberative process to the jury. The amendment attempts to clarify the instruction, to reduce the court's housekeeping obligations to provide the names of different offenses that a jury may be considering, and to make it easier for judges to read. Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 3.11 Deliberations and Verdict

(1) When you go to the jury room, you will be provided with a written copy [copies] of the final jury instructions. [A copy of electronically recorded instructions will also be provided to you.] You should first choose a foreperson. The foreperson should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

(2) During your deliberations please turn off your cell phones or other communications equipment until we recess.

(3) A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.

(4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions

and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

(5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

[*Use the next paragraph when there are less serious included crimes:*]

(6) ~~In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [*name principal charge*] first. [~~ I have already given you instructions regarding a lesser offense. As to any count which includes a lesser offense, you must first consider the principal offense. If you all agree that the defendant is guilty of that crime, ~~you may stop your discussions and return your verdict~~ you need not consider the lesser offense.~~]~~ If you believe that the defendant is not guilty of ~~[*name principal charge*]~~ the principal offense or if you cannot agree ~~about~~ on that ~~crime~~ offense, you ~~should~~ may consider the ~~less serious crime of [*name less serious charge*]~~ lesser offense. ~~[You decide how long to spend on (*name principal charge*) before discussing (*name less serious charge*). You can go back to (*name principal charge*) after discussing (*name less serious charge*)~~ It is up to you to decide how long to consider the principal offense before discussing the lesser offense. You may go back to consider the principal offense again after discussing the lesser offense, if you want to.~~]~~

(7) If you have any questions about the jury instructions before you begin deliberations, or questions about the instructions that arise during deliberations, you may submit them in writing in a sealed envelope to the bailiff.

Use Note

~~This instruction should be given after the attorney's closing arguments regardless of whether the jury instructions are given before or after closing argument.~~

Paragraph (6) of this instruction is only used ~~the approved form~~ when the jury is instructed on less serious crimes. *See People v Handley*, 415 Mich 356, 329 NW2d 710 (1982). The remainder of the instruction should be given in every case.

Public Policy Position
M Crim JI 3.11

Support as Written

Position Vote:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Persons:
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by January 1, 2019. Comments may be sent in writing to Samuel R. 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 .

==========

PROPOSED

The Committee proposes amending M Crim JI 3.29, 3.30, and 3.31, the jury verdict forms used for multiple counts with and without insanity defenses and lesser offenses, because the current forms fail to provide a general "not guilty" option for each charged count. See *People v Wade*, 283 Mich App 462 (2009). Deletions are in strike-through, and new language is underlined.

M Crim JI 3.29 Verdict Form (Insanity Defense)

Defendant:

_____

POSSIBLE VERDICTS:

You may return only one verdict on ~~this~~ each charge. Mark ~~only~~ one verdict ~~on this sheet~~ for each count.

~~___ Not Guilty~~

~~___ Not Guilty by Reason of Insanity~~

Count 1

___ Not Guilty

___ Not Guilty by Reason of Insanity

___ Guilty but Mentally Ill of _____

___ Guilty of _____

Count 2

___ Not Guilty

___ Not Guilty by Reason of Insanity

___ Guilty but Mentally Ill of _____

___ Guilty of _____

M Crim JI 3.30 Verdict Form (Lesser Offenses)

Defendant: _____

POSSIBLE VERDICTS:

You may return only one verdict on ~~this~~ each charge. Mark ~~only~~ one ~~box on this sheet~~ verdict for each count.

~~___ Not Guilty~~

Count 1

___ Not Guilty

___ Guilty of _____

Count 2

___ Not Guilty

___ Guilty of _____

Guilty of the Lesser Offense of:

___ _____

___ _____

___ _____

___ _____

___ _____

M Crim JI 3.31 Verdict Form (Insanity Defense with Lesser Offenses)

Defendant: _____

POSSIBLE VERDICTS:

You may return only one verdict on ~~this~~ each charge. Mark ~~only~~ one verdict ~~on this sheet~~ for each count.

