Agenda
Public Policy Committee
April 20, 2018 – 8:00 am - State Bar of Michigan, Room 2
For those joining by phone, the conference call number is 1.877.352.9775, passcode 6516204165#.

Public Policy Committee……Jennifer M. Grieco, Chairperson

A. Reports

1. Approval of Meeting Minutes
   a. January 26, 2018
   b. February 12, 2018
   c. March 12, 2018

2. Public Policy Report

3. Committee Annual Reports

B. Court Rules

1. ADM File No. 2017-12: Proposed Addition of Rule 2.228 of the Michigan Court Rules

MCL 600.6404(3) allows defendant to transfer a case to the Court of Claims. This proposed rule would require such a transfer to be made at or before the time the defendant files an answer, which is the same period mandated for change of venue under MCR 2.221. This proposal arose from the Court's consideration of *Baynesan v Wayne State University* (docket 154435), in which defendant waited until just a month before trial before transferring a case he could have transferred nearly a year sooner.

Status:	06/01/18 Comment Period Expires.
Referrals:	03/05/18 Civil Procedure & Courts Committee; Government Law Section; Litigation Section; Negligence Law Section.
Comments:	Civil Procedure & Courts Committee. Comment provided to the Supreme Court included in materials.
Liaison:	Brian D. Shekell

2. ADM File No. 2017-10 - Proposed Addition of Rule 6.417 of the Michigan Court Rules

This proposed new rule, based on FR Crim P 26.3, would require a trial court to provide parties an opportunity to comment on a proposed order of mistrial, to state their consent or objection, or suggest alternatives. The proposal was pursued following the Court's consideration of *People v Howard,* docket 153651.

Status:	05/01/18 Comment Period Expires.
Referrals:	01/31/18 Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. Comments provided to the Supreme Court included in materials.
Liaison:	Hon. Michael J. Riordan

3. ADM File No. 2015-04 - Proposed Amendment of Rule 6.429 of the Michigan Court Rules

This proposed amendment is intended to provide trial courts with broader authority to *sua sponte* address erroneous judgments of sentence, following the Court's recent consideration of the issue in *People v Comer*, 500 Mich 278 (2017).

For purposes of publication, the Court included a six-month time period in which such a correction must be made *sua sponte*, and the Court is especially interested in input related to this aspect of the proposed amendments. In balancing the interest in correcting a sentence at any time against the interest in promoting finality and definiteness, adoption of a prescribed time period seems appropriate. Parties have six months to file such a motion under MCR 6.429(B)(3), and a good argument can be made that if the Court adopted a different time period for *sua sponte* corrections, the six-month period for parties would be irrelevant, as a party could simply ask the court to do *sua sponte* what the party could not do by motion. But there may be good reason to adopt a time period longer than that allowed for parties, or to consider a more flexible provision that does not include a specific time period but focuses on application of a standard such as "reasonableness," "good cause," or other language that leaves the determination to the trial court. Therefore, the Court is particularly interested in comments that address this issue.

Status: 05/01/18 Comment Period Expires.
Referrals: 01/31/18: Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. Comments provided to the Supreme Court included in materials.
Liaison: Kim Warren Eddie

4. ADM File No. 2017-14 - Proposed Adoption of Administrative Order 2018-XX

This administrative order would direct circuit courts in collaboration with county clerks to establish an agreed upon plan that outlines those duties not codified in statute or court rule that must be performed within the scope of the county clerk's role as clerk of the circuit court. The plan would be required to be approved by the Supreme Court.

Status: 06/01/18 Comment Period Expires.
Referrals: 03/05/18 Civil Procedure & Courts Committee.
Comments: None at this time.
Liaison: Shauna L. Dunnings

5. ADM File No. 2016-49 - Proposed Addition of Rule 1.18 and Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct

The proposed addition of new rule MRPC 1.18 and amendment of MRPC 7.3 would clarify the ethical duties that lawyers owe to prospective clients and create consistency in the use of the term "prospective client." This proposal was submitted to the Court by the Representative Assembly of the State Bar of Michigan.

Status: 05/01/18 Comment Period Expires.
Referrals: Not referred due to SBM proposal.
Comments: Professional Ethics Committee.
Liaison: Erane C. Washington

6. ADM File No. 2016-27 - Proposed Alternative Amendments of Rule 7.2 of the Michigan Rules of Professional Conduct

The first proposed amendment of Rule 7.2 of the Michigan Rules of Professional Conduct (Alternative A) would require certain lawyer advertisements to identify the lawyer or law firm providing services. This proposal was submitted by the State Bar of Michigan Representative Assembly. Alternative B is the model rule provision that relates to providing information about the lawyer or law firm responsible for the advertisement's content.

Status:	05/01/18 Comment Period Expires.
Referrals:	02/01/18 Civil Procedure & Courts Committee; Professional Ethics Committee; All Sections.
Comments:	Professional Ethics Committee; Alternative Dispute Resolution Section; Solo & Small Firm Section. Comments provided to the Supreme Court included in materials.
Liaison:	Jules B. Olsman

C. Legislation

1. HB 5702 (Runestad) Criminal procedure; forfeiture; prosecutional review of civil asset forfeiture in controlled substances cases; require. Amends sec. 7523 of 1978 PA 368 (MCL 333.7523).

Status:	03/08/18 Referred to House Committee on Judiciary.
Referrals:	03/20/18 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee.
Liaison:	Joseph J. Baumann

2. Wrongful Imprisonment Compensation Legislation

SB 0895 (Bieda) Civil procedure; other; court of claims notification requirements and statute of limitations; exempt claims under the wrongful imprisonment compensation act. Amends secs. 6431 & 6452 of 1961 PA 236 (MCL 600.6431 & 600.6452).

SB 0896 (Jones) Civil procedure; other; wrongful imprisonment compensation act; extend the time for claims by individuals who were released before the effective date of the act. Amends sec. 7 of 2016 PA 343 (MCL 691.1757).

Status:	03/22/18 Reported out of Senate Judiciary without Amendment.
Referrals:	03/20/18 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee.
Liaison:	Richard D. McLellan

D. Consent Agenda

To support the positions submitted by the Criminal Jurisprudence and Practice Committee on each of the following items:

Model Criminal Jury Instructions

1. M Crim JI 11.40, 40a, and 40.b

The Committee proposes new instructions, M Crim JI 11.40, 11.40a and 11.40b, for the "harmful substances" offenses found at MCL 750.200i, 750.200*l*, and 750.200j(1)(c), respectively. (Definitions are found at MCL 750.200h, and a penalty enhancement at MCL 750.212a.)

2. M Crim JI 11.41

The Committee proposes a new instruction, M Crim JI 11.41, for the "chemical irritant" offenses found at MCL 750.200j. (Definitions are found at MCL 750.200h, and a penalty enhancement at MCL 750.212a.)

3. M Crim JI 11.42 and 11.42a

The Committee proposes new instructions, M Crim JI 11.42 and 11.42a, for the "offensive or injurious substances" crimes found at MCL 750.209. (A penalty enhancement is found at MCL 750.212a.)

MINUTES
Public Policy Committee
January 26, 2018 – 8:00 am
State Bar of Michigan, Room 2

Committee Members: Jennifer M. Grieco, Joseph J. Baumann, Shauna L. Dunnings, Kim Warren Eddie, Richard D. McLellan, Daniel D. Quick, Victoria A. Radke, Judge Michael J. Riordan, Brian D. Shekell, Judge Cynthia D. Stephens, Erane C. Washington
Commissioner Guest: Donald G. Rockwell
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Reports

1. Approval of November 17, 2017 minutes
The minutes were unanimously approved.

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

B. Court Rules

1. ADM File No. 2017-19: Proposed Amendment of Rules 2.410 and 2.411 and Proposed Addition of Rule 3.970 of the Michigan Court Rules
The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.
The Access to Justice Policy Committee recommended support with amendments. The Alternative Dispute Resolution Section recommended support.
The committee voted unanimously (10) to adopt the position of the Access to Justice Policy Committee and authorize the Alternative Dispute Resolution Section to advocate its position of support, while also notifying the Section that it cannot oppose any of the amendments proposed by the State Bar position.

2. ADM File No. 2015-26: Proposed Addition of Rule 3.808 of the Michigan Court Rules
The proposed addition of Rule 3.808 is consistent with § 56 of the Michigan Adoption Code, MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending.
The Access to Justice Policy Committee recommended support.
The committee voted 9 in favor, 1 against to support the proposed addition of Rule 3.808 and recommend an amendment to expedite these cases for the best interest of the children.

3. ADM File No. 2016-13: Proposed Addition of Rule 3.810 of the Michigan Court Rules
The proposed new rule would require a court to provide an indigent putative father whose rights are terminated under the Adoption Code with transcripts for the purposes of appeal, similar to the requirement in MCR 3.977(J) for putative fathers whose rights are terminated under the Juvenile Code.

The Access to Justice Policy Committee recommended support. The Appellate Practice Section recommended support with amendments.

The committee voted unanimously to support the proposed addition of Rule 3.810 with the amendment listed below:

> **Rule 3.810 Transcripts for the Purposes of Appeal. In appeal following the involuntary termination of ~~the~~ parental rights ~~of a putative father~~, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.**

The letter should make clear that "respondent" encompasses all persons with standing to appeal.

4. ADM File No. 2017-18: Proposed Amendment of Rule 3.903 of the Michigan Court Rules

The proposed amendment of MCR 3.903 would make juvenile guardianship information public. This change would resolve the conflict between the child protective proceeding social file (which is considered nonpublic) and the juvenile guardianship file (which is public) and would make the rule consistent with current court practices.

The Access to Justice Policy Committee recommended support.

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

5. ADM File No. 2017-08: Proposed Amendment of Rules 3.977 and 6.425 of the Michigan Court Rules

The proposed amendments of MCR 3.977(J) and MCR 6.425(G) were submitted by the Court of Appeals. The proposed amendments would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when counsel is appointed by the court. The proposed amendments would codify existing practice in many courts, and the Court of Appeals believes they would promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process.

The Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Appellate Practice Section, and Criminal Law Section all recommended support.

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

6. ADM File No. 2016-25: Proposed Amendment of Rule 7.212 of the Michigan Court Rules

The proposed amendment of MCR 7.212 was submitted by the Court of Appeals. Proposed amendments of MCR 7.212 would require an appellant to file an appendix with specific documents within 14 days after filing the appellant's principal brief. The proposal is intended to identify for practitioners the key portions of the record that the Court deems necessary for thorough and efficient review of the issues on appeal.

The Access to Justice Policy Committee recommended support, as did the Criminal Jurisprudence & Practice Committee. The Civil Procedure & Courts Committee and Appellate Practice Section both recommended support with amendments.

The committee voted unanimously (11) to support the proposed amendment to Rule 7.212 as drafted, and authorize the Sections and Committees to submit their comments to the Court.

C. <u>Michigan Indigent Defense Commission (MIDC)</u>

1. MIDC Standard 8

Attorneys must have the time, fees, and resources to provide the effective assistance of counsel guaranteed to indigent criminal defendants by the United States and Michigan Constitutions. The MIDC Act calls for a minimum standard that provides: "Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided." MCL 780.991(2)(b). Fair compensation for assigned counsel may optimally be achieved through a public defender office, and the MIDC recommends

an indigent criminal defender office be established where assignment levels demonstrate need, together with the active participation of a robust private bar. MCL 780.991(1)(b). In the absence of, or in combination with a public defender office, counsel should be assigned through a rotating list and be reasonably compensated. Contracted services for defense representation are allowed, so long as financial disincentives to effective representation are minimized. This standard attempts to balance the rights of the defendant, defense attorneys, and funding units, recognizing the problems inherent in a system of compensation lacking market controls.

The Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and Criminal Law Section all recommended support.

The committee voted unanimously to support the Standard as written.

D. <u>Model Criminal Jury Instructions</u>

1. M Crim JI 10.9, 10.9a, 10.9b, 10.9c and 10.9d

The Committee proposes new instructions, M Crim JI 10.9, 10.9a, 10.9b, 10.9c and 10.9d, for the organized retail crime statutes found at MCL 752.1083 and 752.1084.

The Criminal Jurisprudence & Practice Committee recommended support.

The committee voted unanimously (12) to support the jury instructions as written.

2. M Crim JI 11.39, 11.39a and 11.39b

The Committee proposes new instructions, M Crim JI 11.39, 11.39a and 11.39b, for the "explosives" statutes found at MCL 750.204, 750.204a, 750.207 and 750.212.

The Criminal Jurisprudence & Practice Committee recommended support.

The committee voted unanimously (12) to support the jury instructions as written.

3. M Crim JI 15.11a and 15.12a

The Committee proposes amendments to M Crim JI 15.11a and 15.12a, the instructions for driving with Schedule 1 or 2 substances causing death or serious injury under MCL 257.625(4), (5) and (8). The amendments are intended to correct over-broad language in paragraph (4) that included all Schedule 2 substances, where only certain of those substances are included within the purview of the statute. Deletions are in strike-through; new language is underlined.

The Criminal Jurisprudence & Practice Committee recommended support with amendments.

The committee voted unanimously (12) to support the jury instructions as written.

4. M Crim JI 17.20 and 17.20c

The Committee proposes an amendment to M Crim JI 17.20 and a new instruction, M Crim JI 17.20c, instructions for violations of MCL 750.136b(3), second-degree child abuse. The amendment to M Crim JI 17.20 is intended to conform the instruction to statutory language that was omitted in the original instruction and to make technical corrections; deletions are in strike-through; new language is underlined. The new instruction, M Crim JI 17.20c, is for second-degree child abuse charges that were committed by a child care organization where there has been a violation of MCL 722.111 et seq.

The Criminal Jurisprudence & Practice Committee recommended support.

The committee voted unanimously (12) to support the jury instructions as written.

5. M Crim JI 17.33

The Committee proposes an amendment to M Crim JI 17.33, the instruction for violations of MCL 750.145n, which was amended to expand the scope of the statute, and to make technical corrections to the first and third paragraphs. Deletions are in strike-through; new language is underlined.

The Criminal Jurisprudence & Practice Committee recommended support.

The committee voted unanimously (12) to support the jury instructions as written.

6. M Crim JI 36.5
The Committee proposes an amendment to M Crim JI 36.5, the instruction that provides the aggravating factors found in MCL 750.462f that apply to the human trafficking instructions. The amendment accommodates an amendment to that statute. The new language is underlined.
The Criminal Jurisprudence & Practice Committee recommended support.
The committee voted unanimously (12) to support the jury instructions as written.

E. <u>Legislation</u>
1. Competency Evaluation
HB 5244 (Kesto) Mental health; other; time limitation on completion of examination to evaluate issue of incompetence to stand trial; implement. Amends sec. 1028 of 1974 PA 258 (MCL 330.2028).
HB 5246 (Kesto) Mental health; facilities; examination to evaluate issue of incompetence to stand trial; modify process and expand certain resources. Amends sec. 1026 of 1974 PA 258 (MCL 330.2026).
The Access to Justice Policy Committee recommended support. The Criminal Jurisprudence & Practice Committee and Prisons & Corrections Section recommended opposition.
The committee voted 3 to 9 that the bills were not Keller permissible.
The committee voted 9 to 3 that the bills are Keller permissible in affecting access to justice.
The committee voted unanimously (12) to support the concept of improving the speed and accuracy of competency evaluations, but note that these bills are not the vehicle in which to improve these due to lack of deadlines, funding, or standards.

