Public Policy Materials for the
January 2021 Meeting of the Board

Public Policy Committee………………………………Dana M. Warnez, Chairperson

A. Reports

1. Approval of November 19, 2020 minutes
2. Public Policy Report

B. Court Rules

1. ADM File No. 2020-25: Proposed Addition of Administrative Order No. 2020-X

The proposed administrative order would replace the current administrative order regarding distribution of funds from the Lawyer Trust Account Program that was adopted more than 20 years ago. The distribution would remain largely the same as it is now: 70 percent to support delivery of civil legal services to the poor, 15 percent to promote improvements in the administration of justice, 10 percent to support increased access to justice (including racial, gender, and ethnic equality), and 5 percent for support of the activities of the Michigan Supreme Court Historical Society. What would be different is that in paragraph three, funds would be used to support increased access to justice generally with specific reference to racial, gender, and ethnic equality, instead of reference to the long-defunct task forces on Gender Issues in the Courts and Racial/Ethnic Issues in the Court. Those issues will continue to be a focus of the money to be spent, but will be able to include additional recommendations. Further, the money could be spent as directed by the State Court Administrator, instead of being spent "within the judiciary," which unnecessarily restricts the ability to fund programs that exist outside the judiciary but fit within the funding parameters. Finally, the proposed AO would establish a cap on funding for the Michigan State Historical Society to reflect what are likely largely fixed costs for operational expenses; the remainder would be split among the remaining recipients.

Status: 02/01/2021 Comment Period Expires.
Referrals: 10/19/2020 Access to Justice Policy Committee; Diversity & Inclusion Advisory Committee; Justice Initiatives.
Comments: Access to Justice Policy Committee.
Comment provided to the Supreme Court included in materials.
Liaison: Thomas G. Sinas

2. ADM File No. 2020-26: Proposed Amendments of MCR 1.109 and 8.119

The proposed amendments of MCR 1.109 and 8.119 would allow SCAO flexibility in protecting an individual's personal identifying information and clarify when a court is and is not required to redact protected personal identifying information.

Status: 02/01/2021 Comment Period Expires.
Referrals: 10/29/2020 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Children's Law Section; Consumer Law Section; Criminal Law Section; Elder Law & Disability Rights Section; Family Law Section; Healthcare Law Section; Immigration Law Section; Labor & Employment Law Section; Litigation Section; Probate & Estate Planning Section; Taxation Section.
Comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Probate & Estate Planning Section.
Comment provided to the Supreme Court included in materials.
Liaison: Lori A. Buiteweg

3. ADM File No. 2020-20: Proposed Amendment of MCR 2.105

The proposed amendment of MCR 2.105 would establish the manner of service on limited liability companies.

Status: 03/01/2021 Comment Period Expires.

Referrals: 12/01/2020 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Business Law Section; Litigation Section; Real Property Law Section.

Comments: No comments have been received at this time.

Liaison: Mark A. Wisniewski

4. ADM File No. 2020-19: Proposed Amendment of MCR 2.302

The proposed amendment of MCR 2.302 would require transcripts of audio and video recordings intended to be introduced as an exhibit at trial to be transcribed.

Status: 03/01/2021 Comment Period Expires.

Referrals: 12/01/2020 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section; Litigation Section; Negligence Law Section.

Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section.

Liaison: Takura N. Nyamfukudza

5. ADM File No. 2020-17: Proposed Addition of MCR 3.906

The proposed addition of MCR 3.906 would establish a procedure regarding the use of restraints on a juvenile in court proceedings.

Status: 03/01/2021 Comment Period Expires.

Referrals: 11/06/2020 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section; Elder & Disability Rights Section; Family Law Section.

Comments: Criminal Jurisprudence & Practice Committee.
Comments provided to the Court included in materials.

Liaison: Kim Warren Eddie

6. ADM File No. 2020-07: Alternative Proposed Amendments of MCR 6.502

The proposed alternative amendments of MCR 6.502 would address the issue of a court's recharacterization of a defendant's motion for relief from judgment that is styled as something other than a motion for relief from judgment. Under Alternative A, the court would be required to notify the defendant of its intent to recharacterize the motion and allow the defendant an opportunity to withdraw or amend the motion. Under Alternative B, the court would be required to return the motion to the defendant with a statement of the reason for return.

Status: 02/01/2021 Comment Period Expires.

Referrals: 10/29/2020 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Comment provided to the Court included in materials.

Liaison: Valerie R. Newman

Agenda
Public Policy Committee
November 19, 2020 – 3:30 p.m. to 5:00 p.m.

Committee Members: Dana M. Warnez, Lori A. Buiteweg, Kim Warren Eddie, E. Thomas McCarthy, Jr., Valerie R. Newman, Takura N. Nyamfukudza, Nicholas M. Ohanesian, Brian Shekell, Thomas G. Sinas, Judge Cynthia D. Stephens, and Mark A. Wisniewski (11)
SBM Staff: Janet Welch, Peter Cunningham, Elizabeth Goebel, Carrie Sharlow

A. Reports

1. Approval of September 16, 2020 minutes
The minutes were approved with five abstentions.

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

B. Court Rule Amendments

1. ADM File No. 2019-48: Proposed Amendment of MCR 1.109

The proposed amendment of MCR 1.109 would require a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109 as part of the e-Filing rule changes.
The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
The committee voted unanimously (11) to support the proposed amendment with the amendment proposed by the Civil Procedure & Courts Committee to simplify the rule amendment by returning it to the former language of MCR 2.114 (C)(1).

> Requirement. ~~Every document filed shall be signed by the person filing it or by at least one attorney of record.~~ **Every document of a party represented by an attorney shall be signed by at least one attorney of record.** A party who is not represented by an attorney must sign the document. In probate proceedings the following also applies . . .

2. ADM File No. 2019-35: Proposed Amendment of MCR 6.502

The proposed amendment of MCR 6.502 would eliminate the requirement to return successive motions to the filer and would eliminate the prohibition on appeal of a decision made on a motion for relief from judgment. Further, it would require all such motions to be submitted to the assigned judge, and require a trial court to issue an order when it rejects or denies relief.
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section.
The committee voted unanimously (11) to adopt the position of the Appellate Practice Section as presented below:

(1) Remove redundancies in MCR 6.502(G)(1) as follows: [deletions shown in strikethrough].

> **Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, ~~one and~~ only one motion for relief from judgment may be filed with regard to a conviction. . . .**

(2) Amend MCR 6.502(G)(2) to clarify that a retroactive change in law or discovery of new evidence provides grounds to file a second or subsequent motion for relief from judgment so long as the retroactive change in law or discovery of new evidence occurred after the first motion for relief from

judgment was filed, as opposed to when the motion was actually decided. The amended language would read as follows: [additions shown in underline].

> **A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment was filed or a claim of new evidence that was not discovered before the first such motion.**

3. ADM File No. 2020-16: Proposed Amendment of MCR 9.261

The proposed amendment of MCR 9.261 would allow the JTC to share information with two separate divisions of the State Bar of Michigan: the Judicial Qualifications Committee and the Lawyers & Judges Assistance Program.

The following entities offered recommendations: Judicial Ethics Committee; Judicial Qualifications Committee; Lawyers & Judges Assistance Committee.

The committee voted unanimously (11) to support the proposed amendment to MCR 9.261.

4. ADM File No. 2019-06: Amendment of MCR 6.302

The amendment of MCR 6.302 makes the rule consistent with the Supreme Court's ruling in *People v Warren*, 505 Mich 196 (2020), and requires a judge to advise a defendant of the maximum possible prison sentence including the possibility of consecutive sentencing.

The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee voted unanimously (10) to support the proposed amendment to MCR 6.302 with further amendments to MCR 6.302 (B)(2). Because a judge may not have perfect information at the time of sentencing, the suggested amendment clarifies that a judge's representations about the length and type of a sentence shall be based only upon the information available to the judge at the time of sentencing. The amended language would read as follows: [additions shown in **bolded underline**].

MCR 6.302(B)(2)

> …the maximum possible prison sentence for the offense, including, if applicable **and based upon the matters pending before that judicial officer**, whether the law permits or requires consecutive sentences**, making clear to the defendant that the representation only relates to cases pending before that judicial officer,** and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

The committee also recommends to the Court that SCAO bench books and cards be updated to reflect amended MCR 6.302.

C. Model Criminal Jury Instructions

1. M Crim JI 5.15

The Committee proposes adding a new instruction, M Crim JI 5.15, to address the use of a foreign language interpreter during court proceedings before a jury.

The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee voted to support the proposed criminal jury instructions with the further amendments as set forth below: [additions show in underline; deletions shown in strikethrough].