~~___ Not Guilty~~

~~___ Not Guilty by Reason of Insanity~~

Count 1

___ Not Guilty

___ Not Guilty by Reason of Insanity

___ Guilty but Mentally Ill of _____

___ Guilty of _____

Count 2

___ Not Guilty

___ Not Guilty by Reason of Insanity

___ Guilty but Mentally Ill of _____

___ Guilty of _____

___ Guilty but Mentally Ill of the Lesser Offense of _____

___ Guilty of the Lesser Offense of _____

Public Policy Position
Model Criminal Jury Instructions
3.29, 3.30, and 3.31

SUPPORT WITH AMENDMENT

Explanation:
The committee voted unanimously to support M Crim JI 3.29, 3.30, and 3.31 with an amendment to 3.30 including the section of "Guilty of the Lesser Offense of:" under "Count 1."

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

Contact Persons:
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

Public Policy Position
M Crim JI 3.29, 3.30, and 3.31

Support

Explanation:
Support to add 'Not Guilty' on the verdict form of cases where insanity defenses used. See People v Wade 283 Mich App 462 (2009).

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Person: Judge Hugh B. Clarke, Jr.
Email: hugh.clarke@lansingmi.gov

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by May 1, 2019. Comments may be sent in writing to Samuel R. 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 .

==========

PROPOSED

The Committee proposes a new instruction, M Crim JI 7.25, for use where a defendant interposes a self-defense claim to a felon-in-possession-of-a-firearm charge as permitted under *People v Dupree*, 486 Mich 693 (2010).

[NEW] M Crim JI 7.25 Self-Defense as Defense to Felon in Possession of a Firearm

(1) The defendant claims that [he / she] possessed the firearm in order to act in lawful [self-defense / defense of _____]. A person may possess a firearm to defend [himself / herself / another person] under certain circumstances, even where it would otherwise be unlawful for [him / her] to possess the firearm. If a person possesses a firearm to act in lawful [self-defense / defense of others], [his / her] actions are excused, and [he / she] is not guilty of being a felon in possession of a firearm.

(2) Just as when considering the claim of self-defense to the charge of [*identify principal assaultive charge to which the defendant is asserting self-defense*], you should consider all the evidence and use the following rules to decide whether the defendant possessed a firearm to act in lawful [self-defense / defense of _____]. You should judge the defendant's conduct according to how the circumstances appeared to [him / her] at the time [he / she] acted.

(3) First, when [he / she] acted, the defendant must have honestly and reasonably believed that [he / she] had to possess a firearm to protect [himself / herself] from the imminent unlawful use of force by another. If [his / her] belief was honest and reasonable, [he / she] could act to defend [himself / herself / _____] with a firearm, even if it turns out later that [he / she] was wrong about how much danger [he / she / _____] was in.

(4) Second, a person is only justified in possessing a firearm when necessary at the time to protect [himself / herself / _____] from danger of death or serious injury. The defendant may only possess a firearm if it is appropriate to the attack made and the circumstances as [he / she] saw them. When you decide whether the possession of the firearm was what seemed necessary, you should consider whether the defendant knew about any other ways of protecting [himself / herself], but you may also consider how the excitement of the moment affected the choice the defendant made.

(5) Third, at the time [he / she] possessed the firearm, the defendant must not have been engaged in a criminal act that would tend to provoke a person to try to defend [himself / herself] from the defendant.[1]

Use Note

1. This paragraph should be given only when supported by the facts; that is, where there is evidence that, at the time the defendant used deadly force, he or she was engaged in the commission of some crime likely to lead to the other person's assaultive behavior. For example, this paragraph is usually unwarranted if the defendant was engaged in a drug transaction and used force in self-defense against an unprovoked attack by the other party in the transaction. See *People v Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974). On, the other hand, this paragraph *would* apply to a defendant who engaged in a robbery of another person and that other person reacted with force. This paragraph is unnecessary if there are no issues other than who was the aggressor in the situation, whether defendant had an honest and reasonable belief of the use of imminent force by another, or whether the degree of force used was necessary.

Public Policy Position
M Crim JI 7.25

Support as Written

Position Vote:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Persons:
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by April 1, 2018. Comments may be sent in writing to Samuel R. 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 .