2. HB 4433 (Neeley) Juveniles; criminal procedure; automatic record expungement of nonviolent juvenile offenses; provide for. Amends sec. 18e, ch. XIIA of 1939 PA 288 (MCL 712A.18e).
The Access to Justice Policy Committee recommended support with amendments. The Criminal Jurisprudence & Practice Committee recommended oppose. The Criminal Law Section recommended support.
The committee voted unanimously (11) that the bills are Keller permissible in improvement of the functioning of the courts.
The committee voted unanimously (11) to adopt the position of the Access to Justice Policy Committee.

3. HB 4728 (Geiss) Criminal procedure; defenses; legal aid for individuals in deportation proceedings; establish. Creates new act.
The Access to Justice Policy Committee recommended support.
The committee voted unanimously (11) that the bill is Keller permissible in affecting access to justice.
The committee voted 7 to 5 to table the bill for further research.

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January 31, 2018

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

RE: ADM File No. 2017-19: Proposed Amendment of Rules 2.410 and 2.411 and Adoption of New Rule 3.970 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced rule amendments published by the Court for comment. In its review, the Board considered recommendations from its Access to Justice Policy Committee and Alternative Dispute Resolution Section. After a review of these recommendations, the Board voted unanimously to support the proposed rules, with the amendments recommended by the Access to Justice Policy Committee.

The Board strongly supports the Court amending the Michigan Court Rules to allow mediation in appropriate child protection proceedings. Many times, mediation can lead to a better outcome for both the parent and child compared to a trial. The published changes include a number of provisions to protect the parties:

- mediation is nonbinding;
- unless the court holds a hearing, the court shall not refer a case to mediation if there is a PPO or other protective order;
- parties may otherwise object to a mediation order; and
- mediators are required to screen for domestic violence using the SCAO protocol.

Because of the unique nature of child protective proceedings, the Board believes additional amendments to the proposed rules are necessary to improve the mediation process and to protect vulnerable parties. These changes are discussed below and detailed in the attached redline of the rule proposal.

1. **Fees**. The Board recommends that fees are addressed in MCR 3.970(C)(3). Under the proposed rule, the court has the authority to appoint a mediator and the parties may stipulate to a mediator. However, the rule is silent on apportionment of costs, if any. The Board recommends that the rule provide for cost sharing between parties. In addition, the Board recommends adding the following language to protect low-income parties:

   > If a party qualifies for a waiver or suspension of fees under MCR 2.002 or the court determines that the party is unable to pay the cost of the mediator provider and free or low-cost mediation services are not available, the court shall not order a party to pay any portion of the mediation fees.

2. **Grounds for Objection.** The Board recommends that the Court add grounds for objections to mediation in MCR 3.970(D). A central principle of mediation is that parties must have the capacity to meaningfully participate in the process to reach a mutually satisfactory resolution. The rule already accounts for cases where a PPO exists; however, there are many other reasons why a case may not be appropriate for mediation. Additionally, where parties have taken significant steps toward resolving the issues, mediation may not be necessary or helpful and this should be a ground to object. To address these issues, the Board recommends inserting language from MCR 3.216(D), the domestic relations mediation rule, that sets out specific reasons for objecting in addition to a ground based on past efforts (subparagraph (e) below):

   Cases may be exempt from mediation on the basis of the following:
   (a) domestic abuse, unless attorneys for both parties will be present at the mediation session;
   (b) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
   (c) reason to believe that one or both parties' health or safety would be endangered by mediation;
   (d) a showing that the parties have made significant efforts to resolve the issues such that mediation is likely to be unsuccessful; or
   (e) for other good cause shown.

3. **Mediator Qualifications**. The Board recommends that the rules require all mediators to meet the qualifications requirements set out in MCR 3.970(H) unless parties can show an agreed mediator is otherwise qualified. As proposed, MCR 3.970(H) provides that qualifications for mediators include (1) completion of SCAO mediation training; (2) a JD, graduate degree or 5 years' experience in child protection; or 40 hours of mediation experience over two years; (3) observation of two mediation proceedings; and (4) 15 hours advanced training on child protection mediation and 8 hours on domestic violence screening. However, MCR 3.970(F)(1) provides that a mediator agreed upon by the parties need not meet the qualifications requirement. While parties may feel more comfortable with a particular mediator, it is also important that mediators have the knowledge and expertise to assist parties in resolving their dispute. For these reasons, the Board recommends the following (or similar language) be added at the end of the second sentence of MCR 3.970(F)(1):

   … provided that the parties can demonstrate to the court that the mediator is otherwise qualified for the specific issues in the case.

4. **Due Process**. The Board is concerned that the proposed rules may raise due process concerns, specifically with regards to plea agreements. In *In re Wagler*, 498 Mich 911 (2015), the parties reached a mediation agreement with a provision that the respondent would enter a plea and the adjudication would be held in abeyance. When the respondent failed

to comply with services, the court entered an order taking jurisdiction (without advising her of her rights) and terminated parental rights. This Court reversed the Court of Appeals' affirmance, holding that the manner in which the court assumed jurisdiction violated due process because it failed to satisfy itself that the plea (in the mediation agreement) was knowingly made. In order to address this due process concern with respect to plea agreement, the Board recommends that MCR 3.970(G)(6) be amended to require any mediation agreement to comply with MCR 3.971, which requires the court to advise a parent of the effect of a plea.

5. **Confidentiality**. The Board also recommends that parties to the mediation are fully advised of confidentiality issues. In *In re Brock*, 442 Mich 101 (1993), the Court held that under child protection law, MCL 722.631, privilege (except attorney-client) is abrogated and may not be used to exclude privileged statements as evidence in a proceeding. There is no easy solution to this issue; because on substantive issues statutes takes precedent over court rules, it is unclear whether this court rule protection for confidentiality will prevail a legal challenge. Therefore, the Board recommends that the court rule require mediators to advise parents of the limits of confidentiality under the court rules and MCL 722.631 so at least they will be aware.

6. **Technical Correction**. The Board recommends that the Court correct the following typographical error: in MCR 2.410(A)(2), the added language should reference "MCR 3.970" rather than "MCR 3.974."

These amendments will not only improve the mediation process, they will increase the likelihood that only appropriate cases are subject to mediation and that the rules adequately protect vulnerable parties.

Thank you for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

ADM File No. 2017-19

Proposed Amendment of Rules 2.410
and 2.411 and Adoption of New Rule 3.970
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rules MCR 2.410 and 2.411of the Michigan Court Rules and adoption of MCR 3.970. 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 2.410 Alternative Dispute Resolution

(A) Scope and Applicability of Rule; Definitions.

(1) [Unchanged.]

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under MCR ~~3.974~~ 3.970; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B)-(F) [Unchanged.]

Rule 2.411 Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases. MCR 3.970 governs mediation in child protective proceedings.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

[New] MCR 3.970 Child Protection Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to the mediation of child protective proceedings.

(2) "Mediation" includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power.

(B) ADR Plan. Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B).

(C) Order for Mediation.

(1) At any stage in the proceedings, after consultation with the parties, the court may order that a case be submitted to mediation.

(2) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation.

(3) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall:

(a) specify, or make provision for selection of, the mediation provider; ~~and~~

(b) provide time limits for initiation and completion of the mediation process~~.~~ AND

~~(b)~~(c) PROVIDE FOR PAYMENT OF COSTS OF MEDIATION. IF A PARTY QUALIFIES FOR A WAIVER OR SUSPENSION OF FEES UNDER MCR 2.002, OR THE COURT DETERMINES THAT THE PARTY IS UNABLE TO PAY THE COST OF MEDIATION AND FREE MEDIATION SERVICES ARE NOT REASONABLY AVAILABLE, THE COURT SHALL NOT

ORDER A PARTY TO PAY ANY PORTION OF THE MEDIATION FEES.

(4) The order may require attendance at mediation proceedings as provided in subrule (D).

(D) Objections to Mediation. A party may object to an order to mediate by filing a motion. CASES MAY BE EXEMPT FROM MEDIATION ON THE BASIS OF THE FOLLOWING:

(1) DOMESTIC ABUSE, UNLESS ATTORNEYS FOR BOTH PARTIES WILL BE PRESENT AT THE MEDIATION SESSION;

(2) INABILITY OF ONE OR BOTH PARTIES TO NEGOTIATE FOR THEMSELVES AT THE MEDIATION, UNLESS ATTORNEYS FOR BOTH PARTIES WILL BE PRESENT AT THE MEDIATION SESSION;

(3) REASON TO BELIEVE THAT ONE OR BOTH PARTIES' HEALTH OR SAFETLY WOULD BE ENDANGERED BY MEDIATION;

(4) A SHOWING THAT THE PARTIES HAVE MADE SIGNIFICANT EFFORTS TO RESOLVE THE ISSUES SUCH THAT MEDIATION IS LIKELY TO BE UNSUCCESSFUL; OR

(5) FOR OTHER GOOD CAUSE SHOWN.

A motion must be decided before the parties meet at a mediation session.

~~(D)~~(E) Attendance at Mediation Proceedings.

(1) Attendance of Counsel. The court may direct that the attorneys representing the parties attend mediation proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case.

(2) Presence of Parties. The court may direct that the parties to the action and other persons:

(a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and

(b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.

The court's order may specify whether the availability is to be in person or by other means.

(3) Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel.

(4) Failure to appear. The failure of a party to appear in accordance with this rule may be considered a contempt of court.

~~(E)~~(F) Selection of the Mediator.

(1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set

forth in subrule (H). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case AND PROVIDED THE PARTIES CAN DEMONSTRATE TO THE COURT, AND THE COURT FINDS, THAT THE MEDIATOR IS OTHERWISE QUALIFIED FOR THE SPECIFIC ISSUES IN THE CASE. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of subrule (H).

(2) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

~~(F)~~(G) Scheduling and Mediation Process.

(1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court.

(3) Mediation Process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement.

(4) Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time.

(5) Completion of Mediation. Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within

14 days of the completion of mediation.

(6) Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record AND THE COURT COMPLIES WITH MCR 3.971.

(7) Confidentiality. Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed. THE MEDIATOR SHALL ADVISE THE PARTIES, ORALLY AND IN WRITING, OF THE RULES REGARDING CONFIDENTIALITY UNDER MCR 2.412 AND MCL 722.631.

~~(G)~~(H) Qualification of Mediators.

(1) To be eligible to serve as a mediator in child protection cases, a person must meet the following minimum qualifications:

(a) Complete a general civil or domestic relations mediation training program approved by the State Court Administrator providing the generally accepted components of mediation skills;

(b) Have one or more of the following:

(i) Juris doctor degree, graduate degree in conflict resolution or a behavioral science, or 5 years of experience in the child protection field; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Upon completion of the training required under subrule (H)(1)(a), observe two general civil or domestic relations mediation proceedings conducted by an approved mediator, and conduct one general civil or domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(d) Complete a 15-hour advanced training program on child protection mediation practice and an 8-hour training program on domestic violence screening approved by the State Court Administrator.

(2) Approved mediators are required to complete 8 hours of advanced mediation training during each 2-year period.

(3) Additional requirements may not be imposed upon mediators.

Staff Comment: The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.

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

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, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-19. 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.

October 17, 2017

Clerk

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January 31, 2018

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

RE: ADM File No. 2015-26: Proposed Addition of New Rule 3.808 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the State Bar of Michigan Board of Commissioners (the Board) considered the above-referenced proposed rule amendment published by the Court for comment. As part of its review, the Board considered the recommendation from the Access to Justice Policy Committee.

After this review, the Board voted unanimously to support the proposed addition of MCR 3.808. The Board believes that the proposed addition of MCR 3.808 serves the interests of all parties to such proceedings and is an effort to correct a clearly identified gap in the existing process.

The Board, however, urges appellate courts to expedite termination of parental rights appeals as much as possible to allow finality in both the appeal and adoption proceeding.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

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January 31, 2018

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

RE: ADM File No. 2016-13: Proposed Addition of Rule 3.810 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the State Bar of Michigan Board of Commissioners (the Board) considered the above-referenced proposed rule amendment published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee and the Appellate Practice Section.

After this review, the Board voted unanimously to support the proposed addition of MCR 3.810 with the following clarifying amendment:

> Transcripts for Purposes of Appeal. In an appeal following the involuntary termination of ~~the~~ parental rights ~~of a putative father~~, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.

The Board supports providing transcripts at public expense to all indigent parties with standing to appeal orders involuntarily terminating parental rights under the adoption code. Standing to appeal, however, is not limited to the putative father in these types of proceedings. For example, a child may want to appeal an involuntary termination decision. In addition, cases could arise involving a surrogate, egg donor, or sperm donor. Therefore, the Board recommends that the rule be expanded to include all indigent parties with standing to appeal.

The Board also notes that the term "respondent" in the rule should be interpreted to encompass all persons with standing to appeal.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

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January 31, 2018

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

RE: ADM File No. 2017-18: Proposed Amendment of Rule 3.903 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the State Bar of Michigan Board of Commissioners (the Board) considered the above-referenced proposed rule amendment published by the Court for comment. As part of its review, the Board considered a recommendation from the Access to Justice Policy Committee.

After this review, the Board voted unanimously to support the proposed amendment of MCR 3.903. In juvenile guardianship proceedings, the identity of the guardian is not confidential information and the Board sees no reason to continue treating it as such in child protective proceedings.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

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January 31, 2018

Larry Royster
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P.O. Box 30052
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RE: ADM File No. 2017-08: Proposed Amendments of Rules 3.977 and 6.425 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the State Bar of Michigan Board of Commissioners (the Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee, the Criminal Jurisprudence & Practice Committee, the Appellate Practice Section, and the Criminal Law Section. These committees and sections all supported the proposed amendments.

After this review, the Board voted unanimously to support the proposed amendments of MCR 3.977 and 6.425. The Board supports providing complete transcripts in criminal and termination of parental rights appeals in which a party is indigent and appointed counsel has been assigned. Not only will these amendments streamline the appellate process, they will allow counsel to better identify the issues for appeal and assist the Court of Appeals in reaching the proper decision on appeal.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

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January 31, 2018

Larry Royster
Clerk of the Court
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P.O. Box 30052
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RE: ADM File No. 2016-25: Proposed Amendment of Rule 7.212 of the Michigan Court Rules

Dear Clerk Royster:

At its January 26, 2018 meeting, the State Bar of Michigan Board of Commissioners (the Board) considered the above-referenced proposed rule amendment published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee, the Civil Procedure & Courts Committee, the Criminal Jurisprudence & Practice Committee, and the Appellate Practice Section.[1]

After this review, the Board voted unanimously to support the proposed amendments to MCR 7.212, requiring appendices to appellate briefs and setting forth clear requirements for such appendices.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] The Board authorized the Civil Procedure & Courts Committee and the Appellate Practice Section to independently advocate their positions directly to the Court. Although the Board did not adopt the recommendations set forth in these positions, the Board wanted to give the Court the opportunity to consider these suggestions as well.