(1) Amendment to paragraph one (1):

> **This court seeks a fair trial for everyone, regardless of the language they speak or how well it is spoken including those who communicate through sign language.**

(2) Amendment to paragraph four (4):

> **Bias against or for persons who have little or no proficiency in English is not allowed. Do not allow the fact that the court is using an interpreter to help [the defendant / a witness] to influence how you decide the facts or the case in any way. Likewise, do not allow the fact that the testimony is given in a language other than English influence you in any way.**

(3) Amendment to last sentence of paragraph five (5):

> **If, however, after such efforts a discrepancy remains in your mind, ~~I emphasize that~~ you ~~must~~ should rely only upon the ~~official~~ English translation ~~as provided by the official court interpreter and disregard any other contrary interpretation~~. However, it is up to you as the triers of fact to resolve the discrepancy as you would any other question of fact.**

The committee recommends that the following explanations be provided to the Committee on Model Jury Instructions:

- **The current instructions risk giving too much authority to a translation, and as such, could invade the province of the jury to act and think independently.**
- **If the Committee on Model Jury Instructions is able to better communicate the concerns set forth in the suggested amendments, the committee would not be opposed to such efforts.**

2. M Crim JI 17.2a

The Committee proposes amending the Domestic Assault instruction, M Crim JI 17.2a, to add the offense of Aggravated Domestic Assault for which there was no instruction previously.
The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.
The committee adopted the Consent Agenda as proposed.

3. M Crim JI 33.1a

The Committee proposes amending the Animal Fighting instruction, M Crim JI 33.1a, by adding language to comport with an amendment to the applicable statute, MCL 750.49(2)(e).
The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.
The committee adopted the Consent Agenda as proposed.

4. M Crim JI 40.1, 40.2, and 40.3

The Committee proposes new instructions, M Crim JI 40.1, 40.2 and 40.3, for disturbing-the-peace person offenses found in MCL 750.170 (disturbance of lawful meetings), MCL 750.169 (disturbing religious meetings), and MCL 750.167d (disturbing funerals), respectively.
The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.
The committee adopted the Consent Agenda as proposed.

5. M Crim JI 39.7 and 39.7a

The Committee proposes new instructions, M Crim JI 39.7 and 39.7a, for the crimes found in MCL 750.411a(2) of falsely reporting an offense involving explosives and of falsely reporting an offense involving of harmful substances or poisons, respectively.
The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.
The committee adopted the Consent Agenda as proposed.

6. M Crim JI 39.8 and 39.8a

The Committee proposes new instructions, M Crim JI 39.8 and 39.8a, for the crimes found in MCL 750.411a(2)(b): threatening to commit an offense involving explosives (M Crim JI 39.8), or threatening to commit an offense involving of harmful substances or poisons (M Crim JI 39.8a).
The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.
The committee adopted the Consent Agenda as proposed.

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

December 15, 2020

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

RE: ADM File No. 2019-48 – Proposed Amendment of Rule 1.109 of the Michigan Court Rules

Dear Clerk Royster:

At its November 20, 2020 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2019-48. The Board considered recommendations from Access to Justice Policy, the Civil Procedure & Courts, and the Criminal Jurisprudence & Practice committees.

After its review, the Board voted unanimously to support the proposed rule changes with an amendment to clarify and simplify the rule by deleting the first sentence of Rule 1.109(E)(2) so that it mirrors the language that formerly appeared in Rule 2.114(C)(1), as follows:

> Requirement. ~~Every document filed shall be signed by the person filing it or by at least one attorney of record.~~ **Every document of a party represented by an attorney shall be signed by at least one attorney of record.** A party who is not represented by an attorney must sign the document. In probate proceedings the following also applies . . .

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

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December 15, 2020

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

RE: ADM File No. 2019-35 – Proposed Amendment of Rule 6.502 of the Michigan Court Rules

Dear Clerk Royster:

At its November 20, 2020 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2019-35. In its review, the Board considered recommendations from the Access to Justice Policy and Criminal Jurisprudence & Practice committees, and the Appellate Practice Section. The Board voted unanimously to support the rule change with two amendments.

To simplify the rule and remove redundancies, the Board recommends that Rule 6.502(G)(1) be modified as follows:

> Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, ~~one and~~ only one motion for relief from judgment may be filed with regard to a conviction. . . .

The Board also recommends amending Rule 6.502(G)(2) to clarify that the retroactive change in law must occur after the motion for relief from judgment was filed – as opposed to some other date related to the motion, such as it being decided. The Board's recommended amendment is as follows:

> A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment <u>was filed</u> or a claim of new evidence that was not discovered before the first such motion.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

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December 15, 2020

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

RE: ADM File No. 2020-16 – Proposed Amendment of Rule 9.261 of the Michigan Court Rules

Dear Clerk Royster:

At its November 20, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (SBM) considered ADM File No. 2020-16. In its review, the Board considered recommendations from the Judicial Qualifications, Lawyers & Judges Assistance Program, and Judicial Ethics committees, all of which supported the proposal. The Board voted unanimously to support the amendment.

The amendment would allow the Judicial Tenure Commission to share pertinent information about sitting judges with the SBM's Judicial Qualifications Committee in order to: (1) ensure the committee has all relevant information at its disposal when evaluating judicial candidates and (2) provide the committee with a way to verify judicial candidates' self-reported disclosures. In addition, the amendment would allow the Judicial Tenure Commission to share pertinent information about sitting judges with SBM's Lawyers & Judges Assistance Program (LJAP) Committee to help connect judges suffering from substance abuse or mental health challenges with appropriate LJAP resources.

To assist the Court with its consideration of this rule proposal, enclosed please find the recommendations provided to the Board by the Judicial Ethics, the Judicial Qualifications, and the Lawyers & Judges Assistance Program committees.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

Public Policy Position
ADM File No. 2020-16

Support

Explanation

The proposal identified in Administrative File No. 2020-16 would allow the Judicial Tenure Commission to disclose to the State Bar of Michigan similar to the currently authorized practice of the Attorney Grievance Commission being able to disclose to the State Bar of Michigan pursuant to MCR 9.126(E)(2)(a) and (b).

There are several reasons this information is so imperative for the State Bar of Michigan to obtain during many of their processes when working with the bar population. For instance, when the State Bar Judicial Qualifications Committee requests information from the Judicial Tenure Commission for a sitting judge who is under consideration for appointment to another position within the judiciary, the State Bar is unable to access the information. Currently, the Judicial Tenure Commission has no mechanism to provide this information to the State Bar of Michigan. Further, this position has caused frustration on behalf of the State Bar as well as by the Judicial Tenure Commission as no policy reason has been articulated to explain the need or reasoning for such confidentiality when determining the qualifications of a judicial appointment especially when considering that the confidential information through the Attorney Grievance Commission is accessible to the State Bar Judicial Qualifications Committee when considering attorneys being appointed to a judge seat. This information would also allow the Bar committee to verify the information provided by the judicial applicant. The application for judicial appointment specifically asks the applicant for complaints filed with the Judicial Tenure Commission and any disciplinary action by the Judicial Tenure Commission. The Bar Committee is reliant on the applicant to be truthful without any way to verify the information provided.

This issue continues with requests from the Lawyers and Judges Assistance Program who assist the legal community in a variety of ways, including but not limited to, alcohol and substance use disorders. Information from the Judicial Tenure Commission would further assist the Lawyers and Judges Assistance Program to provide the appropriate services to the member they are assisting when knowing additional facts that brought them to their attention.

Additional reasoning for these disclosures is if there is information the State Bar Judicial Qualifications Committee needs to be aware of when considering an appointment for elevation of a sitting judge, it serves the public's interest to have knowledge that the Bar committee has access to all relevant information and be able to evaluate all information received regarding the sitting judge to perform a proper audit of the individual and the appropriateness of the elevation.

The Bar Committee further receives confidential information from a variety of sources when evaluating a judicial elevation and has shown itself capable of maintaining that information confidential. Further, the Lawyers and Judges Assistance Program continually receives and protects confidential information through the course of its service.

As stated before, the Attorney Grievance Commission is able to share confidential information with the State Bar. It should also be noted that the Judicial Tenure Commission is also able to share its confidential information with the State Court Administrative Office, the Attorney Grievance Commission, and law enforcement, in limited circumstances pursuant to MCR 9.261. The proposed disclosures as stated in Administrative File No. 2020-16 are consistent with existing exceptions.

Position Vote:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 1

Contact Person:
Email: d70-6@saginawcounty.com

Public Policy Position
ADM File No. 2020-16

Support

Explanation
The committee provided detailed comments in the attached letter.