==========

PROPOSED

The Committee proposes amending M Crim JI 11.38 and 11.38a, the instructions for felon-in-possession-of-a-firearm charges to comport with the felony-firearm instruction, M Crim JI 11.34, by requiring that the possession of the firearm be "knowing," and to otherwise clarify the instructions. Deletions are in strike-through, and new language is underlined. (As the Use Notes to the instructions are lengthy and are irrelevant to the amendments, they are not published below and the superscript Use Note numbers in the instructions are not included.)

[AMENDED] M Crim JI 11.38 Felon Possessing Firearm: Nonspecified Felony

The defendant is charged with possession of [a firearm / ammunition] after having been convicted of a felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant knowingly [possessed / used / transported / sold / distributed / received / carried / shipped / purchased] [a firearm / ammunition] in this state.

(2) Second, at that time, the defendant ~~was~~ had been convicted of [*name felony*].

[*Use the following paragraph only if the defendant offers some evidence that more than three years has passed since completion of the sentence on the underlying offense*.]

(3) Third, that less than three years had passed since [all fines were paid / all imprisonment was served / all terms of (probation / parole) were successfully completed].

[AMENDED] M Crim JI 11.38a Felon Possessing Firearm: Specified Felony

The defendant is charged with possession of [a firearm / ammunition] after having been convicted of a specified felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant knowingly [possessed / used / sold / distributed / received/ carried / shipped / transported / purchased] [a firearm / ammunition] in this state.

(2) Second, at that time, the defendant ~~was~~ had been convicted of [*name specified felony*].

[*Use the following paragraphs only if the defendant offers some evidence that more than five years has passed since completion of the sentence on the underlying offense and that his or her firearm rights have been restored, MCL 28.424.*]

(3) Third, that less than five years had passed since [all fines were paid / all imprisonment was served / all terms of (probation / parole) were successfully completed].

(4) Fourth, that the defendant's right to [possess / use / transport / sell / receive] [a firearm / ammunition] has not been restored pursuant to Michigan law.

Public Policy Position
M Crim JI 11.38 and 11.38a

Support with Amendment

Explanation:
The committee voted unanimously (10) to support the proposed model criminal jury instructions with an amendment inserting "previously" after "had" in 11.38(2) and 11.38a(2) to allow for better clarity in the jury instruction.

Position Vote:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Persons:
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by January 1, 2019. Comments may be sent in writing to Samuel R. 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 a new instruction, M Crim JI 14.2a, where perjury is charged under MCL 750.423(2) – false declarations made under penalty of perjury (including in electronic media). The instruction is entirely new.

[NEW] M Crim JI 14.2a Perjury

(1) The defendant is charged with the crime of perjury. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant put [his / her] signature on a record.

> A record includes a written document, or something that is electronically stored or capable of being preserved in some other way. It must be capable of being retrieved or recovered in a form that can be seen, heard, or perceived in some way.
>
> A signature is any symbol that the defendant has adopted as [his / her] own, and includes electronic symbols, sounds or processes.

(3) Second, that the record included a provision that the statements or declarations made in the record were given under penalty of perjury.

(4) Third, that the record contained a false declaration or statement. The declaration or statement that is alleged to have been false in this case is that [*give details of alleged false statement*].

(5) Fourth, that the defendant knew that the declaration or statement was false when [he / she] made it.

Public Policy Position
Model Criminal Jury Instructions
14.2a

SUPPORT

Explanation:
The committee voted unanimously to support M Crim JI 14.1a as drafted.

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

Contact Persons:
Sofia V. Nelson snelson@sado.org
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Public Policy Position
M Crim JI 14.2a

Support

Position Vote:
Voted For position: 15
Voted against position: 2
Abstained from vote: 0
Did not vote: 7

Contact Person: Judge Hugh B. Clarke, Jr.
Email: hugh.clarke@lansingmi.gov

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by May 1, 2019. Comments may be sent in writing to Samuel R. 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 amending M Crim JI 15.18 and eliminating 15.19, the instructions for charges involving moving violations causing death or serious impairment of a body function under MCL 257.601d. The amendment follows the decision in *People v Czuprynski*, a published Court of Appeals opinion (No. 336883), finding M Crim JI 15.19 in error for failing to require proof that a moving violation was the cause of the serious impairment of a body function. The proposal combines the elements for both instructions in M Crim JI 15.18. Deletions are in strike-through, and new language is underlined.