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February 5, 2018

Michigan Indigent Defense Commission
200 N. Washington Sq., 3rd Floor
Lansing, MI 48913

RE: Michigan Indigent Defense Commission Standard 8

Members of the Commission:

At its January 26, 2018 meeting, the Board of Commissioners of the State Bar of Michigan (the Board) considered Standard 8 – Economic Disincentives or Incentives, which the MIDC published for comment. In its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee, the Access to Justice Policy Committee, and the Criminal Law Section. Based on those recommendations, the Board voted unanimously to support the proposed standard.

To ensure that indigent criminal defendants receive effective legal representation, it is vitally important that their attorneys are adequately compensated for their work and reimbursed for actual expenses. The proposed standard takes significant steps to improve compensation for court-appointed counsel.

Although Standard 8 calls for relatively large increases in fees over what many courts current pay, this increase is necessary to provide indigent defendants with their constitutional right to adequate legal representation. The hourly fees are still approximately half of what the average solo practitioner and the average private criminal defense attorney in Michigan charge on an hourly basis. *See* The State Bar of Michigan 2014 Economics of Law Practice Survey, Table 3 – Attorney Hourly Billing Rates and Table 7 – Attorney Hourly Billing Rates by Field of Practice.

Standard 8 also provides flexible guidelines for localities to review and pay attorney bills and moves this administrative function out of the judiciary. Just as clients review their attorneys' bills prior to payment, the locality, as the entity contracting for legal services for indigent criminal defendants, should control the review process for attorney bills and receipts. The Standard 8 payment guidelines allow each locality to define thresholds requiring additional scrutiny of potentially excessive attorney charges. With time, the administrative office will gain an expertise as to the appropriateness of attorney billing for that particular locality.

Although there may be concerns that attorneys will take advantage of the new hourly compensation rate and overbill for their services, attorneys who misrepresent their billing face significant consequences. Not only could these attorneys be removed from the locality's criminal assignment list, these attorneys – like all licensed

attorneys in Michigan – could face sanctions for violating the Michigan Rules of Professional Conduct (MRPC). The comment to MRPC 4.1 requires that a lawyer be "truthful when dealing with others on a client's behalf," which would extend to a lawyer submitting his or her bills to the locality for payment. Therefore, attorneys who exaggerate and misrepresent their billing do so at their own peril – not only will they be removed from criminal assignment lists, but they could also be subject to professional disciplinary sanctions, including disbarment.

Another important aspect of Standard 8 is the discouragement of event-based fee systems. These systems discourage good lawyering through two economic disincentives. First, low fees for trials and motion practice often encourage attorneys to attempt to plead out a high number of cases with relatively little work to make the practice of law economically viable. This results in a lower standard of practice for indigent clients compared to those with retained lawyers. Second, by paying per event, rather than the actual hours worked, attorneys have less incentive to put the often long and laborious work into the case of a difficult client who should be convinced to plead guilty. The attorney may decide that the he or she cannot afford the long uncompensated hours necessary to get the client to plead and it is easier and more advantageous to simply take the case to trial. In the end, these unnecessary trials cost the state more money in wasted judicial and prosecutorial resources and longer sentences.

In conclusion, the proposed Standard 8 will significantly improve indigent criminal defendants' access to legal services and the quality of those services. For these reasons, the Board unanimously supports Standard 8.

Sincerely,

Janet K. Welch
Executive Director

cc: Donald G. Rockwell, President

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January 31, 2018

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 10.9, 10.9a, 10.9b, 10.9c and 10.9d
M Crim JI 11.39, 11.39a and 11.39b
M Crim JI 15.11a and 15.12a
M Crim JI 17.20 and 17.20c
M Crim JI 17.33
M Crim JI 36.5

Dear Mr. Smith:

The Board of Commissioners of the State Bar of Michigan 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 vote to support all of the above model criminal jury instructions as written.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Donald G. Rockwell, President

Minutes
Public Policy Committee
February 12, 2018 – 12:00 pm
Teleconference Only
Please call 1.877.352.9775, passcode 6516204165#.

Committee Members: Jennifer M. Grieco, Joseph J. Baumann, Shauna L. Dunnings, James W. Heath, Kim Warren Eddie, Richard D. McLellan, Daniel D. Quick, Victoria A. Radke, Hon. Cynthia D. Stephens, Erane C. Washington
SBM Staff: Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI: Marcia Hune

1. ADM File No. 2016-23: Proposed Amendment of Rule 2.105 of the Michigan Court Rules
The proposed amendment of MCR 2.105 would reference service on the "agent for service of process" so that it is consistent with MCL 449.1105(2).
The committee voted unanimously (10) to support the proposed amendment of Rule 2.105.

2. ADM File No. 2016-09: Proposed Amendments of Rules 3.804, 3.971, 3.977, and Addition of Rule 3.809 of the Michigan Court Rules
The proposed amendments would incorporate into both the rules concerning juvenile proceedings and adoption proceedings the requirement to notify parents that the termination of parental rights does not automatically terminate the obligation to provide support for a child. The proposed amendments also would make clear that failure to provide the notice would not affect the parent's obligation to continue to pay child support.
The Access to Justice Policy recommended support with amendments. The Family Law Section recommended support.
The committee voted unanimously (10) to support the proposed amendments of Rules 3.804, 3.971, 3.977, and Addition of Rule 3.809.

3. ADM File No. 2014-36: Proposed Amendment of Rule 6.425 of the Michigan Court Rules
The proposed amendments of MCR 6.425(G) would reflect recent changes to the appellate counsel assignment process by extending and segmenting the timeframe for courts to respond to appointment requests, requiring judges to provide a statement of reason when appellate counsel is denied, encouraging courts to liberally grant untimely requests for appellate counsel in guilty plea cases, requiring the filing of all lower court transcripts and clarifying MAACS assumption of the trial courts service obligations.
The Access to Justice Policy Committee, Appellate Practice Section, and Criminal Law Section recommended support. The Criminal Jurisprudence & Practice Committee recommended support with amendments.
The committee voted unanimously (10) to support the proposed amendment of Rule 6.425 with a comment recommending that the Court reconcile the provisions of ADM File No. 2014-36 with ADM File No. 2017-08 (amending MCR 6.425(G)).

4. ADM File No. 2016-07: Proposed Amendments of Rules 6.310, 6.428, 6.429, 6.431, 7.205, 7.211, and 7.212 of the Michigan Court Rules

The proposed amendments were submitted to the Court by the State Appellate Defender Office, which argues that they would clarify practices and provide protections for criminal defendants represented by assigned appellate counsel. The proposed amendments would allow an additional 42 days to file post-judgment motions in certain circumstances, expand MCR 6.428 to apply to both plea and trial appeals and where delay is due to the trial court, clarify in proposed amendment of MCR 7.205 that in certain circumstances, substitute appellate counsel may file a delayed application for leave to appeal within 42 days of appointment (even if later than six months after sentencing), add language to MCR 7.211 to guide parties and courts if relief is granted in the trial court, and change the procedure for seeking permission to file a brief longer than 50 pages in length.

The Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Appellate Practice Section, and Criminal Law Section recommended support.

The committee voted unanimously (10) to support the proposed amendments of Rules 6.310, 6.428, 6.429, 6.431, 7.205, 7.211, and 7.212.

5. ADM File No. 2016-20: Proposed Amendment of Rule 8.119 of the Michigan Court Rules

The proposed amendment of MCR 8.119 would clarify the procedure for sealing files and better accommodate protective orders issued under MCR 2.302 by clarifying that a protective order may authorize parties to file materials without also filing a motion to seal.

The committee voted unanimously (10) to support the proposed amendment of Rule 8.119.

6. Michigan Indigent Defense Grants: FY 2019 Executive Recommendation

The governor's budget includes $61.3 million for local indigent defense systems to support the four initial minimum standards to improve the statewide provision of indigent criminal defense services. The standards were authorized by the Michigan Indigent Defense Commission (MIDC), and Michigan's 134 local systems will receive grants to support the costs of improvements required to meet the standards. The recommended total of $61.3 million includes $46 million general fund and $15.3 million in reimbursements from partially indigent defendants.

The committee voted unanimously (10) that this item is Keller permissible.

The committee voted unanimously (10) to support the governor's recommendation.

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March 1, 2018

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

RE: ADM File No. 2016-23: Proposed Amendment of Rule 2.105 of the Michigan Court Rules

Dear Clerk Royster:

At its February 13, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendment published by the Court for comment.[1] As part of its review, the Executive Committee considered a recommendation from the Public Policy Committee.

After this review, the Executive Committee voted unanimously to support the proposed amendment of MCR 2.105, which makes the court rule consistent with MCL 449.1105(a)(2).

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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

RE: ADM File No. 2016-09: Proposed Amendments of Rules 3.804, 3.971, and 3.977 and Addition of New Rule 3.809 of the Michigan Court Rules

Dear Clerk Royster:

At its February 13, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendments published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Access to Justice Policy Committee, Family Law Section, and Public Policy Committee.

After this review, the Executive Committee voted unanimously to support the proposed amendment of MCR 3.804, 3.971, and 3.977 and the addition of MCR 3.809. The additional notice requirements set forth in the proposal will help ensure that all interested parties understand that ongoing child support obligations continue even after a parent voluntarily terminates his or her parental rights until a subsequent order is entered or other action is taken. These amendments will help prevent parents from acting under the mistaken assumption that child support obligations automatically end when they voluntary terminate their parental rights.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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March 1, 2018

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

RE: ADM File No. 2014-36: Proposed Amendment of Rule 6.425 of the Michigan Court Rules

Dear Clerk Royster:

At its February 13, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendment published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Appellate Practice Section, Criminal Law Section, and Public Policy Committee. All of these entities recommended that the State Bar of Michigan support the rule proposal.

After this review, the Executive Committee voted unanimously to support the proposed amendments to MCR 6.425, as they reflect recent changes to the assignment process for the Michigan Appellate Assigned Counsel System.

The Executive Committee notes that ADM 2017-08 is currently pending before the Court, which the State Bar of Michigan also supports. Because ADM 2017-08 proposes amendments to MCR 6.425(G), the Executive Committee requests that the Court ensure that the language in ADM 2017-08 is consistent with the language in ADM 2014-36 should the Court decide to adopt both rule proposals.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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March 1, 2018

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

RE: ADM File No. 2016-07: Proposed Amendments of Rules 6.310, 6.428, 6.429, 6.431, 7.205, 7.211, and 7.212 of the Michigan Court Rules

Dear Clerk Royster:

At its February 13, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendments published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Appellate Practice Section, Criminal Law Section, and Public Policy Committee. All of these entities recommended that the State Bar of Michigan support the rule proposal.

After this review, the Executive Committee voted unanimously to support the proposed amendments to MCR 6.310, 6.428, 6.429, 6.431, 7.205, 7.211, and 7.212. These proposed rule amendments will make the criminal procedure process fairer and better protect criminal defendants.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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March 1, 2018

Larry Royster
Clerk of the Court
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P.O. Box 30052
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RE: ADM File No. 2016-20: Proposed Amendment of Rule 8.119 of the Michigan Court Rules

Dear Clerk Royster:

The State Bar of Michigan (SBM) thanks the Court for publishing for comment the proposed amendment to Rule 8.119 of the Michigan Court Rules (MCR). Recognizing the confusion and inconsistencies in the process of sealing documents in circuit courts across the state, SBM proposed this amendment to MCR 8.119(I).[1] The proposed amendment would clarify that parties may use protective orders issued under MCR 2.302(C) to designate and file confidential materials under seal without having to file subsequent motions to seal pursuant to MCR 8.119(I). This proposal strikes an appropriate balance between protecting confidential and sensitive information required to be filed in court as part of a legal dispute while protecting the public's right to access court records. SBM continues to support this rule amendment.

As discussed in more detail in our June 1, 2016 letter, practitioners have faced repeated problems with court clerks refusing to seal exhibits to court filings, even though a protective order requires such documents to be filed under seal. Typically, protective orders issued under MCR 2.302(C) contain a provision requiring confidential materials attached to court filings be filed under seal. In the past, court clerks would accept such filing upon a showing of the protective order. Recently, however, some court clerks have changed this practice and will not accept sealed filings without an order to seal issued under MCR 8.119(I). This results in unnecessary and burdensome motion practice. Parties are required to file a motion under MCR 8.119(I) every time they seek to file an exhibit subject to a protective order with a court filing. This motion will likely be opposed in some way by the opposing party and require the trial court to hold a hearing and issue a separate order on whether to seal the exhibits before even considering the substance of the motion. This change in practice has resulted in an additional, unnecessary layer of litigation,

[1] This rule proposal was submitted by our Civil Procedure & Courts Committee and approved with overwhelming support by the Representative Assembly (90 to 2) at its April 30, 2016 meeting. The rule proposal was reconsidered by SBM's Executive Committee on February 13, 2018 in light of Judge Van Allsburg's public comment dated December 18, 2017, and the Committee voted unanimously to support the rule as published by the Court for comment.

defeating the rule of construction set forth in MCR 1.105 stating that the "rules are to be construed to secure the just, speedy, and economical determination of every action . . ."

We are heartened that the Michigan Judges Association (MJA) and Judge Van Allsburg recognize that there are problems with the sealing process and support amending MCR 8.119. They oppose the amendments specifically proposed in ADM 2016-20, however, arguing that the amendment will create a less rigorous track under MCR 2.302(C) for sealing documents that "threaten[s] to undermine the principle of open court files . . ." We agree that preserving the public's access to court records is an important concern, but believe the proposed amendment strikes the right balance between public access to court records and the need to protect individuals' and corporations' confidential and sensitive information. If we can't ensure adequate protection for confidential and sensitive information, we believe our courts will cease to be a viable forum to resolve disputes. And the amendment does not plow new ground in terms of protecting confidential or sensitive information: under the plain language of MCR 2.302(C), judges already have the discretion to enter provisions concerning the sealing of documents filed with the court in a protective order. And the proposed amendment offers an improved mechanism to satisfy public access concerns. To the extent an individual has a legitimate interest in a document filed under seal, proposed subsection 9 provides a mechanism in which any member of the public may petition the court for access to such documents.

MCR 2.302(C) is an appropriate rule under which a court may issue a protective order instructing parties to file confidential or other sensitive materials under seal with the court. MCR 2.302(C) provides in relevant part:

> On motion by a party or by person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending ***may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or under burden or expense*** [including] . . . (8) that a trade secret or other confidential research, development, or commercial information not be disclosures or be disclosed only in a designated way; [and] (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. [Emphasis added.]

The use of the language "any order" indicates that the list provided in MCR 2.302(C)(1)-(9) is a demonstrative, rather than exhaustive, list of ways in which the court may protect parties. This means that nothing in the rule prohibits a court from applying the good cause test set forth in MCR 2.032(C) to issue a protective order with a provision governing the sealing of confidential documents in court filings.