Position Vote:
Voted for position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 0

Contact Person: Kathleen Bogas
Email: kbogas@kbogaslaw.com

Kathleen L. Bogas
Brian E. Koncius
Helene L. Fleisher
Lisa M. Panourgias
Of Counsel

October 26, 2020

Board of Commissioners
State Bar of Michigan
Michael Franck Building
306 Townsend
Lansing, MI 48933-2012

Dear Members of the Board of Commissioners:

The Judicial Qualifications Committee is currently made up of twenty members of the State Bar of Michigan. Our jurisdiction is, as requested by the Governor, to evaluate candidates for possible appointment to judicial vacancies and report in confidence to the Governor. This Committee is a hard-working committee and all members take the responsibilities entrusted to them very seriously.

Over the years, the Committee has been unable to access any records or information from the Judicial Tenure Commission regarding sitting and former judges seeking appointment from the Governor. We are able to obtain information from the Attorney Grievance Commission regarding lawyers but have been hamstrung in obtaining any information regarding private discipline of judges. This has led to concern and unease among Committee members in that we have not believed that we had the best information available to rate the applicants and fulfill our duty to the Governor.

When we most recently revised the Judicial Application we placed questions attempting to elicit from applying judges what their experience has been with the JTC. Now we can only rely on what information the applicant indicates on the Application. While we expect everyone to be trustworthy and truthful, sadly, that is not always the case. It is important to our role in evaluating applicants to know what official actions have been taken against them, if any, by any agency, and this is particularly true of the JTC.

The Supreme Court has published a proposed amendment of MCR 9.261. The proposed amendment provides, in part, that "upon request the

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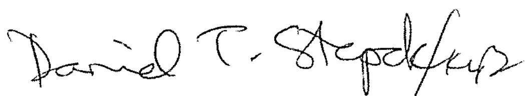
Judicial Tenure Commission shall disclose all information in its possession concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission (JTC) action ... to the State Bar Judicial Qualifications committee, or to any other officially authorized state or federal judicial qualifications committee."

If there is any concern that the adoption this Amendment could lead to private information from the JTC getting out into the public, please be aware that our Committee has very strong confidentiality rules in place. It is a no tolerance policy and is the first thing every Committee member is advised when joining the Committee. Our background investigations, information gleaned from the application and interview, discussions of the Committee and the ratings are never disclosed except to the Governor's Office. Therefore, no Committee member would be permitted to share any information received from the JTC.

Our Committee unanimously believes that this amendment would serve our Committee well and allow us to perform our job better for the Governor. The Committee strongly supports this proposed amendment and we ask the Board of Commissioners to endorse this proposed amendment to the Court Rules.

Sincerely,



Daniel T. Stepek
Co-Chairperson

Kathleen L. Bogas
Co-Chairperson

KLB:caw

Public Policy Position
ADM File No. 2020-16

Support

Explanation
The committee provided detailed comments in the attached letter.

Position Vote:
Voted For position: 13
Voted against position: 0
Abstained from vote: 4
Did not vote (absence): 3

Contact Person: Sean M. Siebigteroth
Email: ssiebig@thewilliamsfirm.com

To: State Bar of Michigan Board of Commissioners
From: Lawyers & Judges Assistance Committee
Re: Position Statement Regarding ADM File No. 2020-16
Date: November 9, 2020

Thank you for the opportunity to comment on the proposed amendment of Rule 9.261 of the Michigan Court Rules.

The Lawyers & Judges Assistance Committee **supports** the proposed amendment.

MCR 9.114(C) makes Contractual Probation available to certain attorneys as an alternative to formal discipline where the alleged misconduct "is significantly related to a respondent's substance abuse problem, or mental or physical disability[.]" MCR 9.114(C)(1)(a).

The terms and conditions of Contractual Probation are created by a monitoring agreement between the attorney and the Lawyers & Judges Assistance Program (LJAP). Contractual Probation allows an attorney to receive treatment, support, and monitoring to address an underlying substance abuse problem or disability. An attorney's satisfactory completion of Contractual Probation permits the attorney to avoid formal disciplinary charges.

By directing an attorney to enter a monitoring agreement with LJAP, the Attorney Grievance Commission creates a "motivational fulcrum." The attorney recognizes that complying with the monitoring agreement protects their professional licensure. When the attorney complies, the probability that they will

establish physical and mental well-being is high, and the probability of further professional misconduct is low.

MCR 9.114(C) serves two purposes. First, it creates a path to establish and maintain mental health for struggling attorneys. At the same time, it creates a process through which the regulatory authority can ensure the attorney is addressing root causes of misconduct.

The proposed addition of (K) to MCR 9.261 permits the Judicial Tenure Commission to "disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action . . . to [LJAP]." Similarly, proposed MCR 9.261(J) allows the Judicial Tenure Commission to "disclose information in its possession concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action or to any other officially authorized state or federal judicial qualifications committee."

Currently, when a Michigan judge engages in official misconduct, or is struggling with a mental or physical disability, regulatory bodies have few options. The State Court Administrative Office can encourage struggling judges to come to LJAP for evaluation and a possible monitoring agreement but have no authority to do so or leverage to apply. The Judicial Tenure Commission (JTC) may remove judges, but those proceedings remain private. A judge who the JTC has removed can run to be a judge again, notwithstanding serious misconduct potentially related to untreated mental illness or substance abuse.

The current Michigan Court Rules prohibit the JTC from reporting misconduct or evidence of untreated mental illness or substance abuse to any state or federal judicial qualifications committee, or to LJAP, without the judge's permission. The amendments proposed in ADM File No. 2020-16 would permit the JTC to do so. This will allow LJAP to engage with struggling judges to help them find needed treatment and will allow judicial qualifications committees to protect the public from those who will not seek the help they need. These amendments will help protect public confidence in the judicial system's integrity from the challenges resulting from the misconduct of impaired judges.

LJAC supports the amendments to MCR 9.261 proposed in ADM File No. 2020-16. They represent strong steps toward a form of Contractual Probation for Michigan judges. Contractual Probation has saved the lives and the practices of many licensed attorneys. A similar approach could save the lives and vocations of struggling Michigan judges.

SBM State Bar of Michigan
p (517) 346-6300
p (800) 968-1442
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306 Townsend Street
Lansing, MI 48933-2012
www.michbar.org

December 15, 2020

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

RE: ADM File No. 2019-06 – Amendment of Rule 6.302 of the Michigan Court Rules

Dear Clerk Royster:

At its November 20, 2020 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2019-06. In its review, the Board considered recommendations from the Access to Justice Policy and the Civil Procedure & Courts committees.

The Board voted unanimously to support the proposed amendment to Rule 6.302 with further amendments to Rule 6.302(B)(2), as follows:

> …the maximum possible prison sentence for the offense, including, if applicable **and based upon the matters pending before that judicial officer**, whether the law permits or requires consecutive sentences**, making clear to the defendant that the representation only relates to cases pending before that judicial officer**, and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

Because a judge may not have perfect information at the time of sentencing, the additional amendments to subsection (B)(2) would clarify that a judge's representations about the length and nature of a sentence are to be based only upon the information available to the judge at the time of sentencing. The amendment supports the spirit of the Rule 6.302 by reinforcing that defendants have the right to understand their maximum sentence. The proposed amendments also take the additional step of informing defendants that representations about their sentences are restricted to information known to the judicial officer at the time of sentencing and that their sentences could ultimately be recalibrated based on new information, such as newly pending federal matters.

The Board also recommends to the Court that the State Court Administrative Office bench books and cards be updated to reflect amended Rule 6.302.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

December 2, 2020

Samuel R. Smith, III
Committee Reporter
Michigan Supreme Court
Committee on Model Criminal Jury Instructions
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: M Crim JI 13.19 and 13.19a
M Crim JI Chapter 15
M Crim JI 17.2a
M Crim JI 33.1a
M Crim JI 39.7 and 39.7a
M Crim JI 39.8 and 39.8a
M Crim JI 40.1, 40.2, and 40.3

Dear Mr. Smith:

The Board of Commissioners of the State Bar of Michigan has considered the above-referenced model criminal jury instructions published for comment. In its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee.

The Board voted unanimously to support the following proposed model criminal jury instructions as published:

M Crim JI 13.19 and 13.19a
M Crim JI Chapter 15
M Crim JI 33.1a
M Crim JI 39.7 and 39.7a
M Crim JI 40.1, 40.2, and 40.3

The Board voted to support **M Crim JI 17.2a** with the recommended amendments presented below:

- The second footnote 1 in Paragraph (1) should be deleted because it is misplaced. The footnote should not be attached as a reference to "aggravated domestic assault," because that crime is not a lesser included offense, as the substance of footnote would indicate. [Deletions shown in strikethrough]

  (1) [The defendant is charged with / you may also consider the less serious crime of[1]] [domestic assault / aggravated domestic assault~~[1]~~].

- Footnote 1 in Paragraph (4) should be deleted because it is unnecessary and does not comport with the substance of Paragraph (4).