[AMENDED] **M Crim JI 15.18** **Moving Violation Causing Death or Serious Impairment of a Body Function**
~~[Use for Acts Committed On or After October 31, 2010]~~

(1) [The defendant is charged with the crime / You may consider the lesser charge[1]] of ~~[*state charge*]~~ committing a moving traffic violation that caused [death / serious impairment of a body function] ~~of another person~~. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant operated a motor vehicle. To operate means to drive or have actual physical control of the vehicle.

(3) Second, that the defendant operated the vehicle on a highway or other place open to the public or generally accessible to motor vehicles [including any designated parking area].

(4) Third, that, while operating the motor vehicle, the defendant committed ~~the following~~ a moving violation by: [*describe the moving violation*].

(5) Fourth, ~~The moving violation of [*describe the moving violation*] was a cause of the death of [*name deceased*]. To "cause" the victim's death, the defendant's operation of the vehicle must have been a factual cause of the death, that is, but for the defendant's operation of the vehicle, the death would not have occurred. In addition, operation of the vehicle must have been a proximate cause of death, that is, death or serious injury must have been a direct and natural result of operating the vehicle.~~ that by committing the moving violation, the defendant caused [the death of (*name deceased*) / (*name injured person*) to suffer a serious impairment of a body function[2]]. To cause [the death of (*name deceased*) / such injury to (*name injured person*), the defendant's moving violation must have been a factual cause of the [death / injury], that is, but for committing the moving violation the [death / injury] would not have occurred. In addition, the [death / injury] must have been a direct and natural result of committing the moving.

Use Note

1. Use when instructing on this crime as a lesser offense.

2. MCL 257.58c, provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

   (a) Loss of a limb or loss of use of a limb.

   (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.

   (c) Loss of an eye or ear or loss of use of an eye or ear.

   (d) Loss or substantial impairment of a bodily function.

   (e) Serious visible disfigurement.

   (f) A comatose state that lasts for more than 3 days.

   (g) Measurable brain or mental impairment.

   (h) A skull fracture or other serious bone fracture.

   (i) Subdural hemorrhage or subdural hematoma.

   (j) Loss of an organ.

Public Policy Position
M Crim JI 15.18

Support as Written

Position Vote:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Persons:
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by February 1, 2018. Comments may be sent in writing to Samuel R. 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 amending M Crim JI 20.38c, the instruction for possessing or accessing child sexually abusive activity, to clarify that it applies when the defendant possesses or accesses child sexually abusive material for viewing it himself or herself. Deletions are in strike-through, and new language is underlined.

M Crim JI 20.38c Child Sexually Abusive Activity – Possessing or Accessing

(1) The defendant is charged with the crime of possessing or accessing child sexually abusive material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [possessed child sexually abusive material / intentionally looked for child sexually abusive material ~~and intentionally caused~~ to view it, or to cause it to be sent to or seen by another person].

(3) Child sexually abusive materials are pictures, movies, or illustrations[1] of [a person under 18 years of age / the representation of a person under 18 years of age] engaged in one or more of the following sexual acts:

[*Choose any of the following that apply*:][2]

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, [and / or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not

include other types of touching, even if affectionate, [and / or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and / or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and / or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and / or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and / or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

[*Choose either (4) or (5), depending on whether the depiction is an actual person or is a created representation of a person under the age of 18:*]

(4) Second, that the defendant knew or should reasonably have known[3] that the person shown in the sexually abusive material was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.

(5) Second, that the defendant possessed or accessed a portrayal of a person appearing to be under the age of 18, knowing that the person portrayed appeared to be under the age of 18, and all of the following conditions apply:

(a) An average person, applying current community standards, would find that the material appealed to an unhealthy or shameful interest in nudity, sex, or excretion.[4]

(b) A reasonable person would not find any serious literary, artistic, political, or scientific value in the material.