Further, MCR 2.302(C) takes precedence over MCR 8.119(I). MCR 8.119(I) provides that "***[e]xcept as otherwise provided by statute or court rule***, a court may not enter an order that seals courts records, in whole or in part in any action or proceeding, unless . .

." (emphasis added). As discussed above, MCR 2.302(C) provides a means for a court to issue a protective order addressing the sealing of court documents. Indeed, MCR 8.119(I)(4) explicitly states that "[n]othing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C)." Therefore, based on the plain language of MCR 2.302(C) and 8.119(I), nothing in the current rules requires courts to apply the arguably more rigorous test set forth in MCR 8.119(I) prior to issuing an order to seal confidential or sensitive documents in court files. In short, the proposed amendment merely clarifies that MCR 2.302(C) is an appropriate rule under which a court may issue a protective order addressing the sealing of confidential documents filed with the court.

MJA and Judge Van Allsburg raise concerns that the proposed rule amendment will create a secondary track for parties to request documents be sealed with less judicial involvement than is required by MCR 8.119(I). Specifically, they argue that parties will be able to obtain orders to seal documents without the court holding a hearing or forwarding the sealing order to this Court and the State Court Administrative Office (SCAO). Proposed MCR 8.119(I)(8), however, specifically states that "[n]othing in this rule is intended to limit the court's authority to . . . require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and [SCAO]." In addition, nothing in MCR 2.302(C) or 8.119(I) prohibits a court from holding a hearing on a motion for a protective order; indeed, MJA notes that even under current practice "a significant minority of [protective] orders require a motion and hearing."

MJA and Judge Van Allsburg are also concerned about the rule proposal because many times protective orders are entered by stipulation between the parties. Nothing in MCR 2.302(C) empowers parties to stipulate to protective orders that are immune from court oversight and approval. The rule only authorizes the court to "issue an order as justice requires" to adequately protect parties from "annoyance, embarrassment, oppression, or undue burden or expense." Although parties may regularly present trial courts with proposed stipulated protective orders, the court retains its discretion to tailor those protective orders as justice requires, balancing the interests of protecting the parties with the interests of public access to court documents. Importantly, proposed MCR 8.119(I)(9) retains the process for an individual to gain access to sealed documents, providing that "[a]ny person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order."

Finally, SBM would like to note that the proposed amendments to MCR 8.119(I) conflict with the process for filing documents under seal proposed in ADM 2002-37, which is currently pending before this Court. SBM respectfully requests that this Court revise proposed MCR 1.109(D)(8) to make clear that documents may be filed under seal pursuant to a protective order issued under MCR 2.302(C).

We thank the Court for publishing this proposed rule amendment for comment and for the opportunity to convey SBM's position on the rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

Minutes
Public Policy Committee
March 12, 2018 – 12:00 pm
Teleconference Only

Committee Members: Jennifer M. Grieco, Joseph J. Baumann, Shauna L. Dunnings, Kim Warren Eddie, James W. Heath, Richard D. McLellan, Daniel D. Quick, Victoria A. Radke, Judge Michael J. Riordan, Brian D. Shekell, Judge Cynthia D. Stephens, Erane C. Washington
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Court Rules

1. ADM File No. 2016-19/2016-28 - Proposed Amendment of MCR 5.125 and 5.409

The proposed amendment of MCR 5.125(C)(22) is intended to ensure that minor children of an alleged legally incapacitated person receive notice of a petition as presumptive heirs. The proposed amendments of MCR 5.125(C)(23) were submitted by the Representative Assembly of the State Bar of Michigan, and are intended to clarify the definition of persons interested in receiving a copy of a guardianship report for a minor, as referenced by MCL 700.5215. The proposed amendment of MCR 5.409 is intended to ensure that the financial institution statements and verification of funds reflect assets on hand as of the last day of the accounting period, not some time beyond that date.
The Civil Procedure & Courts Committee recommended support with amendments.
The committee vote unanimously (12) supports the amendments to MCR 5.125 with the recommendation that "adult child" is defined in MCR 5.125(C)(1).
The committee voted unanimously (12) to take no position on the amendments to MCR 5.409 as currently drafted and recommend that it be amended for clarification and correction.

2. ADM File No. 2016-08 - Proposed Amendment of MCR 6.610

The proposed amendment of MCR 6.610 would eliminate an arguable conflict between MCR 6.610(E)(4) and MCR 6.610(E)(7).
The Criminal Jurisprudence & Practice Committee and Criminal Law Section recommended support.
The committee voted unanimously (12) to support the proposed amendment.

3. ADM File No. 2016-42 - Proposed Amendments of MCR 6.310, 6.429, and 6.431

The proposed amendments of MCR 6.310, 6.429, and 6.431 would provide a "prison-mailbox" rule for post-sentencing motions to withdraw plea, motions to correct an invalid sentence and motions for new trial, filed by in pro per defendants in the custody of the Department of Corrections.
Committee; Criminal Law Section; Prisons & Corrections Section.
The Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Appellate Practice Section, and Criminal Law Section recommended support, although the Criminal Jurisprudence & Practice Committee offered one correction.
The committee voted unanimously (12) to support the proposed amendments with the following corrections as presented in bold font:

MCR 6.310 – Timely filing may be shown by a sworn statement **filed with the motion,** which must set form the date of deposit…
MCR 6.429 –
If a motion to ~~withdraw~~ **correct an** invalid sentence is received.

Timely filing may be shown by a sworn statement **filed with the motion**, which must set form the date of deposit…
MCR 6.431 – Timely filing may be shown by a sworn statement **filed with the motion**, which must set form the date of deposit…

4. ADM File No. 2016-30 - Proposed Amendments of MCR 9.112 and 9.131
The proposed amendments of MCR 9.112 and MCR 9.131 would provide that spouses of AGC or ADB members or employees would be subject to the same procedure for review of allegations of misconduct as the Board or Commission member or employee. This change would comport with recent Supreme Court practice. These proposed amendments are intended to address any perceived conflict of interest that may exist if the procedures in MCR 9.112 were to be used to review a request for investigation of the spouse of a member or employee of the Attorney Grievance Commission or Attorney Discipline Board.
The Professional Ethics Committee recommended support the amendments.
The committee voted unanimously (11) to support the proposed amendments with the recommendation from the Professional Ethics Committee to suggest that the Court consider expanding the rule to include other relations, such as domestic partners, significant others, and adult relatives.

5. ADM File No. 2016-45 - Proposed Amendment of MCR 9.122
The proposed amendment of MCR 9.122 would establish a 56-day time period within which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission (AGC) has dismissed a request for investigation.
The Professional Ethics Committee recommended support with amendments.
The committee voted unanimously (11) to support the proposed amendment with the recommendation from the Professional Ethics Committee to extend the deadline from 56 days to 180 days.

6. ADM File No. 2016-31 - Alternative Proposed Amendments of MRPC 1.16
These alternative proposed amendments of MRPC 1.16(b) are intended to address the possibility of an involuntary plea as the result of an attorney's threat to withdraw as counsel for a criminal client if that client does not accept a previously offered plea (under Alternative A) or more broadly if a lawyer seeks to withdraw because the lawyer considers the client's objective repugnant or imprudent. Under the proposed amendments, the attorney would be required to advise the client that the attorney may not withdraw without permission of the court. Under Alternative A, the requirement would apply only where the client refuses to accept a previously-offered plea agreement; under Alternative B, the requirement would apply in any criminal case in which the lawyer intends to withdraw under MRPC 1.16(b)(3). These proposed amendments arose during the Court's consideration of People v Townsend, docket 153153.
The Criminal Jurisprudence & Practice Committee recommended supporting amending MRPC 1.16 as proposed by the Committee. The Criminal Law Section recommended opposition with recommended amendments.
The committee voted unanimously (11) to oppose the proposed amendments to this rule and recommend that the rule be amended to follow the American Bar Association Model rule, and include the language proposed by the Criminal Jurisprudence & Practice Committee:
Rule 1.16(b)
(a) Unchanged

(b) Except as stated in paragraph (c), after informing the client that he cannot do so without permission from the court, a lawyers may withdraw from representing a client if withdrawal can be accompanied without material adverse effect on the interests of the client, or if:
(1)-(2) unchanged
(3) the client insists upon taking action ~~pursuing an objective~~ that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement~~imprudent~~;
(4)-(6) unchanged

[Language from (b)(3) taken from ABA Model Rule 1.16(b)(4); language in (b) taken from suggestion by Criminal Jurisprudence & Practice Committee]

B. Legislation
1. SB 0871 (O'Brien) Criminal procedure; statute of limitations; statute of limitations for certain criminal sexual conduct violations; modify. Amends sec. 24, ch. VII of 1927 PA 175 (MCL 767.24).

2. SB 0872 (Knezek) Civil procedure; statute of limitations; statute of limitations for criminal sexual conduct violations; extend retroactively, and add grace period for minor victims of criminal sexual conduct. Amends sec. 5805 of 1961 PA 236 (MCL 600.5805) & adds sec. 5851b.

3. SB 0875 (O'Brien) Courts; other; court of claims; notice of intention and certain procedures in cases involving minor claimants; modify. Amends sec. 6431 of 1961 PA 236 (MCL 600.6431).

4. SB 0876 (Horn) Courts; other; court of claims; statute of limitation in certain types of cases involving minor claimants; modify. Amends sec. 6452 of 1961 PA 236 (MCL 600.6452).
The committee voted 7 to 4 to table the legislation.

C. ABA Day 2018
1. Funding for the Legal Services Corporation (LSC)
LSC grantees provide civil legal aid to constituents who struggle to get by on incomes below or near the poverty line. The President's FY 2019 Budget proposes the elimination of LSC funding, while the Legal Services Corporation FY 2019 funding request is $564.8 million. (Current funding is at $385 million.) Last year, in accordance with the ABA, the State Bar of Michigan advocated to restore funding at least the inflation-adjusted FY 2010 level of $482 million.
The committee voted unanimously that this was Keller permissible in improving the availability of legal services to society.
The committee voted unanimously (11) to support.

2. Public Service Loan Forgiveness
The ABA supports preservation of the federal public service loan forgiveness program (PSLF) as a vital source of immediate support to state, local, and tribal communities that enables them to provide critical services to their residents. The ABA opposes efforts to repeal or end the program, such as in H.R. 4508, PROSPER Act, absent any impact analysis or alternative strategy for addressing the underlying problem for which the program was created.
The committee voted unanimously that this was Keller permissible in improving the availability of legal services to society.
The committee voted unanimously (11) to support.

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March 29, 2018

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

RE: ADM File Nos. 2016-19 and 2016-28: Proposed Amendments of Rules 5.125 and 5.409 of the Michigan Court Rules

Dear Clerk Royster:

At its March 20, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendments published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Civil Procedure & Courts Committee and Public Policy Committee.

After this review, the Executive Committee voted unanimously to support the proposed amendments to MCR 5.125 with the recommendation that the term "adult child" be defined in MCR 5.125(C)(1) as a "child 18 years or older." This will prevent emancipated minors from claiming that they fall within the category of "adult child."

The Executive Committee took no position on the proposed amendments to MCR 5.409. Instead, the Executive Committee recommends that the Court ask the proponent of this rule change to amend and clarify the proposed rule language to address the concerns raised in the public comments.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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March 29, 2018

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

RE: ADM File No. 2016-08: Proposed Amendment of Rule 6.610 of the Michigan Court Rules

Dear Clerk Royster:

At its March 20, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendment published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Criminal Law Section, Criminal Jurisprudence & Practice Committee, and Public Policy Committee, all of which supported the proposed amendment.

After this review, the Executive Committee voted unanimously to support the proposed amendment to MCR 6.610 to eliminate any conflict between subsections (E)(4) and (E)(7).

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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March 29, 2018

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

RE: ADM File No. 2016-42: Proposed Amendments of Rules 6.310, 6.429, and 6.431 of the Michigan Court Rules

Dear Clerk Royster:

At its March 20, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendments published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Criminal Law Section, Appellate Practice Section, Criminal Jurisprudence & Practice Committee, Access to Justice Policy Committee, and Public Policy Committee.

After this review, the Executive Committee voted unanimously to support the rule proposal to provide a prison-mailbox rule for post-sentencing motions with the following amendments (recommended language shown in bold):

MCR 6.310:

Timely filing may be shown by a sworn statement **filed with the motion**, which must set forth the date of deposit and state that first-class postage has been prepaid.

MCR 6.429:

If a motion to ~~**withdraw**~~**correct an** invalid sentence is received by the court after the expiration of the periods set forth above . . . Timely filing may be shown by a sworn statement **filed with the motion**, which must set forth the date of deposit and state that first-class postage has been prepaid.

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

MCR 6.431

Timely filing may be shown by a sworn statement **filed with the motion,** which must set forth the date of deposit and state that first-class postage has been prepaid.

Requiring that the sworn statement be filed with the motion will reduce the number of disputes about when the prisoner deposited the motion in the outgoing mail at the correctional institution and assist courts in determining the timeliness of the post-sentencing motion.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

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March 29, 2018

Larry Royster
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P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2016-30: Proposed Amendments of Rules 9.112 and 9.131 of the Michigan Court Rules

Dear Clerk Royster:

At its March 20, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendments published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Professional Ethics Committee and Public Policy Committee.

After this review, the Executive Committee voted unanimously to support the proposed amendments with the recommendation that the Court consider whether the use of the term "spouse" is too limited to fully address the perceived conflict of interest issue that led to this rule proposal, and might be amended to include other domestic relationships, such as significant others, domestic partners, or other adult relatives.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2016-45: Proposed Amendment of Rule 9.122 of the Michigan Court Rules

Dear Clerk Royster:

At its March 20, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendment published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Professional Ethics Committee and Public Policy Committee.

After this review, the Executive Committee voted unanimously to support the rule proposal with the amendment that the Court extend the deadline to file a complaint in the Supreme Court from 56 days to 180 days to allow sufficient time for the Attorney Grievance Commission to consider and determine requests for reconsideration of dismissals.

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

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March 29, 2018

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

RE: ADM File No. 2016-31: Proposed Amendment of Rule 1.16 of the Michigan Rules of Professional Conduct

Dear Clerk Royster:

At its March 20, 2018 meeting, the State Bar of Michigan Executive Committee considered the above-referenced proposed rule amendment published by the Court for comment.[1] As part of its review, the Executive Committee considered recommendations from the Criminal Law Section, Criminal Jurisprudence & Practice Committee, Professional Ethics Committee, and Public Policy Committee.

After this review, the Executive Committee voted unanimously to oppose both Alternative A and Alternative B. Instead, the Executive Committee recommends that the Court adopt the following amendments to Rule 1.16 (proposed amendments shown in underline, strikethrough, and bold):

> (a) [No change.]
>
> (b) Except as stated in paragraph (c), **after informing the client that the lawyer cannot do so without permission from the tribunal for the pending case,** a lawyer may withdraw from representing a client if withdrawal can be accompanied without material adverse effect on the interests of the client, or if:
>
> (1)-(2) [No change.]
>
> (3) the client insists upon **taking action ~~pursuing an objective~~** that the lawyer considers repugnant or **with which the lawyer has a fundamental disagreement~~imprudent~~;**
>
> (4)-(6) [No change.]

