

State Bar of Michigan  
Representative Assembly  
October 8, 2015

SUMMARY OF PROCEEDINGS

The following is a summary of proceedings of the State Bar Representative Assembly session held Thursday, October 8, 2015, at the Suburban Collection Showplace in Novi, Michigan.

1. Call to order by Chairperson Vanessa Peterson Williams.
2. Clerk Fred K. Herrmann declared a quorum (50 members) was present.
3. Upon a motion made and seconded, the proposed calendar was adopted.
4. As provided in Rule 4.8, the Summary of Proceedings of the April 25, 2015 meeting was deemed approved.
5. Daniel J. Cherrin, Member of the Nominating and Awards Committee, addressed the Assembly on filling vacancies for the current meeting. Upon a motion made and seconded, Diana M. Langdon was appointed to fill an immediate vacancy within the 12<sup>th</sup> Circuit.
6. Aaron V. Burrell, Chair, Special Issues Committee, addressed the Assembly on the dues structure of the State Bar of Michigan.
7. Kimberly A. Breitmeyer, Chair, Assembly Review Committee, addressed the Assembly on a proposed Communication Strategy.
8. Karen H. Safran, Chair of the Civil Procedure & Courts Committee, addressed the Assembly for consideration of proposed amendments to Rules 2.116 and 2.119 of the Michigan Court Rules to adjust the timing of dispositive motions to allow for reply briefs, and to clarify that reply briefs are not allowed for any other motions unless leave is given by the Court. Upon a motion made and supported, after discussion, the proposal passed 77 to 20 as follows:

Rule 2.116 Summary Disposition

(A) – Unchanged

(B) Motion

(1) - Unchanged

(2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least ~~28~~35 days after the opposing party was served with the pleading stating the claim.

(C) – (F) – Unchanged

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, *MCR 2.119* applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least ~~24~~28 days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least ~~7~~14 days before the hearing.

(iii) the moving party or parties may file a reply brief in support of the motion. Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief and must be limited to 10 pages. The reply brief must be filed and served at least 7 days before the hearing.

(iv) no additional or supplemental briefs may be filed without leave of the court.

(b) If the court sets a different time for filing and serving a motion, ~~or a~~ response, or a reply brief, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion, ~~or~~ response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

#### Rule 2.119 Motion Practice

##### (A) Form of Motions

(1) – Unchanged

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based.

(a) Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.

(b) Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.

(c) Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type.

(d) A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

9. Robert F. Gillett, Member of the Committee on Justice Initiatives, and Valerie R. Newman, Member of the Committee on Justice Initiatives, addressed the Assembly for consideration of proposed amendments to Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 of the Michigan Court Rules to address the issue of sentencing indigent litigants to jail or prison for the failure to pay court-ordered fees, fines or costs without a prior determination of the ability to pay. Upon a motion made and supported, after discussion, the proposal passed 92 to 10 (with 1 abstention) as follows:

Rule 3.605 – Collection of Penalties, Fines, Forfeitures, and Forfeited Recognizances

(A) – (C) Unchanged

(D) Remission of Penalty. An application for the remission of a penalty, including bond forfeiture, may be made to the judge who imposed the penalty or ordered the forfeiture. The application may not be heard until reasonable notice has been given to the prosecuting attorney (or municipal attorney) and he or she has had an opportunity to examine the matter and prepare to resist the application. The application may be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, unless ordered by the court.

Rule 3.606 – Contempts Outside Immediate Presence of Court

(A) – (E) Unchanged

(F) The court shall not sentence a person to a term of incarceration unless the court has complied with the provisions of MCR 6.425 (E)(3), notwithstanding proceedings pursuant to the Child Support and Parenting Time Enforcement Act, MCL 552.602 et seq.

Rule 3.928 – Contempt of Court

(A) – (C) Unchanged

(D) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Rule 3.944 – Probation Violation

(A) – (E) Unchanged

(F) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Rule 3.956 – Review Hearings; Probation Violation

(A) – (B) Unchanged

(C) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

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

(A) Unchanged

(B) Misdemeanor Cases. MCR 6.001-6.004(B) and (C), 6.006, 6.102(D) and (F), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.445(A)-(G), and the rules in

subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts.

Rule 6.425 – Sentencing; Appointment of Appellate Counsel

(A) – (D) Unchanged

(E) (1)-(2) Unchanged

(3) Incarceration for Nonpayment.

(a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with a court order to pay financial obligations, unless the court determines on the record that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order.

(b) Payment alternatives. If the court determines on the record that the defendant is unable to comply with a court order to pay financial obligations without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or the entire amount of money owed to the extent permitted by law.

(c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:

(i) Defendant’s employment status and history.

(ii) Defendant’s employability and earning ability.

(iii) The willfulness of the defendant’s failure to pay.

(iv) Defendant’s financial resources.

(v) Defendant’s basic living expenses, including but not limited to food, shelter, clothing, necessary medical expenses, or child support.

(vi) Any other special circumstances that may have bearing on the defendant’s ability to pay.

Rule 6.445 – Probation Revocation

(A) – (F) Unchanged

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court without ~~and~~ having complied with the provisions set forth in MCR 6.425(B) and (E).

Rule 6.610 – Criminal Procedure Generally

(A) – (E) Unchanged

(F) (1) Unchanged

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3).

(~~23~~) Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction.

(~~34~~) Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

Rule 6.933 – Juvenile Probation Revocation

(A) – (D) Unchanged

(E) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

10. John P. Mayer, Member of the Representative Assembly, addressed the Assembly for consideration of SJR J and HJR S, two resolutions calling for an amendment to Section 19 of Article VI of the Michigan Constitution of 1963 to remove and/or increase the age limitation eligibility criteria for judicial office. As required by the Permanent Rules of Procedure 5.1.1, the Assembly conducted a vote on the whether the proposals were permissible for a vote under *Keller v. State Bar of California*; the Keller permissibility passed 82 to 12 (with 4 abstentions). Upon a motion made and supported, after discussion, the Assembly voted 71 to 37 (with 2 abstentions) to support SJR J; and 57 to 49 (with 3 abstentions) to support HJR S.
11. Judge Angela Kay Sherigan presented the *Unsung Hero Award* to Judge Allie Greenleaf Maldonado. Judge Maldonado accepted the award and addressed the Assembly.
12. Daniel F. Bonnor presented the *Michael Franck Award* to Vernon D. Kortering (posthumous). Mr. Kortering's son, David Kortering, accepted the award and addressed the Assembly.
13. Chief Justice Robert P. Young, Jr. addressed the Assembly on the Michigan's judiciary, Driving Change to Improve Service to the Public.
14. Vanessa Peterson Williams, Representative Assembly Chair, announced the election of Joseph P. McGill as the 2015-2016 Clerk of the Assembly.
15. Vanessa Peterson Williams, Representative Assembly Chair, presented certificates to the outgoing Assembly members whose terms of service expired at the end of the October 2015 Annual Meeting.
16. Daniel D. Quick was sworn in as 2015-2016 Chair of the Assembly by Chief Justice Robert P. Young, Jr. of the Michigan Supreme Court.

17. Daniel D. Quick, Representative Assembly Chair, presented a plaque to Vanessa Peterson Williams for all her work over the past year as Assembly Chair.
18. Vanessa Peterson Williams, Representative Assembly Chair, presented tokens of appreciation to the 2014-2015 Committee Chairs for their work over the past year.
19. Adjournment