(c) The material shows or describes sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity, as previously described for you.

(6) Third, that the defendant [knew that (he / she) possessed / knowingly looked for] the material.

Public Policy Position
Model Criminal Jury Instructions
20.38c

SUPPORT

Explanation:
The committee voted unanimously to support M Crim JI 20.38c with the following amendment:

> (2) First, that the defendant [possessed child sexually abusive material / intentionally **sought and viewed** ~~looked for~~ child sexually abusive material ~~and intentionally caused~~ ~~**to view it, or**~~ to cause it to be sent to or seen by another person].

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

Contact Persons:
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Michael A. Tesner mtesner@co.genesee.mi.us

Public Policy Position
M Crim JI 20.38c

Oppose

Explanation:
The Criminal Law Section had several concerns with regards to the jury instruction:

1) In section (2), the movement of the word "intentionally" could allow conviction of possession when someone looked for child sexual abusive material without success;
2) Also in section (2), it is unclear if the element intentionality applies to the second clause "or to cause it to be sent..."
3) The vagueness of the instruction may lead a jury to believe that merely googling "child porn" violates the statute.

Note:
SBM staff contacted the Joshua Blanchard, chair of the Criminal Law Section, and Sofia Nelson, Council-Member who made the motion to oppose the criminal jury instruction, for further details and background on the Section's opposition. Ms. Nelson, who also serves as the co-chair of the Criminal Jurisprudence & Practice (CJAP) Committee, noted that the amended language presented by the CJAP committee in its position addresses the concerns enumerated above by the Criminal Law Section.

Position Vote:
Voted For position: 14
Voted against position: 3
Abstained from vote: 0
Did not vote: 7

Contact Person: Judge Hugh B. Clarke, Jr.
Email: hugh.clarke@lansingmi.gov

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by January 1, 2019. Comments may be sent in writing to Samuel R. 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 amending M Crim JI 27.1, the jury instruction for embezzlement charged under MCL 750.174, and M Crim JI 27.5, the jury instruction for embezzlement charged under MCL 750.177 or 750.178 to accommodate statutory changes and clarify the instructions. Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 27.1 Embezzlement by Agent or Servant

(1) The defendant is charged with the crime of embezzlement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the [money / property] ~~belongs~~ belonged to [*name principal*].[1]

(3) Second, that the defendant had a relationship of trust with [*name principal*] because the defendant was [*define relationship*].[2]

(4) Third, that the defendant obtained possession or control of the [money / property] because of this relationship.

(5) Fourth, that the defendant

[*Choose (a), (b), or (c):*]

(a) dishonestly disposed of the [money / property].

(b) converted the [money / property] to [his / her] own use.

(c) took or hid the [money / property] with the intent to convert it to [his / her] own use without the consent of [*name principal*].

(6) Fifth, that at the time the defendant did this, [he / she] intended to defraud or cheat [*name principal*] of some property.[3]

(7) Sixth, that the fair market value of the property or amount of money embezzled was:[4]

[*Choose only one of the following unless instructing on lesser offenses:*]

(a) $100,000 or more.

(b) $50,000 or more but less than $100,000.

(c) $20,000 or more, but less than $50,000.

(d) $1,000 or more, but less than $20,000.

(e) $200 or more, but less than $1,000.

(f) some amount less than $200.

[*Use the following paragraph only if applicable:*]

(8) [You may add together the fair market value of property or money embezzled in separate incidents if part of a scheme or course of conduct (within ~~a~~ any 12-month period)[5] when deciding whether the prosecutor has proved the value of the property or amount of money embezzled ~~the amount required~~ beyond a reasonable doubt.]

Use Note

1. The principal must be someone other than the defendant.

2. The statute lists agent, servant, employee, trustee, bailee, or custodian. See the table of contents to chapter 22 for a list of definitions that may be used.

3. This is a specific intent crime. The defendant's intent to return or replace the money at a later time does not provide a defense. *People v Butts*, 128 Mich 208, 87 NW 224 (1901).