[1] Under Article III, §9 of the State Bar of Michigan Bylaws, "[t]he Executive Committee may take a position on a proposed Court Rule if the deadline for a response does not allow for consideration by the Board, provided the position is not inconsistent with policies adopted by the Board or Representative Assembly."

To address the issue presented in *People v Townsend*, in subsection b, the State Bar recommends that the rule require the lawyer to inform the client that the lawyer must obtain permission from the court before he or she will be allowed to withdraw.

In addition, the State Bar agrees with the Michigan District Judges Association (MDJA), the Criminal Law Section, and Mr. Blanchard that a lawyer should not be allowed to withdraw from a case simply because the lawyer considers the client's actions to be "imprudent." The dictionary defines "imprudent" as "not prudent; lacking discretion; incautious; rash." This term is too broad and subjective to serve as the basis for an attorney to withdraw from representation. This is particularly true in the context of determining whether to accept a plea deal, given a client's right to proceed to trial even in the face of overwhelming evidence against him or her. Therefore, the State Bar joins MDJA, the Criminal Law Section, and Mr. Blanchard in advocating for MRPC 1.16(b)(3) to be amended to adopt the language of ABA Model Rule 1.16(b)(4).

We thank the Court for the opportunity to convey the State Bar's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan

SBM STATE BAR OF MICHIGAN

To: Board of Commissioners

From: Governmental Relations Division Staff

Date: April 13, 2018

Re: Governmental Relations Update

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

Court Rules

ADM 2017-19 re MCR 2.410, 2.411, and 3.970: Mediation in Child Protective Proceedings

This rule amendment proposed providing judges with explicit authority to order mediation in child protective proceedings and set forth procedures to govern such mediation.

At its January 26, 2018 meeting, the Board of Commissioners voted unanimously to support the rule proposal with the amendments proposed by the ATJ Policy Committee.

On March 28, 2018, the Court held a public administrative hearing to consider ADM 2017-19. Rebecca Shiemke, an ATJ Policy Committee member, addressed the Court on behalf of the State Bar.

On March 28, 2018, the Court published a revised rule for adoption, which included a number of the Board's recommendations, including prohibiting the court from ordering any party to pay a fee for mediation services, incorporating MCR 3.216(D) as a basis to exempt a case from mediation, and requiring the mediator to notify parties orally and in writing regarding confidentiality.

The rules are effective May 1, 2018.

ADM 2014-29 re MCR 2.602: Conditional Dismissals and Pocket Judgments

This rule proposal concerned the entry of conditional dismissals and pocket judgments. The proposal originated from the Civil Procedure & Courts Committee and was revised and approved by the Representative Assembly. The Court originally published the RA version for comment, but later received an alternate proposal from the Michigan District Judges Association and the Michigan Creditors Bar Association. The Court republished the ADM for comment with Alternative A being the RA-approved language and Alternative B being the MDJA/MCBA proposed language. When the Public Policy and Board considered this ADM, it directed the original proponents of the court rule to draft an Alternative C to expand the scope of the rule to apply to both pocket judgments and conditional dismissals (as published

for comment, Alternative B would have only applied to conditional dismissals). Dan Quick, with the help of Karen Safran, drafted Alternative C, which the Executive Committee unanimously voted to support at its December 12, 2017 meeting.

This ADM was considered at the Court's January 17, 2018 public administrative hearing and Karen Safran, Chair of the Civil Procedure & Courts Committee, offered comments to the Court on behalf of the State Bar.

The Court adopted the Alternative C language with an added subsection to address the concerns raised by Josh Hilgart with regard to Kalamazoo County's Eviction Diversion program and some very minor, non-substantive changes.

The amendments are effective on May 1, 2018.

ADM 2016-13 re MCR 3.810: Transcripts for Indigent Respondents to Appeal Involuntary Termination of Parental Rights.

This rule proposal would allow an indigent putative father, whose parental rights were involuntary terminated under the adoption code, to receive transcripts at the public's expense to pursue an appeal.

Based on the recommendation of the Appellate Practice Section, the Board of Commissioners unanimously voted to support the rule proposal with amendments. Recognizing that the putative father may not be the only party with standing to pursue an appeal (e.g., children, surrogates, or egg donors), the Board recommended removing the specific reference to "putative father" and allowing all indigent respondents with standing to appeal an involuntary termination of parental rights the ability to receive transcripts at public expense.

After considering the administrative file at a public administrative hearing, the Court published the new rule for adoption, changing the term "putative father" to "respondent" as proposed by the State Bar.

The new rule is effective May 1, 2018.

ADM 2016-09 re MCR 3.804, 3.971, 3.977, and 3.809: Notice that Termination of Parental Rights Does Not Automatically Terminate Child Support Obligations

This court rule amendment would require courts to notify parents prior to entering an order to terminate parental rights that such an order does not automatically terminate the obligation to provide child support.

At its February 13, 2018 meeting, the Executive Committee voted to support ADM 2016-09, as it helps clarify and reinforce the fact that the ongoing support obligation survives an order terminating parental rights. The Court considered the rule proposal at a public administrative hearing on March 28, 2018 and shortly thereafter adopted the proposed rule amendments in full.

The rule amendments are effective May 1, 2018.

ADM 2015-26 re MCR 3.808: Ensuring No Pending Termination of Parental Rights Proceedings or Appeals Prior to Entering a Final Order of Adoption.

This administrative file proposed adding a new rule governing adoption proceedings. This rule would require a court to determine that the adoptee is not subject to any pending proceedings on rehearing or reconsideration or on appeal from a decision to terminate parental rights prior to entering a final order of adoption.

At its January 26, 2018 meeting, the Board of Commissioners voted to support the proposed amendments, but include a comment to the court urging appellate courts to expedite termination appeals as much as possible to provide finality in both the appeal and adoption proceeding.

After considering the administrative file at a public administrative hearing, the Court published the rule for adoption with no changes.

The new rule is effective May 1, 2018.

ADM 2014-36 re MCR 6.425: Changes to Appellate Assigned Counsel Process

The rule amendment proposed changes to the appellate counsel assignment process and required the filing of all lower court transcripts.

At its February 13, 2018 meeting, the State Bar Executive Committee voted to support the proposed amendments. Based on instructions from the Executive Committee, in its letter, the State Bar noted:

> ADM 2017-08 is currently pending before the Court, which the State Bar of Michigan also supports. Because ADM 2017-08 proposes amendments to MCR 6.425(G), the Executive Committee requests that the Court ensure that the language in ADM 2017-08 is consistent with the language in ADM 2014-36 should the Court decide to adopt both rule proposals.

After considering the proposed rule at a public administrative hearing, the Court adopted the proposed rule amendments, which would require the filling of all lower court transcripts. Notably, in ADM 2017-08 (discussed below), the Court did not enact the rule change with regard to MCR 6.425 because it was already contained in ADM 2014-36.

The amendments are effective May 1, 2018.

ADM 2017-08 re MCR 3.977 and 6.425: Requiring Full Transcripts when Appointing Counsel in Criminal and Termination of Parental Rights Appeals

This proposed rule amendment would require trial courts to order the full transcript when appointing counsel in criminal and termination of parental rights proceedings.

At its January 26, 2018 meeting, the Board voted unanimously to support the rule because it would promote access to justice for indigent appellants and enable attorneys representing these clients to better identify issues for appeal. In addition, the rule amendment would save time in the appellate process, as parties would not have to request additional transcripts.

After considering the administrative file at a public administrative hearing, the Court adopted the proposed rule with regard to termination of parental rights proceedings, but did not adopt the rule as to criminal proceedings because this provision was provided in a different newly-adopted court rule amendment, ADM 2014-36. See above.

The rule amendment is effective May 1, 2018.

ADM 2017-18 re MCR 3.903: Juvenile Guardianships

This proposal concerned the confidentiality of juvenile guardianship information. The Board of Commissioners unanimously voted to support the proposed amendment at its January 26, 2018 meeting. This ADM was considered at the Court's March 28, 2018 public administrative hearing and published for adoption shortly thereafter.

The amendment is effective May 1, 2018.

ADM 2016-23 re MCR 2.105: Agent for Service of Process

This proposal added a reference to the "agent for service of process." The Executive Committee unanimously voted to support the proposed amendment at its February 13, 2018 meeting.

This ADM was considered at the Court's March 28, 2018 public administrative hearing and published for adoption shortly thereafter.

The amendment is effective May 1, 2018.

ADM 2017-04 re Canon 4 of the Michigan Code of Judicial Conduct: This proposal raised the disclosure threshold for gifts to judges from $100 to $375. Our Board supported this rule proposal, noting the gift threshold had not be increased since 1974. The Court adopted the proposed increase to $375.

The amendment is effective immediately.

Legislation

HB 5244 & HB 5246 (Kesto) – Competence Evaluations – At the January 26 Board meeting, the Board voted to support the concept of improving the speed and accuracy of competency evaluations, but note that these bills are not the vehicle in which to improve these due to lack of deadlines, funding, or standards. The bills have since passed the House on February 28, with a slight amendment removing the Department of Corrections as the appropriate department certifying facilities to perform examinations.

FY2018-19 Budget for Michigan Indigent Defense Grants

In early February, Governor Snyder made his Executive Budget Recommendation for FY 2018-2019 which included funding for Michigan Indigent Defense Grants that would be used to help local indigent defense systems meet the new standards approved last year. The governor's proposed budget includes a $61.3 million appropriation to award grants to local indigent defense systems in support the four initial minimum standards. The recommended total of $61.3 million includes $46 million from the general fund and $15.3 million in reimbursements from partially indigent defendants.

The Executive Committee requested an electronic vote by the Board at the end of February. The Board voted to support the FY 2018-2019 Executive Recommendation to provide $61.3 million for Michigan Indigent Defense Grants.

The House Appropriations subcommittee for Licensing and Regulatory Affairs (LARA) reported the budget to the full House Appropriations Committee with the full $61.3 million appropriation for the indigent defense grants. The Senate LARA subcommittee is expected to report the budget to the full Senate Appropriations Committee later this week. There has been considerable pushback from local governments over the Governor's proposal to partially fund the indigent defense grants with $15.3 million from reimbursements from partially indigent defendants. The local units of government want to retain those reimbursements for their own expenses.

Committee & Work Group Annual Reports

2017-2018

Prepared April 1, 2018

Public Policy Steering

2017-18 Annual Reports

Table of Contents

Note: To view a compilation of all 2017-18 Annual Reports
Please visit https://www.michbar.org/file/generalinfo/committee_pdfs/annualreports2018.pdf

State Bar of Michigan | 2017-2018 COMMITTEE ANNUAL REPORT

Article VI § 6, Bylaws of the State Bar of Michigan
No later than May 1 of each year, the chair of each committee and sub entity of the Bar, with the assistance of the staff liaison, shall report to the Executive Director on a form provided by the State Bar on the activities and accomplishments of the committee or sub entity.

Public Policy

Jurisdiction: · Encourage progress toward the public policy goals set forth in the strategic plan.
· Help ensure that public policy work is carried out in a manner that effectively considers input from members, efficiently responds to public policy issues, encourages Keller-permissible proactive public policy work, and effectively communicates public policy issues and positions to our members.

Chair

P55501 Jennifer M. Grieco
Neuman Anderson Grieco McKenney PC
401 S Old Woodward Ave Ste 460
Birmingham MI 48009-6622
Phone: (248) 594-5252
Fax: (248) 792-2838
e-mail: jgrieco@nagmlaw.com

Member

Term Ending: 2018

P73324 Alari Kristina Adams, Detroit
P34834 Michael J. Blau, Farmington
P44120 Lori A. Buiteweg, Ann Arbor
P41934 David E. Gilbert, Battle Creek
P56521 Stephen J. Gobbo, Lansing
P55501 Jennifer M. Grieco, Birmingham
P76599 Laura M. Kubit, Caro
P61654 Hon. Angela Kay Sherigan, Shelby Township
P28417 Hon. Cynthia D. Stephens, Detroit

State Bar Liaison

Peter Cunningham, Lansing
P79603 Kathryn Hennessey, Lansing

State Bar Liaison Assistant

Carrie Sharlow, Lansing

Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type / Description	Date	Location
Meeting Type: Public Policy Steering Committee - 10 a.m. to 12 p.m.	10/03/17	State Bar of Michigan
Description: Initial meeting of full committee.		
Meeting Type: Timely & Responsive Public Policy - 4 p.m. to 5 p.m.	10/30/17	Teleconference Only
Description: Subcommittee meeting.		
Meeting Type: Communicating Public Policy Issues to Members - 3:45 p.m. to 5 p.m.	11/13/17	Teleconference Only
Description: Subcommittee meeting.		
Meeting Type: Timely & Responsive Public Policy - 4 p.m. to 5 p.m.	01/11/18	Teleconference Only
Description: Subcommittee meeting.		
Meeting Type: Communicating Public Policy Issues to Members - 2 p.m. to 3 p.m.	01/17/18	Teleconference Only
Description: Subcommittee meeting.		
Meeting Type: Public Policy Steering Committee - 10 a.m. to 12 p.m.	02/15/18	Teleconference Only
Description: Meeting of the full committee.		

Reset Section

Resources provided by the State Bar of Michigan in support of committee work:

The committee receives the following support from the State Bar of Michigan (SBM):
-- Financial support is provided in the SBM budget under Governmental Relations.
-- SBM staff provides support preparing for meetings, including polling for meeting dates and times, scheduling meetings, providing teleconference numbers, preparing and circulating materials for meetings (including a printed agenda book), and drafting agendas.
-- SBM staff provides support during meetings, including taking notes, preparing minutes, ensuring quorum, tracking votes, and providing refreshments for in-person meetings.

Reset Section

Committee Activities and Strategic Goal Accomplishments:
Please list each accomplishment/activity, and indicate which strategic plan area it supports by checking the corresponding boxes.

The Steering Committee met and discussed various issues concerning public policy and decided to break into the following 3 subcommittees: (1) Timely & Responsive Public Policy Positions; (2) Proactive Public Policy Work; and (3) Communicating Public Policy Issues to Members.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
TIMELY & RESPONSIVE PUBLIC POLICY POSITIONS After meeting multiple times, the subcommittee agreed to the following recommendations: 1. Use technology to give sections and committees a series of best practices concerning public policy positions and present these best practices to section and committee leaders at the BLE and Annual Meeting. 2. Explore a rule a change to allow the EC to take legislative public policy positions if members are unanimous and the legislation affects the functioning of the courts. 3. Set placeholder monthly Board meetings to consider public policy issues via conference call.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
PROACTIVE PUBLIC POLICY WORK The subcommittee met once to discuss how the Representative Assembly and Board could improve its consideration of proactive public policy work. Due to separate discussions between RA and Board members on the same subject, the subcommittee disbanded and members joined the Timely & Responsive Subcommittee.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
COMMUNICATING PUBLIC POLICY ISSUES TO MEMBERS After multiple meetings, the subcommittee agreed to the following recommendations: 1. Review and make recommendations on public policy website. 2. Utilize the e-Journal to promote the Public Policy Update. 3. Utilize Twitter more effectively for public policy issues.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
The steering committee met in February to have an initial discussion of the subcommittee recommendations.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section

REPORT **Future Goals and Activities:**

The steering committee will meet as a whole in April to discuss and finalize its recommendations to the Board. In addition, the steering committee will review the public policy committees' annual reports and evaluate our progress toward Strategic Plan goals and effectiveness of new committee structure.