The Board voted to oppose **M Crim JI 39.8 and 39.8a** as drafted because the model rules did not include (a) constitutionally derived true threat language, and (b) a proviso that a defendant need not follow through on a threat for the elements of the crime to satisfied.

Thank you for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Robert J. Buchanan, President

SBM STATE BAR OF MICHIGAN

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

December 1, 2020

Samuel R. Smith, III
Committee Reporter
Michigan Supreme Court
Committee on Model Criminal Jury Instructions
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: M Crim JI 5.15

Dear Mr. Smith:

The Board of Commissioners of the State Bar of Michigan has considered the above-referenced model criminal jury instructions published for comment. In its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee and the Access to Justice Policy Committee.

The Board voted to support **M Crim JI 5.15** with three amendments that would: (1) expand the instructions to include sign language interpreters; (2) help further guard against implicit bias when interpreters are used; and (3) address the broad concern that the model jury instructions as drafted give too much authority to a translation, and as such, could invade the province of the jury to act and think independently.

Suggested amendment to paragraph one (1):

The Board sought to ensure that the **M Crim JI 5.15** explicitly included and applied to individuals who communicate through sign language. The Board supported this clarification because it falls squarely within the model instruction's intent to ensure "fair trial[s] for everyone. The suggested amended language is as follows:

> This court seeks a fair trial for everyone, regardless of the language they speak or how well it is spoken including those who communicate through sign language.

Suggested amendment to paragraph four (4):

The Board supported amendments to the instructions that would help guard against implicit bias when an interpreter is used. The language addition in paragraph four (4) reinforces the model instruction's prohibition on juries discriminating against witnesses who speak a foreign language. The suggested amended language is as follows:

> Bias against or for persons who have little or no proficiency in English is not allowed. Do not allow the fact that the court is using an interpreter to help [the defendant / a witness] to influence how you decide the facts or the case in any way. Likewise, do not allow the fact that the testimony is given in a language other than English influence you in any way.

Suggested amendment to last sentence of paragraph five (5):

The Board supported amendments to the instruction to balance the need for uniformity and consistency in court translations and interpretations against the countervailing need to grant jurors – particularly those who understand the same language as the interpreter – the discretion to resolve any discrepancies in the translation as they would any other question of fact. Furthermore, the amendments strike the word "official" to eliminate ambiguity concerning the meaning of the term, including who or what entity makes a translation "official." Lastly, the word

"must" is replaced with the more flexible word "should," to better reflect the overall tone and intent of the paragraph.

The suggested amended language is as follows:

> If, however, after such efforts a discrepancy remains in your mind, ~~I emphasize that~~ you ~~must~~ should rely ~~only~~ upon the ~~official~~ English translation ~~as provided by the official court interpreter and disregard any other contrary interpretation.~~, and it is up to you as the triers of fact to resolve the discrepancy as you would any other question of fact.

Thank you for the opportunity to convey the State Bar's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Robert J. Buchanan, President

Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

October 14, 2020

ADM File No. 2020-25

Proposed Rescission of Administrative Order No. 1997-9 and Proposed Addition of Administrative Order No. 2020-X

On order of the Court, this is to advise that the Court is considering a proposed rescission of Administrative Order No. 1997-9 to be replaced with Administrative Order No. 2020-X. 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.

Administrative Order No. 2020-X – Allocation of Funds from Lawyer Trust Account Program

On order of the Court, effective immediately, Administrative Order No. 1997-9 is rescinded and replaced with Administrative Order No. 2020-X to provide that funds to be distributed by the Board of Trustees of the Michigan State Bar Foundation shall be disbursed as follows:

1. Seventy percent of the net proceeds of the Lawyer Trust Account Program to support the delivery of civil legal services to the poor;

2. Fifteen percent of the net proceeds of the Lawyer Trust Account Program to support programs to promote improvements in the administration of justice;

3. Ten percent of the net proceeds of the Lawyer Trust Account Program to support increased access to justice, including matters relating to gender, racial, and ethnic equality, to be implemented at the direction of the State Court Administrator;

4. Five percent of the net proceeds of the Lawyer Trust Account Program, not to exceed a maximum of $XX,XXX, to support the activities of the Michigan Supreme Court Historical Society. Any funds in excess of the maximum amount shall be divided evenly among the recipients in paragraph 1 through 3.

Staff Comment: The proposed administrative order would replace the current administrative order regarding distribution of funds from the Lawyer Trust Account Program that was adopted more than 20 years ago. The distribution would remain largely the same as it is now: 70 percent to support delivery of civil legal services to the poor, 15 percent to promote improvements in the administration of justice, 10 percent to support increased access to justice (including racial, gender, and ethnic equality), and 5 percent for support of the activities of the Michigan Supreme Court Historical Society. What would be different is that in paragraph three, funds would be used to support increased access to justice generally with specific reference to racial, gender, and ethnic equality, instead of reference to the long-defunct task forces on Gender Issues in the Courts and Racial/Ethnic Issues in the Court. Those issues will continue to be a focus of the money to be spent, but will be able to include additional recommendations. Further, the money could be spent as directed by the State Court Administrator, instead of being spent "within the judiciary," which unnecessarily restricts the ability to fund programs that exist outside the judiciary but fit within the funding parameters. Finally, the proposed AO would establish a cap on funding for the Michigan State Historical Society to reflect what are likely largely fixed costs for operational expenses; the remainder would be split among the remaining recipients.

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, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-25. 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 14, 2020

Clerk

Public Policy Position
ADM File No. 2020-25

Support with Amendments

Explanation
The committee supports ADM File No. 2020-25 with two separate amendments:

Paragraph 3 Proposed Amendment
The committee voted 22 in favor with three abstentions to support ADM File No. 2020-25 with an amendment to Paragraph 3 providing that the ten percent provided in paragraph 3 should be implemented and disbursed by the Michigan State Bar Foundation with the consideration of the input of the State Court Administrator.

The committee supports this amendment because it would allow the Michigan State Bar Foundation the ability to efficiently and flexibly disburse funds, and do so in accordance with key input from the State Court Administrator's Office.

Paragraph 4 Proposed Amendment
The committee voted 21 in favor, one in opposition, with three abstentions to support ADM File No. 2020-25 with an amendment to Paragraph 4 providing that the five percent (5%) provided to the Michigan Supreme Court Historical Society should be reverted to the Michigan State Bar Foundation for the delivery of civil legal services to the poor, and this re-allocation of funding should be accomplished in a phased approach over two (2) years.

The committee supports this amendment to the proposed rule because it reflects the committee's mission of promoting and supporting access to justice. By ensuring that IOLTA funding to the fullest extent possible goes to the support of legal services for the poor and underserved populations, access to justice is increased. The phasing out of IOLTA support to the Michigan Supreme Court Historical Society reflects a balancing between giving the Society ample time to secure other sources of funding, while prioritizing the delivery of IOLTA funding to legal services for the poor.

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

1st Floor, Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915
Ph: (517) 373-7589
Fax: (517) 373-7592

Hon. Dorothy Comstock Riley
Founder

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Matthew C. Herstein
Hon. Mary Beth Kelly
Mary Massaron
Hon. Denise Langford Morris
Shenique A. Moss
John D. Pirich
Hon. Victoria A. Valentine
Janet K. Welch
Jill M. Wheaton

Executive Director
Carrie Sampson

Via Email and Regular Mail

December 8, 2020

Anne M. Boomer, Esq.
Administrative Counsel Michigan Supreme Court
PO Box 300552
Lansing, MI 48909

RE: **2020-25 - PROPOSED ADDITION OF ADMINISTRATIVE ORDER NO. 2020-X (ALLOCATION OF FUNDS FROM LAWYER TRUST ACCOUNT PROGRAM)** (the “Proposed Order”)

Dear Ms. Boomer:

The Michigan Supreme Court Historical Society (the “Society”) submits this comment to the Proposed Order replacing Administrative Order 1997-9, Allocation of Funds From Lawyer Trust Account Program, entered November 14, 1997 (the “Existing Order”). The Society is one of the parties most affected by the Proposed Order, which would cap its existing 5% share of the funds from the lawyer trust account program (commonly known as IOLTA funds) at a specific dollar amount, temporarily specified as $XX,XXX in the Proposed Order.

EXECUTIVE SUMMARY

In summary, the Society has been advised that the idea of a dollar cap is predicated on the potential success of the Michigan State Bar Foundation’s current and future efforts to substantially increase the amount of IOLTA revenues in order to increase funds for Civil Legal Services. The Society is agreeable to a reasonable cap with protection from inflation, with the hope and expectation that the Bar Foundation’s efforts will be successful. The Society is also in agreement with the Court’s indication in connection with the Proposed Order that the cap itself be reflective of the “largely fixed costs for operational expenses”. We note that such an amount would also be roughly consistent with the average of historical payments made to the Society over the past 23 years under the Existing Order. The background, analysis, conclusions, and proposed language behind this summary of our comments is set forth below.