4. The Fair Market Value Test, M Crim JI 22.1, should be given when applicable.

5. The 12-month time limit does not apply if the embezzlement scheme or course of conduct was directed against only one person or one legal entity. In those cases, with one victim, do not include the parenthetical phrase referring to the 12-month period.

[AMENDED] M Crim JI 27.5 Embezzlement of Mortgaged Property

(1) The defendant is charged with the crime of dishonestly [embezzling / removing / hiding / transferring] mortgaged property. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the property in question here, [*identify property*], had a [*identify encumbrance*] on it.

(3) Second, that [the defendant / someone else] held this property.

(4) Third, that the defendant [embezzled / removed / hid / transferred] the property.[1]

(5) Fourth, that when the defendant did this [he / she] knew that the property had a [*identify encumbrance*] on it.

(6) Fifth, that when the defendant did this, [he / she] intended to defraud or cheat [*name complainant*].[2]

~~[*Use (7) for felonies:*]~~

~~(7) Sixth, that the fair market value of the property involved is over $100.[3]~~

~~[*Use (8) for misdemeanors:*]~~

~~(8) Sixth, that the property involved is worth something.~~

(7) Sixth, that the fair market value of the property embezzled was:[3]

[*Choose only one of the following unless instructing on lesser offenses:*]

(a) $20,000 or more.

(b) $1,000 or more, but less than $20,000.

(c) $200 or more, but less than $1,000.

(d) some amount less than $200.

Use Note

1. Define terms used. See the table of contents to chapter 22 for a list of definitions.

2. This is a specific intent crime.

3. The Fair Market Value Test, M Crim JI 22.1, should be given when applicable.

Public Policy Position
Model Criminal Jury Instructions
27.1 and 27.5

SUPPORT

Explanation:
The committee voted unanimously to support M Crim JI 27.1 and 27.5 as drafted.

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

Contact Persons:
Sofia V. Nelson snelson@sado.org
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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by February 1, 2019. Comments may be sent in writing to Samuel R. 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 new instructions for crimes charged under MCL 750.49, pertaining to using animals for fighting or targets (or providing facilities for doing so or breeding such animals, etc.): M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g. These instructions are entirely new.

[NEW] M Crim JI 33.1 Possession or Sale of Animal for Fighting, Baiting, or Shooting

(1) The defendant is charged with a crime involving possession or sale of an animal for [fighting / baiting / shooting]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [owned / possessed / used / bought / sold / offered to buy or sell/imported/exported] [a / an] [*identify kind of animal*].

(3) Second, that the [*identify kind of animal*] was to be used [for the purpose of fighting / for the purpose of baiting / as a target to be shot at as a test of skill in marksmanship].

(4) Third, that the defendant knew that the [*identify kind of animal*] was to be used [for the purpose of fighting / for the purpose of baiting / as a target to be shot at as a test of skill in marksmanship].

Use Note

If the defendant raises an issue concerning "possession," the jury may be instructed in accord with M Crim JI 12.7 and 11.34b.

[NEW] M Crim JI 33.1a Use of an Animal for Fighting, Baiting, or Shooting

(1) The defendant is charged with a crime involving the use of an animal for fighting, baiting, or shooting. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select (2), (3), (4) or (5) according to what has been charged:*]

(2) First, that the defendant knowingly [was a party to / caused] the use of [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(3) First, that the defendant [rented / obtained the use of] [a building / a shed / a room / a yard / grounds / premises] for the purpose of using [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(4) First, that the defendant permitted the use of [a building / a shed / a room / a yard / grounds / premises] that belonged to [him / her] or that was under [his / her] control for the purpose of using [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(5) First, that the defendant [organized / promoted / collected money for] the use of [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(6) Second, that the defendant knew that the [*identify kind of animal*] was to be used [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

[NEW] M Crim JI 33.1b Exhibitions of Animal Fighting, Baiting, or Shooting

(1) The defendant is charged with a crime involving the exhibition of an animal for fighting, baiting, or shooting. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select (2) or (3) according to what has been charged:*]

(2) First, that the defendant was present at [a building / a shed / a room / a yard / grounds / premises] where preparations were being made for an exhibition of [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(3) First, that the defendant was present at an exhibition of [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(4) Second, that the defendant knew that an exhibition of [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship] [was about to take place / was taking place].