Reset Section

Other Information:
In addition to any other important information, please indicate the titles of any workgroups or subcommittees, and attach their annual report as an addendum.

Reset Section

Approved by	Approved	Name
Chair	3/28/18	Jennifer Grieco
Co-chair		
Staff Liaison	03/27/18	Peter Cunningham and Kathryn Hennessey
Other		

Email Form

State Bar of Michigan | 2017-2018 COMMITTEE ANNUAL REPORT

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Access to Justice Policy

Jurisdiction: · Analyze and make recommendations for positions on proposed legislation, court rules, and other policies for the effective delivery of high quality legal services in Michigan, equal and fair to all.
· Make recommendations regarding collateral civil consequences of criminal convictions and issues of adequate representation for adults and juveniles in the criminal justice system.

Co-Chair

P60753 Lorray S.C. Brown, Ann Arbor
Michigan Poverty Law Program
220 E Huron St Fl 6
Ann Arbor MI 48104-1991
Phone: (734) 998-6100 x613
Fax: (734) 998-9125
e-mail: lorrayb@mplp.org

P47291 Valerie R. Newman, Detroit
Wayne County Prosecutor's Office
1441 Saint Antoine St Fl 11
Frank Murphy Hall of Justice
Detroit MI 48226-2362
Phone: (313) 224-5777
e-mail: vnewman@waynecounty.com

Member

Term Ending: 2018

P76762 Heather Renee Abraham, Traverse City
P67583 Erika R. Breitfeld, Auburn Hills
P60753 Lorray S.C. Brown, Ann Arbor
P79126 Kimberly Buddin, Detroit
P54467 Kathleen L. Conklin, Alpena
P69337 Hon. Prentis Edwards, Jr., Detroit
P69552 Heather J. Garretson, Grand Haven
P60260 James R. Gerometta, Detroit
P42275 Hon. Annette M. Jurkiewicz-Berry, Detroit
P65387 Gennelia Capobres Laluna-Schaeffer, Saint Jose
P47201 Ellen Cogen Lipton, Huntington Woods
P40362 Mary M. Lovik, Okemos
P41498 Hon. Mabel Johnson Mayfield, Saint Joseph
P47291 Valerie R. Newman, Detroit
P48885 Hon. Christopher S. Ninomiya, Iron Mountain
P45371 Jill L. Nylander, Flint
P73490 Olivia Marcella Paglia, Bloomfield Hills
P30685 Kenneth C. Penokie, Escanaba
P55328 Hon. Melissa L. Pope, Fulton
P58869 Sarah R. Prout, Okemos
P72880 Salma Saley Safiedine, Farmington Hills
P57571 Christine N. Seppala, Detroit
P37160 Rebecca E. Shiemke, Ann Arbor
P63933 Khalilah Vonn Spencer, Detroit

P46863 Thomas K. Thornburg, Saint Joseph
P76019 Amanda Louise Tringl, Lansing

State Bar Liaison

Peter Cunningham, Lansing
P79603 Kathryn Hennessey, Lansing

State Bar Liaison Assistant

Carrie Sharlow, Lansing

Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type / Description	Date	Location
Meeting Type: In-Person	11/01/17	State Bar of Michigan
Description: Initial meeting		
Meeting Type: Teleconference	01/11/18	State Bar of Michigan
Description: Teleconference meeting to discuss public policy items.		
Meeting Type: Teleconference	03/09/18	State Bar of Michigan
Description: Teleconference to discuss urgent public policy matters.		
Meeting Type: In-Person (expected)	04/04/18	State Bar of Michigan
Description: Meeting to discuss public policy items.		
Meeting Type: In-Person (expected)	05/16/18	State Bar of Michigan
Description: Meeting to discuss public policy items.		
Meeting Type: In-Person (expected)	07/10/18	State Bar of Michigan
Description: Meeting to discuss public policy items.		

Reset Section

Resources provided by the State Bar of Michigan in support of committee work:

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-- SBM staff provides support during meetings, including taking notes, preparing minutes, ensuring quorum, tracking votes, and providing refreshments for in-person meetings.
-- SBM staff refers relevant legislation and proposed court rule amendments to the committee for its review and consideration. The agenda book for meetings includes staff research on the items, along with background materials and information to assist in the committee's discuss.
-- SBM staff also assists with taking e-votes when necessary, including emailing motions to committee members and tracking votes.
-- SBM staff assists in drafting the Committee's public policy position statements for consideration by the SBM Board of Commissioners.

Reset Section

Committee Activities and Strategic Goal Accomplishments:
Please list each accomplishment/activity, and indicate which strategic plan area it supports by checking the corresponding boxes.

COURT RULES The committee reviewed and made recommendations to the Board a wide range of court rule proposals, many of which the Board adopted, including: -- ADM 2002-37: electronic filing procedures; -- ADM 2015-26: notice of child support obligations when parent voluntarily terminates rights; -- ADM 2016-13: transcripts for indigents in termination of parental rights (TPR) proceedings; -- ADM 2016-25: appellate appendices; -- ADM 2017-08: requiring complete transcripts to be provided in criminal and TPR appeals; -- ADM 2017-18: making juvenile guardianship information public;	☐G1 ☐G2 ☑G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
-- ADM 2017-19: child protective mediation procedures; -- ADM 2014-36: reflecting changes to the MAACS process; -- ADM 2016-07: clarifying criminal process to protect defendants represented by assigned counsel; and -- ADM 2016-42: creating prison-mailbox rule to post-sentencing motions;	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
LEGISLATION The committee reviewed a number of legislative policy items, including: -- HB 4433: expedited juvenile expungement procedures; -- HB 5244 and 5246: competency examination process; and -- SB 771, 772, 775 and 776: extending statutes of limitations for criminal sexual assault against minors.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
OTHER POLICY ITEMS The committee also considered a number of other policy items as they arose, including: (1) the Civil Discovery Rules proposed by the Civil Discovery Rule Review Special Committee and (2) the Michigan Indigent Defense Standards.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
PUBLIC ADMINISTRATIVE HEARINGS In addition, committee members participated in Michigan Supreme Court public administrative hearings, including: -- addressing access to justice concerns with the Court's proposed amendment to the e-filing rules in ADM 2002-37; and -- addressing access, domestic abuse, and procedural concerns with proposed rules concerning child protective mediation.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section

Future Goals and Activities:

The committee will continue to review and take positions on relevant reactive public policy items. In addition, the committee will continue to advocate for proactive public policy as issues arise, including proposing court rule amendments to the Representative Assembly.

Other Information:
In addition to any other important information, please indicate the titles of any workgroups or subcommittees, and attach their annual report as an addendum.

This is the first year for this committee. The committee is largely composed of former members of the Justice Policy Initiative, Criminal Issues Initiative, and the Domestic Violence Committee, as well as a number of new members.

The committee considers a wide breadth of public policy items, including criminal, civil, domestic relations, and juvenile issues. The committee has been able to review a large number of public policy items due to the members' commitment to the committee and preparedness for meetings. Prior to committee meetings, the committee assigns liaison teams tasked with researching a particular public policy item and presenting a recommendation to the committee during the meeting. The liaison reports have been thoughtful and thorough, which is ultimately reflected in the quality of the committee's recommendations to the Board.

The diversity on the committee has also contributed to many thoughtful discussions on public policy items.

Reset Section

Approved by	Approved	Name
Chair	3/28/18	Lorray S.C. Brown
Co-chair	3/30/18	Valerie R. Nemwan
Staff Liaison	3/26/18	Peter Cunningham / Kathryn Hennessey
Other		

Email Form

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American Indian Law

Jurisdiction: · Identify the most effective role of the State Bar of Michigan in advancing the interests of the sovereign tribal courts.
· Facilitate and encourage the relationship between tribal courts, state courts, and federal courts, and the promotion of positive relationships between the lawyers of Michigan and the American Indian Community.

Chair

P61654 Hon. Angela Kay Sherigan
Wojnecka & Sherigan PC
56804 Mound Rd
Shelby Township MI 48316-4943
Phone: (586) 822-4220
Fax: (586) 992-3004
e-mail: nwlacouncil@aol.com

Member

Term Ending: 2018
P27699 James A. Keedy, Traverse City
P56903 Roy R. Kranz, Bay City
P24837 Kathryn L. Tierney, Brimley
P52802 Leslie E. Van Alstine, II, Manistee
Term Ending: 2019
P66299 Kirsten Matoy Carlson, Detroit
P31762 Hon. Timothy P. Connors, Ann Arbor
P57750 James M. Kinney, Hastings
P61654 Hon. Angela Kay Sherigan, Shelby Township
Term Ending: 2020
P75985 Elaine Margaret Barr, Lansing
P68122 Hon. Holly T. Bird, Traverse City
P76418 Brooke Bradley, Mount Pleasant
P71403 Cameron Ann Fraser, Traverse City
P55328 Hon. Melissa L. Pope, Fulton

Supreme Court Representative Member

P68975 Maribeth Dickerson Preston, Lansing

State Bar Liaison

Gregory P. Conyers, Lansing

State Bar Liaison Assistant

Michelle Erskine, Lansing

Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type Description	Date	Location
Meeting Type Monthly meeting via teleconference held the first Friday of each		
Description		
Meeting Type		
Description		
Meeting Type		
Description		
Meeting Type		
Description		
Meeting Type		
Description		
Meeting Type		
Description		

Reset Section

Resources provided by the State Bar of Michigan in support of committee work:

Phone conference capabilities, assistance of Gregory Conyers, assistance from staff to the Representative Assembly

Reset Section

Committee Activities and Strategic Goal Accomplishments:
Please list each accomplishment/activity, and indicate which strategic plan area it supports by checking the corresponding boxes.

Goals: G1,S4 - Outreach to the Michigan Indian Judicial Association. Working with the Tribal State Federal Judicial Forum.	
G2,S2 - Continue to monitor and update members on ICWA and MIFPA appellate court cases. The Committee submitted to the Representative Assembly September 2017 Meeting proposed changes to MCR 3.993 regarding direct appeals. The Assembly approved the proposal and the matter was submitted to the Michigan Supreme Court for its consideration.	
G2S4 - diversity of committee	

Future Goals and Activities:

Continue to work with the Tribal State Federal Judicial Forum as its implementation partner.

Outreach to Tribal Courts and bar associations that are near reservation land.

Continue to review court forms and court rules and suggest amendments/changes if need.

Reset Section

Other Information:
In addition to any other important information, please indicate the titles of any workgroups or subcommittees, and attach their annual report as an addendum.

Workgroup: VAWA/UMLI, no report.

Reset Section

Approved by	Approved	Name
Chair	X	Hon. Angela Sherigan
Co-chair		
Staff Liaison	X	Gregory Conyers
Other		

Email Form

Article VI § 6, Bylaws of the State Bar of Michigan
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Civil Procedure and Courts

Jurisdiction: · Review proposed court rules and statutes related to civil practice in the courts and make recommendations concerning improvements in the administration, organization, and operation of Michigan state courts.

Chair

P51317 Karen H. Safran
Carson Fischer PLC
4111 Andover Rd Fl 2NDW
West Bldg
Bloomfield Hills MI 48302-1924
Phone: (248) 644-4840
Fax: (248) 644-1832
e-mail: ksafran@carsonfischer.com

Member

Term Ending: 2018
P33366 Thomas H. Bannigan, Detroit
P72367 Tobijah B. Koenig, Grand Rapids
P66292 Sean P. McNally, Southfield
P55180 Marcileen C. Pruitt, Southfield
P51317 Karen H. Safran, Bloomfield Hills
P41613 Alan R. Sullivan, Bay City
P71282 Matthew Arthur Tarrant, Saginaw

Term Ending: 2019
P61545 Nicholas S. Ayoub, Grand Rapids
P74222 Elisa M. Gomez, Detroit
P34150 Ann Victoria Hopcroft, Oscoda
P55480 Joey Scott Niskar, Farmington Hills
P31139 Gary R. Peterson, Portage
P69751 Thomas Daniel Siver, Grand Rapids
P58546 Hon. Victoria A. Valentine, Pontiac
P48783 Peter H. Webster, Troy
P76022 Lyonel Evans Woolley, Lansing

Term Ending: 2020
P75744 Brooke Lauren Archie, Detroit
P34225 Daniel J. Bernard, Clinton Township
P30246 Richard D. Bisio, Troy
P71350 Nancy Katherine Chinonis, Flint
P41430 Elizabeth J. Fossel, Grand Rapids
P43509 Lori J. Frank, Southfield
P36759 Darleen Lynn Petrosky, Farmington Hills
P65638 Dawn M. Prokopec, Grosse Pointe Farms
P28837 Alan M. Valade, Brighton
P57556 Randy J. Wallace, Berkley

Advisor

P64680 Pamela C. Dausman, Lansing
P59649 George M. Strander, Lansing

P48109 Daniel D. Quick, Troy

State Bar Liaison

Peter Cunningham, Lansing
P79603 Kathryn Hennessey, Lansing

State Bar Liaison Assistant

Carrie Sharlow, Lansing

Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type / Description	Date	Location
Meeting Type: In-person committee meeting	06/03/17	Troy, MI
Description: The committee met to discuss various public policy items.		
Meeting Type		
Description		
Meeting Type: In-person committee meeting	11/11/17	Troy, MI
Description: The committee met to discuss various public policy items.		
Meeting Type: In-person committee meeting	12/09/17	Troy, MI
Description: The committee met to discuss draft civil discovery proposal.		
Meeting Type		
Description		
Meeting Type		
Description		

Reset Section

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-- SBM staff also assists with taking e-votes when necessary, including emailing motions to committee members and tracking votes.
-- SBM staff assists in drafting the Committee's public policy position statements for consideration by the SBM Board of Commissioners.

Reset Section

Committee Activities and Strategic Goal Accomplishments:
Please list each accomplishment/activity, and indicate which strategic plan area it supports by checking the corresponding boxes.