BACKGROUND REGARDING THE SOCIETY AND IOLTA

The Society has been privileged to be one of the beneficiaries of the Court’s Existing Order with respect to IOLTA funds. The Society is a Michigan nonprofit corporation, organized in 1988 for the purpose of helping preserve the history and legacy of the Michigan Supreme Court and the Michigan judiciary more generally, through conservation of its portrait collection, research, aid to scholarship, education, and

the acquisition of artifacts of historical significance. The Society is governed by an independent fiduciary board made up of distinguished lawyers, judges, and legal professionals, and, as is currently the case, includes former Justices of the Court as well as former Presidents of the State Bar.

The Society is proud of the numerous projects it has undertaken since its founding, beginning with the preservation, conservation, and expansion of the collection of judicial portraits under its care at the Hall of Justice and in Court Chambers in Detroit. The Society has acquired artifacts relating to the court for public display, sponsored numerous research and publication projects about the history of the Court, including special sessions of the Court and a historical reference guide (now in its second edition). The Society has had an ongoing oral (and now video) history project with former Justices. It publishes a quarterly newsletter with historical information and updates about the Society's activities and maintains a substantial website to make its work easily accessible to the public. The Society also helps administer the Learning Center at the Hall of Justice and has provided educational materials for students about the Court.

Under the Existing Order for the past 23 years, the Society has received 5% of those funds. These funds, together with the contributions of the members of the Society and others, have enabled it to do its work. The amounts received by the Society from IOLTA have varied greatly over the years, as interest rates have fluctuated, but the average over that time is approximately $100,000 (not adjusted for inflation). The Society has received over $100,000 on four occasions (the last being 2009). While this means that in some years past the Society has received amounts exceeding its expenditures, allowing it to build up some reserves, in recent years (2011–2019), the IOLTA payments have averaged approximately $17,000. This sharp drop in IOLTA funding has been a serious challenge for the Society. The Society endured some difficult years financially as a result, raising concern about substantial deficits and increasing its reliance on membership contributions, board gifts, and grants. Even in its diminished amount, the annual IOLTA funds were and are an important part of our annual budget of approximately $125,000 in 2019.

THE REQUEST OF THE BAR FOUNDATION TO THE SOCIETY

The proposed change to the Existing Order to cap the Society's share of IOLTA revenues was suggested by the Michigan State Bar Foundation. The Bar Foundation advised the Society that it was undertaking a program to increase IOLTA revenues, and that its preliminary efforts suggested that such a program could have a dramatic, positive effect. The Bar Foundation indicated that this would potentially make more funds available for providing civil legal services to those in need, a goal that the Society endorses.

The initial effort of the Bar Foundation had a very positive impact and increased the IOLTA revenues to the Society for 2020 to $45,947, which was over double the $19,876 received in 2019. Because of the pandemic, which resulted in the cancellation of the Society's major activities in 2020, with an extremely negative effect on Society revenues, the increase could not have come at a better time. The Society is very appreciative of the work of the Bar Foundation in bringing about this increase.

The Bar Foundation has indicated to the Society that it believes that further efforts on its part can dramatically increase IOLTA revenues well beyond current numbers. If this

turns out to be the case, the Bar Foundation believes that the 5% share of IOLTA revenues that the Society might receive could be well over six figures and, in the best case, exceed $275,000. If that were the case, the Foundation has suggested that this would be beyond the needs of the Society.

The Society would be delighted to see the Bar Foundation's efforts succeed to the greatest extent possible. If it is the case that IOLTA revenues increase as dramatically as the Foundation projects might be possible, the Society agrees that shifting those revenues that are beyond what the Society would reasonably require currently is reasonable and would justify a limitation on the 5% of IOLTA revenues that the Society has historically received. At the same time, the Society believes that a return to the historical level of IOLTA support that it has received over the last 23 years would be appropriate given the expansion of the work of the Society since 1997 and its record of service.

THE PROPOSED ORDER

The draft order provides for the Society to receive 5% of IOLTA revenues, as in the past, but adds a cap of a yet to be determined amount, signified as "$XX,XXX." In the comments it is stated: "the proposed AO would establish a cap on funding for the Michigan State Historical Society to reflect what are likely largely fixed costs for operational expenses..."

We have reviewed what we expect to be our fixed costs for operational expenses for our next fiscal year and estimate them to be $96,273. A breakdown of those expenses is attached. The Society has a single full-time employee, its Executive Director, to deal with its myriad activities, and personnel costs, together with insurance, accounting and auditing expenses, care of the portrait collection, and miscellaneous other items make up this number.

The Society agrees with the Court's statement that a dollar cap that is consistent with the Society's largely fixed costs for operational expenses is a good benchmark. This would allow the Society to use membership contributions and proceeds from its fundraising efforts to further its work in education, scholarship, and acquisition and preservation of items relating to the history of the court.

There is one serious concern about any dollar cap on Society IOLTA revenues, and that is inflation. For example, a dollar in 2021 is likely to be worth only a fraction of that amount in 2031, but a dollar cap without more does not take that fact into account. The last IOLTA Administrative Order was in place for over 23 years. The buying power of a dollar in 1997 is 62% of what it is today. Accordingly, if the Proposed Order were to remain in effect as long as the Existing Order, and inflation mirrored the past 23 years, the $99,999 cap would effectively shrink to $62,000 (or, put another way, rather than covering all of the Society's current operational costs as the Court has suggested, it would cover a little more than half of them). To simply remain at their existing levels, the Society's operational expenses will need to increase in absolute dollar terms to keep pace with inflation that will almost certainly be at least 2% annually and could be many times that amount in the future.

Accordingly, the Society proposes that there be a simple inflation protection provision in tandem with the cap. Specifically, the Society proposes that the language in the final Administrative Order should provide that the cap be set at "$99,999 plus an amount computed annually by the Supreme Court Administrative Office to equal the cumulative,

compounded increase to date in the Consumer Price Index for All Urban Consumers since 2022." Use of that Index has been common in legislation in Michigan and elsewhere in dealing with inflation protection.

We note that in addition to being consistent with the Court's comments, we think this is a very appropriate response to the Bar Foundation's request for a cap for the following reasons:

(1) As noted above, historically, the Society has received on average almost $100,000 (in non-inflation adjusted dollars) annually over the past 23 years from the IOLTA revenues and the need remains as great for the Society as it was when the 5% figure was established in 1997. The low average of recent years should not be considered a proper guide and has been challenging for the Society.

(2) Depending on the success of the Bar Foundation's efforts, it could reduce the Society's share of IOLTA revenue by half or more, so it is a substantial reduction reflecting our willingness to cooperate with the aims of the Bar Foundation in making more funding available for civil legal services.

(3) We believe that we have been good stewards of the IOLTA funds the Society has received over the years, with a fiduciary board that engages in careful oversight of Society expenditures.

(4) The Society has many potential projects that we believe are worthy, but we have been limited by lack of funds; we are not seeking money that would be surplus over our needs but need to be able to avoid operating deficits in order to carry them out.

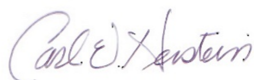
CONCLUSION

The Society is extremely grateful to have been a recipient of IOLTA funds for the past 23 years under the Existing Order. We believe that the 5% share allocated to the Society has been appropriate and enabled us to do the good work expected by the Court. We applaud the efforts of the Bar Foundation to try to grow the IOLTA revenues and would very much like to see a great success in that regard. In the event the current positive results of its efforts continue to grow, the Society is willing to agree to a dollar cap on the 5% share that is reflective of both its operational expenses (as the benchmark suggested by the Court) and its historical average, a benchmark that the Society also believes is appropriate to consider. We do ask that the dollar cap provide for an inflation protection provision to prevent a reasonable cap from being turned into an unreasonable one by forces outside anyone's control.

Thank you for your attention and this opportunity to comment.

Respectfully submitted,

The Michigan Supreme Court Historical Society,



By Carl W. Herstein
Its: President

Projected Budget for Operational Expenses of the Michigan Supreme Court Historical Society 2021

Accounting/Tax Documents	$3,500
Bank Fees	$1,500
Board Meetings	$1,500
Holiday Cards	$750
Insurance	$5,000
Letterhead/Envelopes	$500
Memberships in peer groups	$400
Online Membership database	$3,500
Office Supplies	$250
Accounting and other software	$1,250
Parking for Executive Director	$922
Payroll (incl. fees, taxes, work comp)	$64,451
Portrait Maintenance	$8,000
Exec. Dir. Travel/Professional Dev.	$750
Interns (2)	$4,000
TOTAL	**$96,273**

(Draft of November 5, 2020)

Order

Michigan Supreme Court
Lansing, Michigan

October 28, 2020

ADM File No. 2020-26

Proposed Amendments of
Rules 1.109 and 8.119 of the
Michigan Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.109 and 8.119 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 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) [Unchanged.]