[NEW] M Crim JI 33.1c Breeding, Buying, or Selling Animal Trained for Fighting, Baiting, or Shooting

(1) The defendant is charged with a crime involving the breeding, buying or selling of an animal for [fighting / baiting / shooting]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [bred / bought / sold / offered to buy or sell / exchanged / imported / exported] [(a / an) (*identify kind of animal*) / the offspring of (a / an) (*identify kind of animal*)] trained or used [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

(3) Second, that the defendant knew the [*identify kind of animal*] had been trained or used [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

[NEW] **M Crim JI 33.1d** **Possessing or Buying Equipment for Animal Fighting, Baiting, or Shooting**

(1) The defendant is charged with a crime involving the possession or sale of equipment used for animal [fighting / baiting / shooting]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [owned / possessed / used / bought / sold / offered to buy or sell / transported / delivered] any device or equipment intended to be used for [(*identify kind of animal*) fighting / baiting (a / an) (*identify kind of animal*) / targeting [a / an] (*identify kind of animal*) to be shot at as a test of skill in marksmanship].

(3) Second, that the defendant knew the device or equipment was intended to be used for [(*identify kind of animal*) fighting / baiting (a / an) (*identify kind of animal*) / targeting [a / an] (*identify kind of animal*) to be shot at as a test of skill in marksmanship].

[NEW] M Crim JI 33.1e Inciting Animal Used in Fighting to Attack a Person

(1) The defendant is charged with a crime involving inciting an animal trained or used for fighting to attack a person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [a / an] [*identify kind of animal*] was [trained or used for fighting / was the first or second generation offspring of an animal trained or used for fighting].

(3) Second, that the defendant knew that the [*identify kind of animal*] was [trained or used for fighting / the first or second generation offspring of an animal trained or used for fighting].

(4) Third, that the defendant incited the [*identify kind of animal*] to attack a person.

(5) Fourth, that the defendant intended to incite the animal to attack a person.

[*Use (6) when the attack is alleged to have caused death*.]

(6) Fifth, that the animal caused the death of that person.

[NEW] M Crim JI 331.f Owning Animal Trained for Fighting – Attacking a Person

(1) The defendant is charged with a crime involving ownership of an animal trained or used for fighting that attacked another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant owned [a / an] [*identify kind of animal*] that was [trained or used for fighting / the first or second generation offspring of a dog trained or used for fighting].

(3) Second, that the defendant knew the [*identify kind of animal*] was [trained or used for fighting / the first or second generation offspring of a dog trained or used for fighting].

(4) Third, that the [*identify kind of animal*] attacked another person without provocation.

[*Use (5) when the attack is alleged to have caused death.*]

(5) Fourth, that the [*identify kind of animal*] caused the death of that person.

Use Note

The section of the statute addressed by this instruction, MCL 750.49(13), provides only that first or second generation dogs are included, and not other fighting animals.

[NEW] M Crim JI 33.1g Owning Animal Trained for Fighting - Unrestrained

(1) The defendant is charged with a crime involving ownership of an animal trained or used for fighting that was not securely restrained. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant owned [a / an] [*identify kind of animal*] that was [trained or used for fighting / the first or second generation offspring of (a / an) (*identify kind of animal*) trained or used for fighting]

(3) Second, that the defendant knew the [*identify kind of animal*] that was [trained or used for fighting / the first or second generation offspring of (a / an) (*identify kind of animal*) trained or used for fighting].

(4) Third, that the [*identify kind of animal*] [went beyond the property limits of its owner without being securely restrained / was not securely enclosed or restrained on the owner's property].

Public Policy Position
Model Criminal Jury Instructions
33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g

SUPPORT

Explanation:
The committee voted unanimously to support M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g as drafted.

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

Contact Persons:
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