The committee continued to advocate for a number of court rule amendments that it had proposed and the RA approved. For ADM 2014-29, the committee created a compromise position between its original position and an alternative proposed by MDJA and MCBA. The Court adopted this compromise rule proposal, which will be effective on May 1, 2018. For ADM 2016-20, the committee continued to advocate for changes to MCR 8.119 concerning the sealing of documents. For ADM 2016-19/2016-28, the committee continued to advocate for changes to MCR 5.125(C)(23).	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
COURT RULE AMENDMENTS The committee reviewed a number of court rule proposals and made recommendations to the Board, including -- ADM 2002-37: electronic filing procedures; -- ADM 2016-25: appellate appendices; -- E.D. Mich Local Rule 5.3: civil materials filed under seal	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
LEGISLATION HB 4754: inter-circuit concurrent jurisdiction plans; HB 4797: municipality-wide jury pools; HB 5073: mandatory mediation; and SB 872, 875, and 876: extending SoL in civil cases involving CSC with a minor.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
OTHER PUBLIC POLICY PROJECTS The committee dedicated an entire in-person meeting to providing feedback on the Civil Discovery Court Rule Review Special Committee's proposed amendments to the civil discovery rules. The committee is currently considering a new proactive court rule amendment that would require responses to requests to admit and requests for production of documents to be signed by the client.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
PUBLIC ADMINISTRATIVE HEARINGS Committee Chair Karen Safran represented SBM at two Michigan Supreme Court public administrative hearings concerning ADM 2014-29 and ADM 2016-20.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☑S6 ☐S6 Reset Section

REPORT **Future Goals and Activities:**

The committee will continue to review and take positions on relevant reactive public policy items. In addition, the committee will continue to advocate for proactive public policy as issues arise, including proposing court rule amendments to the Representative Assembly. The committee is currently exploring a rule proposal that would require a client to sign responses to discovery requests, including requests to admit and requests for production of documents, as is already required in interrogatory responses.

Other Information:
In addition to any other important information, please indicate the titles of any workgroups or subcommittees, and attach their annual report as an addendum.

Typically, the committee meets on Saturdays for two hours in Troy, Michigan to discuss proposed legislation and court rule amendments. The committee regularly offers recommendations on proposed court rule amendments published by the Michigan Supreme Court, and the committee's recommendations are frequently adopted by the SBM Board of Commissioners.

The committee is comprised of attorneys committed to improving the functioning of civil courts in Michigan. Members specialize in a broad range of civil practice, including negligence, labor and employment, business, appellate, consumer, creditor-debtor, elder and disability, real property, entertainment, intellectual property, and probate law. Members also have diverse practice settings, including solo practices, small law firms, large multi-state law firms, government, public interest, and legal aid.

Reset Section

Approved by	Approved	Name
Chair	03/28/18	Karen Safran
Co-chair		
Staff Liaison	03/26/18	Kathryn Hennessey
Other		

Email Form

Article VI § 6, Bylaws of the State Bar of Michigan
No later than May 1 of each year, the chair of each committee and sub entity of the Bar, with the assistance of the staff liaison, shall report to the Executive Director on a form provided by the State Bar on the activities and accomplishments of the committee or sub entity.

Civil Discovery Court Rule Review

Jurisdiction: To review and propose revisions to the Michigan Court Rules dealing with the civil discovery process to address the expense and burden of civil discovery, including technology considerations on civil discovery and the organization of the rules.

Chair

P48109 Daniel D. Quick
Dickinson Wright PLLC
2600 W Big Beaver Rd Ste 300
Troy MI 48084-3312
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Fax: (248) 433-7274
e-mail: dquick@dickinsonwright.com

Member

Term Ending: 2017

P23289 Hon. James M. Alexander, Pontiac
P30246 Richard D. Bisio, Troy
P43992 Anne M. Boomer, Lansing
P60753 Lorray S.C. Brown, Ann Arbor
P45374 David E. Christensen, Southfield
P12204 Edward H. Cooper, Ann Arbor
P30369 Hon. Elizabeth L. Gleicher, Detroit
P45391 Mathew Kobliska, Farmington Hills
P66816 James L. Liggins, Jr., Kalamazoo
P48109 Daniel D. Quick, Troy
P51317 Karen H. Safran, Bloomfield Hills
P59649 George M. Strander, Lansing
P27165 Valdemar L. Washington, Flint
P41017 Hon. Christopher P. Yates, Grand Rapids

State Bar Liaison

Peter Cunningham, Lansing
P79603 Kathryn Hennessey, Lansing
Carrie Sharlow, Lansing

Committee Meeting Schedule:
Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type		Date	Location
Description			
Meeting Type	In-Person	05/15/17	Ann Arbor, MI
Description	Civil Discovery Steering Committee Meeting		
Meeting Type			
Description			
Meeting Type	In-Person	02/10/18	Ann Arbor, MI
Description	Civil Discovery Steering Committee Meeting		
Meeting Type			
Description			
Meeting Type			
Description			
Meeting Type			
Description			

Reset Section

Resources provided by the State Bar of Michigan in support of committee work:

The Civil Discovery Court Review Special Committee receives support from Katie Hennessey and Carrie Sharlow. SBM provided the following resources to the Special Committee:
-- Financial support under the Governmental Relations budget;
-- Support preparing for meetings, including polling for meeting dates and times, scheduling meetings, providing teleconference numbers, preparing and circulating materials for meetings;
-- Created and Implemented Stakeholder Outreach Plan;
-- Drafted messages to stakeholder organizations and bar members soliciting feedback on rule proposals;
-- Tracked and organized rule feedback;
-- Assisted RA in organizing review of rule proposal;
-- Organizing committee and subcommittee meetings and reporting on progress of meetings;
-- Assisted with subcommittee feedback on comments; and
-- Assisted with drafting RA proposal.

Reset Section

Committee Activities:

Once the Committee approved the September 25, 2017 draft report and proposal, these materials were distributed to Representative Assembly (RA) members. Committee Chair Dan Quick presented the civil discovery project to the RA at its September 28, 2017 meeting and invited members to review the materials and submit any feedback to the Committee.

After the Committee had presented the draft proposal to the RA, the Committee conducted expansive outreach to relevant stakeholders. The Committee made the draft report and proposal publicly available to all State Bar members and invited them to submit comments and offer feedback. In addition, the Committee requested feedback from almost 50 stakeholder organizations, including relevant State Bar sections and committees, special purpose bars, local bar associations, and other organizations.

Based on its extensive outreach efforts, the Committee received feedback from a diverse range of perspectives, including solo practitioners, large corporations, law firms, bar associations, State Bar sections and committees, and organizations representing specific components of the judicial system. After a review of the proposal, the following organizations expressed general support for the proposal:

- Michigan District Judges Association
- Michigan Judges Association
- Michigan Creditors Bar Association
- Michigan Defense Trial Association
- State Planning Body
- Legal Services Association of Michigan
- SBM Alternative Dispute Resolution Section
- SBM Business Law Section
- SBM Civil Procedure & Courts Committee
- SBM Criminal Jurisprudence & Practice Committee
- SBM Negligence Section

In addition to general support for the proposal, a number of individuals and organizations offered feedback. Although some organizations certainly have differing opinions on aspects of the proposed rules (which are noted in the proposal itself, where applicable), all of the comments have been carefully considered by the Committee in drafting the final proposal under consideration by the RA. In addition, the Committee solicited further feedback from subcommittee members with specialized knowledge of certain areas of the rules. Notably, no organization, section, or committee has voted to oppose the proposal.

To add to the Committee's outreach efforts, the RA also conducted its own internal review. RA Chair Joseph P. McGill encouraged all members to review and provide feedback on the draft proposal. Intensive review efforts were conducted by the RA Drafting Committee, the RA Special Issues Committee, and individual RA members.

On March 10, 2018, the Committee submitted its final proposal to the RA for consideration at its April 21, 2018 meeting.

Reset Section

Future Goals and Activities:

The Committee will present the rule proposal at the RA's April 21, 2018 meeting. Assuming that the RA approves the rule proposal, the Committee will work with SBM to submit the proposal to the Michigan Supreme Court for its consideration.

Reset Section

Other Information:

The 46 Committee and subcommittee members engaged in the civil discovery court rule review project have contributed significant time, energy, creativity, and insightful ideas throughout this process. The Committee and subcommittees consist of a diverse range of lawyers, including appellate, circuit, and district court judges, legal academics, solo practitioners, small and large law firm litigators, and legal aid attorneys. Included among the members are experts in court rule amendments, civil discovery, and alternative dispute resolution; members who have served in leadership positions in the SBM Board of Commissioners and Representative Assembly; and various leaders of SBM sections and committees as well as affinity bar associations.

The Committee and subcommittees have worked diligently to meet tight time deadlines and remain committed to dedicating the resources needed to present an innovative and insightful proposal to amend the Michigan civil discovery rules to the Representative Assembly.

Throughout this project, members have focused on finding civil discovery solutions that fit the specific needs of Michigan. Members have not only focused on lowering costs and increasing efficiency of civil discovery, but they have also remained dedicated to creating a civil discovery system that is fair and increases access to justice for all, including the most vulnerable citizens of this State.

Reset Section

Approved by	Approved	Name
Chair	03/23/18	Daniel D. Quick
Co-chair		
Staff Liaison	3/23/18	Kathryn L. Hennessey
Other		

e-Mail Form

Reset Section

State Bar of Michigan | 2017-2018 COMMITTEE ANNUAL REPORT

Article VI § 6, Bylaws of the State Bar of Michigan
No later than May 1 of each year, the chair of each committee and sub entity of the Bar, with the assistance of the staff liaison, shall report to the Executive Director on a form provided by the State Bar on the activities and accomplishments of the committee or sub entity.

Criminal Jurisprudence & Practice

Jurisdiction: · Review proposed court rules and statutes related to criminal procedure and practice in state courts and make recommendations concerning improvements in the operation of criminal law and procedure to promote the fair and efficient administration of criminal justice.
· Make recommendations concerning the establishment and operation of systems for the representation of indigent persons charged with criminal offenses.

Chair

P61932 Nimish R. Ganatra
Washtenaw County Prosecutor's Office
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Ann Arbor MI 48104-1413
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Fax: (734) 222-6610
e-mail: ganatran@ewashtenaw.org

Member

Term Ending: 2018
P61932 Nimish R. Ganatra, Ann Arbor
P67389 Jonathan Sacks, Detroit

Term Ending: 2019
P74091 Christopher Noel Anderson, Charlotte
P54713 Mark A. Holsomback, Kalamazoo
P49666 Gretchen A. Schlaff, Mount Clemens
P45599 Michael A. Tesner, Flint
P21465 Bruce A. Timmons, Okemos

Term Ending: 2020
P40151 Hon. Louise Alderson, Lansing
P51446 Wilson D. Brott, Acme
P54863 Thomas E. Evans, Belleville
P78459 Ann Margaret Garant, Holt
P80886 Loren Elizabeth Khogali, Detroit
P77960 Sofia Valencia Nelson, Detroit
P77034 Takura Nicholas Nyamfukudza, East Lansing
P55854 Patricia A. Patrick, Farmington
P33863 Richmond M. Riggs, Detroit
P27887 Samuel R. Smith, III, Lansing

Advisor

P65936 Ryan Lee Berman, Bloomfield Hills

State Bar Liaison

Peter Cunningham, Lansing

State Bar Liaison Assistant

Carrie Sharlow, Lansing

Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type / Description		Date	Location
Meeting Type	Regularly Scheduled Meeting, 1 p.m. to 3 p.m.	6/16/17	State Bar of Michigan
Description	Reviewed and made recommendations on legislation, proposed court rule amendments, and criminal jury instructions.		
Meeting Type	Regularly Scheduled Meeting, 1 p.m. to 3 p.m.	10/20/17	State Bar of Michigan
Description	Reviewed and made recommendations on legislation, proposed court rule amendments, and criminal jury instructions.		
Meeting Type	Regularly Scheduled Meeting, 1 p.m. to 3 p.m.	12/8/17	State Bar of Michigan
Description	Reviewed and made recommendations on legislation and proposed court rule amendments.		
Meeting Type	Regularly Scheduled Meeting, 1 p.m. to 3 p.m.	1/12/18	State Bar of Michigan
Description	Reviewed and made recommendations on legislation and proposed court rule amendments.		
Meeting Type	Regularly Scheduled Meeting, 1 p.m. to 3 p.m.	2/9/18	Teleconference
Description	Reviewed and made recommendations on legislation and proposed court rule amendments.		
Meeting Type	Regularly Scheduled Meeting, 1 p.m. to 3 p.m.	3/9/18	Teleconference
Description	Reviewed and made recommendations on legislation and proposed court rule amendments.		

Reset Section

Resources provided by the State Bar of Michigan in support of committee work:

The committee receives the following support from the State Bar of Michigan (SBM):
-- Financial support is provided in the SBM budget under Governmental Relations.
-- SBM staff provides support preparing for meetings, including polling for meeting dates and times, scheduling meetings, providing teleconference numbers, preparing and circulating materials for meetings, and drafting agendas.
-- SBM staff provides support during meetings, including taking notes, preparing minutes, ensuring quorum, tracking votes, and providing refreshments for in-person meetings.
-- SBM staff refers relevant legislation and proposed court rule amendments to the committee for its review and consideration. The agenda book for meetings includes staff research on the items, along with background materials and information to assist in the committee's discuss.
-- SBM staff also assists with taking e-votes when necessary, including emailing motions to committee members and tracking votes.
-- SBM staff assists in drafting the Committee's public policy position statements for consideration by the SBM Board of Commissioners.

Reset Section

Committee Activities and Strategic Goal Accomplishments:
Please list each accomplishment/activity, and indicate which strategic plan area it supports by checking the corresponding boxes.

COURT RULES The committee reviewed and made recommendations to the Board a wide range of court rule proposals, many of which the Board adopted, including: -- ADM 2002-37: electronic filing procedures; -- ADM 2016-25: appellate appendices; -- ADM 2017-08: requiring complete transcripts to be provided in criminal and TPR appeals; -- ADM 2014-36: reflecting changes to the MAACS process; -- ADM 2016-07: clarifying criminal process to protect defendants represented by assigned counsel; -- ADM 2016-42: creating prison-mailbox rule to post-sentencing motions;	☐G1 ☐G2 ☑G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
-- ADM 2016-08: eliminate a conflict between MCR 6.610(E)(4) and MCR 6.610 (E)(7); -- ADM 2016-31: procedures to withdraw as counsel; -- ADM 2017-06: clarify e-filing practices and procedures in the Supreme Court; -- ADM 2015-11: reasonable notice of evidence prior to trial; -- ADM 2017-10: allow for comments on a proposed order of mistrial; and -- ADM 2015-04: correcting erroneous judgments of sentencing	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
LEGISLATION The committee reviewed a number of legislative policy items, including: -- HB 4433: expedited juvenile expungement procedures; -- HB 4797: jury pool selection; -- HB 5244 & HB 5246: mental health competency exams; -- SB 381: service of notices to surety bonds; -- SB 871: statute of limitations for certain criminal sexual conduct violations. The Committee takes the review of Keller permissibility of legislation seriously and has twice determined that legislation is not Keller-permissible.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
OTHER POLICY ITEMS The committee has discussed thirteen model criminal jury instruction packages relating to organized retail crime, child abuse, human trafficking, controlled substances crimes, unlawful police conduct, and chemical irritant offenses. The committee reviewed and recommended a position on one standard issued by the Michigan Indigent Defense Commission. Finally, the committee reviewed he Civil Discovery Rules proposed by the Civil Discovery Rule Review Special Committee.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☑S5 ☐S6 ☐S6 Reset Section
	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☐S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☐S5 ☑S6 ☐S6 Reset Section

REPORT **Future Goals and Activities:**

The Committee will continue to review proposed court rule amendments and legislation that fall under its jurisdiction. The Committee expects to meet in April, May, and June.