(b) Filing, Accessing, and Serving Personal Identifying Information

(i)-(ii) [Unchanged.]

(iii) If a party is required to include protected personal identifying information in a public document filed with the court, the party shall file the document with the protected personal identifying

information redacted, along with a personal identifying information form approved by the State Court Administrative Office under subrule (i). The personal identifying information form must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers listed in the personal identifying information form will be understood to refer to the corresponding complete identifier. A party may amend the personal identifying information form as of right. Fields for protected personal identifying information maywill not be included in SCAO-approved court forms, and the information will be protected, in the form and manner established by the State Court Administrative Office.

(iv)-(vii) [Unchanged.]

(c)-(e) [Unchanged.]

(10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.

(a) The responsibility for excluding or redacting personal identifying information listed in subrule (9) from all documents filed with or offered to the court rests solely with the parties and their attorneys. The clerk of the court is not required to review, redact, or screen documents at time of filing for personal identifying information, protected or otherwise, whether filed electronically or on paper. For a document filed with or offered to the court, the clerk of the court is not required to redact protected personal identifying information from that document before providing a requested copy of the document (whether requested in person or via the internet) or before providing direct access to the document via a publicly accessible computer at the courthouse. The clerk of the court is required to redact protected personal identifying information before providing direct access to the document via the internet, such as through the court's website.

(b)-(e) [Unchanged.]

(E)-(H) [Unchanged.]

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039. If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record~~; however, the documents cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those documents~~. <u>If a public document prepared or issued by the court contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided via a paper or electronic copy, direct access via a publicly accessible computer at the courthouse, or direct access via the internet, such as on the court's website.</u> The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1)-(2) [Unchanged.]

(I)-(L) [Unchanged.]

Staff comment: The proposed amendments of MCR 1.109 and 8.119 would allow SCAO flexibility in protecting an individual's personal identifying information and clarify when a court is and is not required to redact protected personal identifying information.

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, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-26. 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 28, 2020

Clerk

Public Policy Position
ADM File No. 2020-26

Support in Concept; No Position on Proposed Language

Explanation
The committee voted unanimous to support the concept of protecting personal identifying information in court documents; however, the committee took no position on the language proposed in ADM 2020-26.

Position Vote:
Voted For position: 34
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 0

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

Public Policy Position
ADM File No. 2020-26

Support with Recommendations

Explanation

The committee voted unanimously to support in concept the protection of personal identifying information in court documents as presented in the proposed amendments to Rules 1.109 and 8.119. The committee's position to support the proposed rule amendment is subject to the incorporation of the Probate & Estate Planning Section recommendation that:

> "due consideration be given to the administrative burdens this [proposed rule] may place on the courts, especially during the current pandemic, which could limit online access to important documents for both Section members and the public at large."

Position Vote:

Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2020-26

Explanation

The Probate and Estate Planning Section supports the idea of protecting personal identifying information and, therefore, does not oppose ADM File No. 2020-26, but suggests that due consideration be given to the administrative burdens this may place on the courts, especially during the current pandemic, which could limit online access to important documents for both Section members and the public at large.

Position Vote:

Voted for position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 2

Contact Person: James Spica
Email: spica@mielderlaw.com

FREDDIE G. BURTON, JR.
JUDY A. HARTSFIELD
FRANK S. SZYMANSKI
TERRANCE A. KEITH
LISA MARIE NEILSON
DAVID BRAXTON
LAWRENCE J. PAOLUCCI
DAVID A. PERKINS
JUDGES OF PROBATE

FREDDIE G. BURTON, JR
CHIEF JUDGE OF PROBATE

DAVID BRAXTON
CHIEF JUDGE PRO TEMPORE

APRIL K. MAYCOCK
PROBATE REGISTER

JEANNE S. TAKENAGA
PROBATE REGISTER 1990-2011

Via Electronic and Ordinary Mail

January 11, 2021

Larry Royster
Supreme Court Clerk
P.O. Box 30052
Lansing, Mich. 48909

Re: ADM 2020-26 -
Proposed Amendments to MCR 1.109 and 8.119

Dear Mr. Royster:

This comment letter is offered on behalf of the Wayne County Probate Court in opposition to the proposed court rule amendments which would require redaction of records before they could be posted on-line. Please allow me to explain the basis for our objections.

The proposed change to mandate the redaction of Personal Protected Identifying Information (PPII) runs counter to SCAO's philosophy (up to this point), first manifested in ADM 2006-02, that Courts were not required to redact information from forms submitted for filing; instead it was up to the individual to not provide this information. In addition, the dynamics have changed as universal efiling will be coming and more and more courts are switching over to allowing direct access to documents via their website.

The proposed changes would defeat the purpose of on-line image access and cripple the ability of courts to provide copies. There is no reasonable amount of resources available to redact all of this information from the millions of documents that courts maintain.

Imposing this mandate will in effect make documents unavailable to the public and attorneys during the pandemic, when there is no public access in most courts. This is at odds with the Supreme Court's outstanding and innovative efforts to ensure access to justice and expedite the processing and administration of cases. Having file information on-line is vital to achieving these goals.

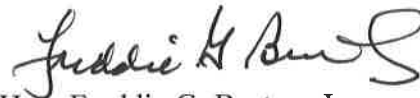
Also, county clerks are certain to oppose these amendments, as they do not have the staff or resources to redact documents for their Circuit Court records. This issue may not be on the radar for many courts and judges yet as they struggle to keep up with their caseload during the pandemic. However, it is certain to heat up over time as on-line records access becomes more widespread throughout Michigan Courts.

A reduction mandate will be a concern for many years going forward. Eventually, this issue will go away as SCAO is preparing forms which will remove the PPII from the main documents – i.e., probate forms will not have identifying information on them like they do now, but this data will be on a separate form not available to the public, via on-line or in a paper file, etc. However, it will be a considerable period of time before this

occurs and the amendments, if adopted, will result in a long term severe restriction on the flow of information to the public and attorneys and make it more difficult to conduct judicial business.

If you have any questions concerning this comment do not hesitate to contact me at fburton@wcpc.us or 313 224-5686.

Sincerely,



Hon. Freddie G. Burton, Jr.
Chief Judge

Order

Michigan Supreme Court
Lansing, Michigan

November 18, 2020

ADM File No. 2020-20

Proposed Amendment of
Rule 2.105 of the Michigan
Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.105 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 2.105 Process; Manner of Service

(A)-(G) [Unchanged.]

(H) Limited Liability Company. Service of process on a limited liability company may be made by:

(1) serving a summons and a copy of the complaint on a member or the resident agent;

(2) serving a summons and a copy of the complaint on a member or person in charge of an office or business establishment of the limited liability company and sending a summons and a copy of the complaint by registered mail, addressed to the registered office of the limited liability company.

(3) If a limited liability company fails to appoint or maintain an agent for service of process, or the agent for service of process cannot be found or served through the exercise of reasonable diligence, service of process may be made by delivering or mailing by registered mail to the director of the Department of Licensing and Regulatory Affairs (pursuant to MCL 450.4102) a summons and copy of the complaint.

(H)-(K) [Relettered (I)-(L) but otherwise unchanged.]

Staff comment: The proposed amendment of MCR 2.105 would establish the manner of service on limited liability companies.

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 March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-20. 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.

November 18, 2020

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

November 18, 2020

ADM File No. 2020-19

Proposed Amendment of
Rule 2.302 of the Michigan
Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.302 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 2.302 Duty to Disclose; General Rules Governing Discovery

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(2) [Unhchanged.]

(3) Trial Preparation; Materials.

(a)-(c) [Unchanged.]

(d) If a party intends to introduce an audio or video recording during a proceeding, the party will file transcripts of that audio or video recording in accordance with MCR 2.302(H).

(4)-(7) [Unchanged.]

(C)-(H) [Unchanged.]

Staff comment: The proposed amendment of MCR 2.302 would require transcripts of audio and video recordings intended to be introduced as an exhibit at trial to be transcribed.

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 March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-19. 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.

November 18, 2020

Clerk

Public Policy Position
ADM File No. 2020-19

Oppose

Explanation

The committee voted unanimously (21) to oppose the proposed amendment of MCR 2.302.

The committee opposes the proposed amendment because it raises significant access to justice issues. Specifically, the proposed rule amendment does not address how the costs associated with generating transcripts of audio or video recordings would be borne by or apportioned to parties generally and to indigent parties in particular.

The committee's specific concerns are as follows:

- The proposed new rule refers to "transcripts" (plural) of "that audio or video recording." It appears it's just trying to say that a transcript (one) of each audio or video recording sought to be introduced must be filed. But by using the plural, arguably the rule as written requires multiple transcripts of one recording. Taken on its face, the rule could be construed to require the transcription of an entire audio or video recording, even where only a fraction of the recording is intended to be introduced at trial.

- The proposed rule does not specify whether an interested party may create the transcript herself/himself or whether a transcriber must be used. Courts that have adopted a similar rule have included clarifying language on this point. See, e.g., Cal R 2.1040(b)(1) (providing that "[t]he transcript may be prepared by the party presenting or offering the recording into evidence; a certified transcript is not required").

- If a transcriber is required, additional clarifying language would also be necessary. Must the transcriber be identified in the transcript? If the transcriber must be a third party, must the transcriber be certified? If so, by whom?

- Courts that have adopted this rule have typically included language outlining exceptions to the general rule requiring transcription, specifically where 1) proceedings are uncontested or the other party does not appear (unless otherwise ordered by the judge), 2) parties agree that the audio does not contain any words that are relevant to the issues in a case, or 3) for good cause, as ordered by the judge. See, e.g., Cal R 2.1040(b)(3) (providing that no transcript is required under the above circumstances). Given the resources involved in producing these transcripts, the inability to make an exception to the rule would be a serious oversight.

- Most concerningly, the rule does not address the financial burden to parties associated with this requirement. At the very least, it does not address whether a judge may waive the new transcript requirement if a party is indigent and demonstrates it will create a financial hardship to obtain a transcript. However, the more general effect of this requirement could impose

significant costs on parties where considerable evidence exists in the form of audio and video files. It is also worth noting the higher costs associated with transcription/translation services that are required for recordings in languages other than English. See, e.g., National Association of Judiciary Interpreters & Translators, *Position Paper on General Guidelines and Requirements for Transcription Translation in a Legal Setting for Users and Practitioners* (2019) https://najit.org/wp-content/uploads/2016/09/Guidelines-and-Requirements-for-Transcription-Translation.pdf.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 7

Contact Persons:

Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2020-19

Oppose

Explanation

The committee voted unanimously (19) to oppose the proposed amendment to Rule 2.302 as set forth in ADM File No. 2020-19. The committee, while recognizing the need to preserve the record for appeal in criminal cases, finds that this proposed rule raises significant concerns with the timeliness of hearings and with overbreadth. Furthermore, the proposed rule is unclear on who would bear the costs of producing a transcript of audio and/or video recordings – a particular concern when litigants are poor. The committee encourages the Court or the State Bar of Michigan to form a workgroup to further discuss and resolve this issue.

Position Vote:

Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2020-19

The Section opposes or more specifically raises concerns about the proposed amendment as written as discussed in the attached letter.

Position Vote:
Voted for position: 21
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 0

Contact Person: Anne Argiroff
Email: anneargiroff@earthlink.net

SBM STATE BAR OF MICHIGAN

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

www.michbar.org

APPELLATE PRACTICE SECTION

OFFICERS

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30300 Northwestern Hwy. Ste. 135
Farmington Hills, MI 48334

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State Bar of Michigan
Board of Commissioners
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

January 12, 2021

Via email: csharlow@mail.michbar.org
Re: ADM File No. 2020-19

Dear Board Members:

The Appellate Practice Section Council has reviewed ADM File No. 2020-19, which would amend the civil discovery rules by adding a new subsection, MCR 2.302(B)(3)(d), providing as follows:

> If a party intends to introduce an audio or video recording during a proceeding, the party will file transcripts of that audio or video recording in accordance with MCR 2.302(H).

As appellate practitioners, we are sympathetic to the apparent goals of this proposed rule. But because of questions about its scope and applicability, we cannot support the proposal in its current form.

While the rule's placement within MCR 2.302(B)(3)—entitled "Trial Preparation; Materials"—suggests that it might apply only to recordings prepared in anticipation of litigation, its language contains no such limitation. That would present real practical difficulties in some cases. While the transcription of recorded depositions or interviews might be uncomplicated and helpful to courts and practitioners, that might not be the case for other types of recordings—such as cell phone video of a chaotic event with multiple people yelling unintelligibly, security video with lengthy and irrelevant side conversations, or recordings without any spoken dialogue. This may create a particular burden in domestic relations cases.

Not only would the proposed rule place new and uncertain burdens on litigants, it may invite disputes over whether and how recordings must be transcribed, and the consequences for failure to comply. As our Council could not reach a consensus on these questions, we have serious reservations about the proposal as written.

Twenty-one members of the APS Council voted in support of this position and two members voted no. We thank you for this opportunity to comment.

Very truly yours,
s/*Anne Argiroff*, Chair,
Appellate Practice Section

Order

Michigan Supreme Court
Lansing, Michigan

November 4, 2020

ADM File No. 2020-17

Proposed Addition of Rule 3.906 of the Michigan Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an addition of Rule 3.906 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.

[NEW] Rule 3.906 Use of Restraints on a Juvenile

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a juvenile during a court proceeding and must be removed prior to the juvenile being brought into the courtroom and appearing before the court unless the court finds that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the juvenile or another person.

(2) The juvenile has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the juvenile presents a substantial risk of flight from the courtroom.

(B) The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture.

Staff comment: The proposed addition of MCR 3.906 would establish a procedure regarding the use of restraints on a juvenile in court proceedings.

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 March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-17. 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.

November 4, 2020

Clerk

Public Policy Position
ADM File No. 2020-17

Support

Explanation

The committee voted to support the proposed addition of Rule 3.906 as drafted. The committee supported the proposed new rule because the majority of states have similar court rules in place that establish a presumption against the use of restraints on juveniles and the committee recommended that Michigan courts bring themselves into accord. Furthermore, the committee supported the new rule because it would bring consistency across the state's courts by providing a uniform procedure regarding the use of restraints in juvenile courtroom proceedings.

Position Vote:

Voted For position: 16
Voted against position: 4
Abstained from vote: 0
Did not vote (absence): 3

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

From:	Gadola, John, Honorable
To:	ADMcomment
Subject:	ADM file No. 2020-17
Date:	Thursday, November 5, 2020 2:25:39 PM

1)is this proposed NEW court rule being proposed as a result of some statutory change in the state of Michigan?
2)is this proposed NEW court rule being proposed to codify some new case law interpretation of an existing statute in the state of Michigan?
If yes, please let us as judges know where in the Michigan statutes or case law there was some change in Michigan law.
If no, please advise us as judges, and lawyers in the state of Michigan as to how we can go about creating new proposed court rules that seem to be just freestanding court rules based upon no statutory authority.
3)under this proposed NEW court rule section (B), are we as judges being made to create a record of our findings of fact, so that there is a record to preserve some issue for appeal purposes?
If yes, please advise as to what the topic of appeal would be when there is no constitutional right of the detained youth being violated, nor any violation of existing Michigan law.

Honorable John A. Gadola

Presiding Judge of the Family Division

7th Judicial Circuit Court

Michigan Probate Judges Association

Received
DEC 2 9 2020
State Court Administrative Office

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President

Hon. John D. Tomlinson
President-Elect

Hon. William M. Doherty
Vice-President

Hon. F. Kay Behm
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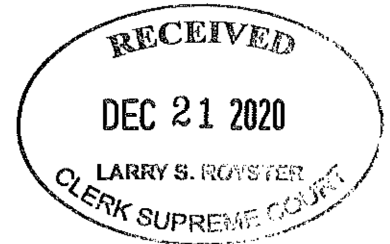
December 17, 2020



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

Re: Proposed MCR 3.906
ADM File # 2020-17

Dear Clerk Royster:

On December 11, 2020, The Board of Directors of the Michigan Probate Judges Association voted to support the proposed MCR 3.906 in principle.

MPJA acknowledges that restraints on juveniles should only be used when necessary and supports the requirement that a record be made of the findings underlying the decision. There are concerns, however, regarding the proposal as written. The requirement that the issue be decided *before* the youth is brought into the courtroom is problematic. MCR 3.906 (A) would require that restraints "be removed prior to the juvenile being brought into the courtroom and appearing before the court. . ." Proposed paragraph (B) further states that the juvenile's counsel must be heard on the issue. Given those requirements and the juvenile's presumed right to be present at the hearing, the proposed rule seemingly would require that the restraints be removed before the court hears from the juvenile's counsel and considers the issue. This could be dangerous for all. If the juvenile in fact meets one or more of the factors, removing the restraints prior to entering the courtroom may present significant security issues for the youth, transporters and anyone present. Then, if the determination is made that restraints are indeed needed, putting them back on may be very challenging and even dangerous for transport officers.

Although some courtrooms may have an adjoining lockup, many do not. This would necessitate removal of restraints in a hallway, sometimes near points of egress which increases the risk of flight and danger. Removal of restraints should not be required in public hallways. Even if a courtroom has an adjoining lockup, judges may prefer to have the youth brought into the courtroom and seated perhaps in a jury box

P.O. Box 609, Iron Mountain, MI 49801

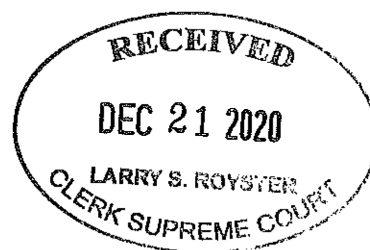
rather than being placed in a more punitive setting of a lockup for the removal of restraints.

Although MPJA recognizes the desirability of establishing a procedure regarding the use of restraints on a juvenile in a court proceeding, we would prefer to address the matter of whether restraints are required as the first issue to be decided, in the courtroom and prior to the restraints being removed.

Your consideration of these concerns will be sincerely appreciated.

Very truly yours,

Hon. Thomas D. Slagle
President, Michigan Probate Judges Association



From: Gold, Jonathan
To: ADMcomment
Subject: ADM File No 2020-17
Date: Wednesday, January 6, 2021 9:31:23 AM

To Whom It May Concern

I am writing to provide comment on the proposed rule change regarding use of restraints in youth.

I strongly support this change. As a pediatrician, I know that hospitals have also moved away from the use of restraints in children who are deemed potentially violent. There is a well-established body of literature on managing concerns about violence with less invasive methods. In general, best policy is to use the least invasive method needed.

In addition, the use of restraints in the court setting has the potential to create bias on the part of the judge and/or jury regarding the youth which may affect the outcome of the hearing.

Thank you for the opportunity to comment.

Jonathan Gold, MD FAAP
Chair Government Affairs Committee
Michigan Chapter of the American Academy of Pediatrics

Order

Michigan Supreme Court
Lansing, Michigan

October 28, 2020

ADM File No. 2020-07

Proposed Alternative Amendments of Rule 6.502 of the Michigan Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering proposed alternative amendments of Rule 6.502 of the Michigan Court Rules. Before determining whether either 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.]

ALTERNATIVE A

Rule 6.502 Motion for Relief from Judgment

(A)-(C) [Unchanged.]

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. When a *pro se* defendant files his or her first motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall promptly notify the defendant of its intention to recharacterize the pleading as a motion for relief from judgment; inform the defendant of any effects this might have on subsequent motions for relief, see MCR 6.502(B), (G); and provide the defendant ___ days to withdraw or amend his or her motion before the court recharacterizes the motion. If the court fails to provide this

notice and opportunity for withdrawal or amendment, the defendant's motion cannot be considered a motion for relief from judgment for purposes of MCR 6.502(B), (G). The clerk of the court shall retain a copy of the motion.

(E)-(G) [Unchanged.]

ALTERNATIVE B

Rule 6.502 Motion for Relief from Judgment

(A)-(C) [Unchanged.]

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. Where the defendant files a motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form. The clerk of the court shall retain a copy of the motion.

(E)-(G) [Unchanged.]

Staff comment: The proposed alternative amendments of MCR 6.502 would address the issue of a court's recharacterization of a defendant's motion for relief from judgment that is styled as something other than a motion for relief from judgment. Under Alternative A, the court would be required to notify the defendant of its intent to recharacterize the motion and allow the defendant an opportunity to withdraw or amend the motion. Under Alternative B, the court would be required to return the motion to the defendant with a statement of the reason for return.

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, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-07. 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 28, 2020

Clerk

Public Policy Position
ADM File No. 2020-07

Support Alternative A with Amendments

Explanation

The committee voted unanimously to the support "Alternative A" of the proposed amendments of MCR 6.502 with the following additional, clarifying language set forth below in **bolded** text:

> Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. When a *pro se* defendant files his or her first motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall promptly notify the defendant of its intention to recharacterize the pleading as a motion for relief from judgment; inform the defendant of any effects this might have on subsequent motions for relief, see MCR 6.502(B), (G); and provide the defendant **90** days to withdraw or amend his or her motion before the court recharacterizes the motion. If the court fails to provide this notice and opportunity for withdrawal or amendment **or the defendant establishes that notice was not actually received**, the defendant's motion cannot be considered a motion for relief from judgment for purposes of MCR 6.502(B), (G). The clerk of the court shall retain a copy of the motion.

The Committee found "Alternative A" to be preferable because it: (a) provides notice and the opportunity to withdraw the motion for those individuals who did not intend to file a relief from judgment, and (b) creates a more streamlined and simple process for those individuals who did intend to file a relief from judgment motion. The Committee found Alternative B to be less favorable because it raises issues concerning federal habeas – specifically, the potential for the habeas clock to expire during the time it takes the court to return the motion for refiling.

The Committee supports adding the bolded language to "Alternative A" as identified above because it would clarify that if or when a defendant does not actually receive notice (e.g., a change in prison address resulting in the non-delivery of the notice) a defendant's motion cannot be considered a motion for relief from judgment for the purposes of MCR 6.502(B),(G). The Committee supports and recommends a 90-day window in which a defendant may withdraw or amend his or her motion, as this time-frame accounts for delays in mail delivery – a particular concern during the mail slowdown caused by the Covid-19 pandemic.

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 13

Contact Persons:

Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2020-07

Support Alternative A with Amendments

Explanation
The committee voted 12 to 2 with 2 abstentions to support Alternative A with the proposed amendments listed below:

> Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. When a *pro se* defendant files his or her first motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall promptly notify the defendant of its intention to recharacterize the pleading as a motion for relief from judgment; inform the defendant of any effects this might have on subsequent motions for relief, see MCR 6.502(B), (G); and provide the defendant **90** days to withdraw or amend his or her motion before the court recharacterizes the motion. If the court fails to provide this notice and opportunity for withdrawal or amendment **or the defendant establishes that he or she was not at the correctional facility to which the notice was sent**, the defendant's motion cannot be considered a motion for relief from judgment for purposes of MCR 6.502(B), (G). The clerk of the court shall retain a copy of the motion.

The committee found Alternative A to be preferable because it is provides a relatively straightforward way to address issues concerning the court's recharacterization of a defendant's motion for relief from judgment in instances where such motions are styled as something other than a motion for relief from judgment.

The committee supports amending Alternative A by adding the bolded language identified above because it would clarify that when a defendant does not receive notice because a change in prison address results in the non-delivery of the notice, the defendant's motion cannot be considered a motion for relief from judgment for the purposes of Rule 6.502(B),(G). The committee supports and recommends a 90-day window in which a defendant may withdraw or amend his or her motion, as this time-frame accounts for delays in mail delivery due to the Covid-19 pandemic as well as the more typical delays associated with sending and/or receiving of mail in a correctional facility.

The committee found Alternative B to be less favorable because it raises issues concerning federal habeas – specifically, the potential for the habeas clock to expire during the time it takes the court to return the motion for refiling.

Position Vote:
Voted For position: 12
Voted against position: 2
Abstained from vote: 2
Did not vote (absence): 7

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Jerard M. Jarzynka
Prosecuting Attorney

312 S. Jackson Street
Jackson, MI 49201

OFFICE OF THE PROSECUTING ATTORNEY

November 2, 2020

Larry Royster
Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

Re: ADM File no. 2020-07, proposed amendment to MCR 6.502

Dear Mr. Royster:

Even though I like Proposal A more, either is a good idea. Enclosed is an example of a warning letter that I have been sending for the last 15 to 17 years to my circuit judges in this situation.

Sincerely,

Jerrold Schrotenboer
Chief Appellate Attorney

Enclosure

(517) 788-4283 • Fax (517) 780-4714
www.co.jackson.mi.us/prosecutor

July 8, 2020

Judge John McBain
Circuit Court

Re: *People v Percy Taylor*, #16-004024-FC

Dear Judge McBain:

I am writing to you asking that you warn defendant that his recently filed "Motion for Remand" is really a motion for relief from judgment subject to subchapter 6.500. Although Michigan courts do not require such warnings, giving them is both fair and required in the federal system. *Castro v United States*, 540 US 375, 377; 124 S Ct 786; 157 L Ed 2d 778 (2003).

Because defendant has already had his appeal by right, any relief that he may request is exclusively through a motion for relief from judgment. MCR 6.501. He is allowed only one such motion. MCR 6.502(G).

Therefore, I am asking that you tell defendant that he has three options. First, he can proceed with the motion realizing that he may not file another (unless any subsequent motion somehow fits within an exception under MCR 6.502(G)(2)). Second, he can amend the motion, raising whatever additional issues that he may want to raise. Third, he can withdraw the motion and then file it later (with, if he feels like it, new issues).

If I do not hear from defendant, I will file an answer by September 2.

Sincerely,

Jerrold Schrotenboer
Chief Appellate Attorney

cc: Percy Taylor, #198462
Saginaw Correctional Facility
9625 Pierce Road
Freeland, MI 48623