Reset Section

Other Information:
In addition to any other important information, please indicate the titles of any workgroups or subcommittees, and attach their annual report as an addendum.

Reset Section

Approved by	Approved	Name
Chair		Nimish Ganatra
Co-chair		
Staff Liaison		Peter Cunningham
Other		

Email Form

Article VI § 6, Bylaws of the State Bar of Michigan
No later than May 1 of each year, the chair of each committee and sub entity of the Bar, with the assistance of the staff liaison, shall report to the Executive Director on a form provided by the State Bar on the activities and accomplishments of the committee or sub entity.

United States Courts

Jurisdiction: · Make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice.
· Two members are judges designated by the Chief Judge of the United States District Court for the Eastern District of Michigan and one member is a judge designated by the Chief Judge of the United States District Court for the Western District of Michigan.

Chair

P53319 Adam B. Strauss
Stryker
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Portage MI 49002-1802
Phone: (269) 389-7545
Fax: (269) 385-2066
e-mail: adam.strauss@stryker.com

Clerk

P45777 Thomas L. Dorwin, Grand Rapids
David Weaver, Detroit

Member

Term Ending: 2018
P53995 Dean M. Googasian, Bloomfield Hills
P47394 Thaddeus E. Morgan, Lansing
P41850 Michael W. Puerner, Hastings
P53319 Adam B. Strauss, Portage
Term Ending: 2019
P61375 Peter M. Falkenstein, Ann Arbor
P76765 Jan Meir Geht, Traverse City
P29077 Mark W. McInerney, Detroit
P57378 Julie A. Wagner, Downers Grove
Term Ending: 2020
P35869 John A. Ferroli, Grand Rapids
P75854 Michael G. Getty, Saint Joseph
P61501 Matthew W. Heron, Livonia
P73907 Elizabeth R. Husa Briggs, Lansing
P29411 Gregory V. Murray, Bingham Farms

Member Appointed by U.S. Eastern District Courts

P40295 Hon. Terrence G. Berg, Detroit
P55882 Judith E. Levy, Ann Arbor

Member Appointed by U.S. Western District Courts

Phillip J. Green, Grand Rapids

Federal Bar Association Advisor, Eastern District

P29411 Gregory V. Murray, Bingham Farms

Federal Bar Association Advisor, Western District
Phillip J. Green, Grand Rapids

State Bar Liaison
P37083 Clifford T. Flood, Lansing

State Bar Liaison Assistant
Janna Sheppard, Lansing

Committee Meeting Schedule:

Please attach any additional information needed regarding Committee meetings as an addendum.
**Please keep meeting descriptions brief.*

Meeting Type / Description	Date	Location
Meeting Type: Regular Committee Meeting	10/11/2017	State Bar of Michigan
Description: In-person/phone participation		
Meeting Type: Regular Committee Meeting	11/08/2017	State Bar of Michigan
Description: In-person/phone participation		
Meeting Type: Regular Committee Meeting	01/10/2018	State Bar of Michigan
Description: In-person/phone participation		
Meeting Type: Regular Committee Meeting	03/14/2018	State Bar of Michigan
Description: In-person/phone participation		
Meeting Type: Bench-Bar Committee Dinner	05/10/2018	Detroit
Description: Annual Bench-Bar Dinner at Giovanni's with Eastern and Western District Judges in attendance.		
Meeting Type:		
Description:		

Reset Section

Resources provided by the State Bar of Michigan in support of committee work:

Besides providing the resources called for in Article VI, Section 7 of the State Bar Bylaws, the State Bar provided meeting space, equipped with telephone conferencing capabilities, and State Bar Liaisons Clifford T. Flood and Janna Sheppard provided administrative support, including attending each meeting and assisted in preparing and circulating meeting agendas and minutes. Further, the State Bar will incur the expenses for the Annual Bench-Bar dinner.

Reset Section

Committee Activities and Strategic Goal Accomplishments:
Please list each accomplishment/activity, and indicate which strategic plan area it supports by checking the corresponding boxes.

Continue to review proposed federal rule amendments (civil, bankruptcy, and criminal) and to submit comments when appropriate. Continue to monitor federal rule amendment proposals submitted in previous years.	☐G1 ☐G2 ☐G3 ☐G4 ☑S1 ☐S1 ☐S1 ☐S1 ☑S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☐S5 ☐S6 ☐S6 Reset Section
Promoted the exchange of information between the Eastern and Western Districts of Michigan regarding operation and administrative functions and procedures and opportunities for cooperation. Facilitated an outreach effort to provide attorneys newly admitted to the Eastern District of Michigan with information on becoming admitted to the Western District. Continued consulting with representatives from both Districts and each corresponding Federal Bar Association to develop beneficial common programs. Brainstormed ways to create a Boot Camp program for new attorneys with Judges in each District.	☐G1 ☐G2 ☐G3 ☐G4 ☑S1 ☐S1 ☐S1 ☐S1 ☑S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☑S4 ☐S5 ☐S5 ☐S6 ☐S6 Reset Section
Drafted an article that was published in the MBJ regarding en banc opinions of the 6th Circuit during the previous term (Committee member John Ferroli has single-handedly undertaken this project for several years).	☐G1 ☐G2 ☐G3 ☐G4 ☑S1 ☐S1 ☐S1 ☐S1 ☑S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☐S5 ☐S6 ☐S6 Reset Section
Developed a plan to have the respective Court Clerks from each district draft and publish an article in the Michigan Bar Journal discussing relevant local practices and providing useful information for the benefit of practitioners.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☑S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☐S4 ☐S5 ☐S5 ☐S6 ☐S6 Reset Section
Sponsored an annual bench-bar dinner with judges and magistrates of the Eastern and Western Districts (alternates yearly between the two Districts), currently scheduled for Thursday, May 18, 2017 in Grand Rapids. The dinner is intended to provide an opportunity for the judges and Committee members to meet and discuss common issues.	☐G1 ☐G2 ☐G3 ☐G4 ☐S1 ☐S1 ☐S1 ☐S1 ☑S2 ☐S2 ☐S2 ☐S2 ☐S3 ☐S3 ☐S3 ☐S3 ☐S4 ☐S4 ☐S4 ☑S4 ☐S5 ☐S5 ☑S6 ☐S6 Reset Section

REPORT **Future Goals and Activities:**

The Committee will continue to:
1. review and, when appropriate, comment on proposed amendments to the Federal Rules and to local rules.
2. educate members of the Bar of significant rule changes through articles or other means.
3. review 6th Circuit en banc opinions and when appropriate, publish a summary in the Michigan Bar Journal.
4. promote a statewide Bench/Bar Conference by coordinating activities of the Eastern and Western Districts FBA chapters.
5. sponsor an Annual Bench Bar dinner with judges and magistrate judges of the Eastern and Western Districts.

Other Information:
In addition to any other important information, please indicate the titles of any workgroups or subcommittees, and attach their annual report as an addendum.

To promote continuity and assist in an orderly transition from year to year, the Committee will continue to elect a committee vice-chairperson at the first meeting of each year and at the appropriate time, respectfully request that the incoming SBM President appoint the vice-chair as the Committee's chairperson for the ensuing year.

Reset Section

Approved by	Approved	Name
Chair		Adam Strauss
Co-chair		
Staff Liaison		Clifford T. Flood and Janna Sheppard
Other		Members

Email Form

Strategic Plan Goals and Strategies as charged to the committee for fulfillment:
Please use this page while filling out the activities, goals and information pages following.

☐ **GOAL 1: The State Bar of Michigan provides resources to help all of its members achieve professional excellence and success in the practice of law.**

☐ Strategy 1: Helping new lawyers to be practice ready

☐ Strategy 2: Supporting each active member's professional competence and continuing professional development

☐ Strategy 3: Engaging members in learning about and implementing innovative delivery methods

☐ Strategy 4: Promoting greater member engagement to connect members with the bar, its resources and each other

☐ **GOAL 2: The State Bar of Michigan champions access to justice, and builds public trust and confidence in the justice system in Michigan.**

☐ Strategy 1: Creating and maintaining an accessible, coordinated online foundation of legal resources for the public

☐ Strategy 2: Creating and maintaining greater public awareness and competence around legal issues that affect them

☐ Strategy 3: Expanding opportunities for SBM members to participate in access to justice initiatives through traditional means including pro bono and by partnering with public service organizations, local and affinity bars

☐ Strategy 4: Encouraging improved diversity and inclusion of the profession as a fundamental component of the public's respect for the rule of law and confidence and trust in the justice system

☐ Strategy 5: Expanding collaboration with professional organizations and communities outside of the legal community

☐ Strategy 6: Providing timely, targeted messages to promote understanding of the rule of law and role of judiciary and the legal profession

☐ **GOAL 3: The State Bar of Michigan maintains the highest conduct among its members, and initiates and advocates for improvements that facilitate accessible, timely justice.**

☐ Strategy 1: Working with our partners to effectively regulate the legal profession in Michigan

☐ Strategy 2: Educating members on ethical rules and regulations

☐ Strategy 3: Reviewing ethical rules and regulation, and adapting them to eliminate barriers to innovation

☐ Strategy 4: Conducting research and development that promotes innovation and forecasts change

☐ Strategy 5: Pursuing permissible and achievable public policy goals, while minimizing divisiveness and encouraging member input and diverse points of view on public policy issues

☐ Strategy 6: Promoting respect for diversity as an important element of professionalism

☐ **GOAL 4: The State Bar of Michigan structures itself to achieve its strategic goals in a responsive and cost-efficient manner.**

☐ Strategy 1:Developing governance, member and administrative structures that provide for broad-based decision making and timely action

☐ Strategy 2: Employing practices that strengthen the State Bar of Michigan's fiscal position and responsible use of resources

☐ Strategy 3: Ensuring the technology infrastructure follows best business practices and is poised to meet the future needs of members and the State Bar of Michigan

☐ Strategy 4: Targeting the State Bar of Michigan's communications to build awareness of bar programs and initiatives among members and the recipient community

Order

Michigan Supreme Court
Lansing, Michigan

February 28, 2018

Stephen J. Markman,
Chief Justice

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

ADM File No. 2017-12

Proposed Addition of Rule 2.228
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an addition of Rule 2.228 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.

Rule 2.228 Transfer to Court of Claims

A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer. After that time, the defendant may seek a transfer to the Court of Claims by motion under MCR 2.221.

Staff Comment: MCL 600.6404(3) allows defendant to transfer a case to the Court of Claims. This proposed rule would require such a transfer to be made at or before the time the defendant files an answer, which is the same period mandated for change of venue under MCR 2.221. This proposal arose from the Court's consideration of *Baynesan v Wayne State University* (docket 154435), in which defendant waited until just a month before trial before transferring a case he could have transferred nearly a year sooner.

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 June 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-12. 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.

February 28, 2018

Clerk

Public Policy Position
ADM File No. 2017-12

SUPPORT WITH AMENDMENTS

Explanation

As explained in the staff comment, this rule proposal arose from the Court's consideration of *Baynesan v Wayne State University* (MSC Docket 154435). In that case, the circuit court and the Court of Claims had concurrent jurisdiction because the statute required trial in circuit court of a case in which there was a right to a jury trial and allowed joinder of a claim for equitable relief in the circuit court, and the Court found that the defendant had agreed to that joinder by continuing to litigate the case in the circuit court for a year. In a case like *Baynesan* involving concurrent jurisdiction, it is appropriate to require the defendant to seek a transfer to the Court of Claims by motion under MCR 2.221, as provided in the rule proposal. MCR 2.221 governs motions for a change in venue and gives the court discretion in determining whether to grant or deny the motion.

When, however, a case within the exclusive jurisdiction of the Court of Claims is filed in the circuit court, the court without jurisdiction is limited to either transferring or dismissing the case; it cannot, for example, exercise any discretion in denying a motion because it was untimely. Instead of MCR 2.221 applying in this situation, the motion should be considered under MCR 2.227, which governs transfer of actions on finding of lack of jurisdiction, giving the court the option of transferring the case to the Court of Claims or dismissing it for lack of subject matter jurisdiction.

For these reasons, the Committee supports the rule proposal with the following amendments:

MCR 2.228 Transfer to Court of Claims

> (A) A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer. ~~After that time, the defendant may seek a transfer to the Court of Claims by motion under MCR 2.221.~~
>
> (B) After the time provided in subrule (A)—
>
> (1) If the court in which a civil action is pending has concurrent jurisdiction with the Court of Claims, the defendant must seek leave to file a notice of transfer and the court may grant leave if it is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed.
>
> (2) If the court in which a civil action is pending does not have subject matter jurisdiction because the case is within the exclusive jurisdiction of the Court of Claims, a party may proceed under MCR 2.227.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 2
Abstained from vote: 0
Did not vote: 4

Contact Person: Karen H. Safran
Email: ksafran@carsonfischer.com

From:	Arlene Tecson
To:	ADMcomment
Subject:	Proposed Addition of Rule 2.228 of the Michigan Court Rules (ADM File No. 2017-12)
Date:	Friday, March 09, 2018 4:11:43 PM
Attachments:	image634000.png

Dear Supreme Court Clerk,

We are writing to comment on the Proposed Addition of Rule 2.228 of the Michigan Court Rules, currently out for comment until 6/1/18.

As proposed, MCR 2.228 states: "A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer. After that time, the defendant may seek a transfer to the Court of Claims by motion under MCR 2.221." [Emphasis added.]

The deadline to file a motion "under MCR 2.221," however, is identical to the deadline provided in the first sentence of proposed MCR 2.228: "(A) Time to File. A motion for change of venue must be filed before or at the time the defendant files an answer." [Emphasis added.] Thus, the reference to seeking a transfer "by MCR 2.221 motion" "after that time" is confusing.

We note that MCR 2.221(B) does set forth a separate deadline for filing late motions: "Untimeliness is not a ground for denial of a motion filed after the answer if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed."

Is the Court perhaps referring to this MCR 2.221(B) 14-day deadline when it says the defendant can file a motion under MCR 2.221 "after that time"? If so, to avoid confusion, we respectfully request that the Court further revise proposed MCR 2.228 to cite specifically to MCR 2.221(B). If the Court is not referring to the MCR 2.221(B) deadline, we would ask that the Court state directly the deadline it intends to apply "after that time," rather than referring to motions under MCR 2.221.

Thank you for your time and consideration.

Sincerely,

Arlene Tecson
Rules Attorney

Direct: +1-310-846-0798
Email: arlene.tecson@aderant.com

Aderant
BETTER TOGETHER

https://www.aderant.com | LinkedIn | Twitter | Facebook

Order

Michigan Supreme Court
Lansing, Michigan

January 17, 2018

Stephen J. Markman,
Chief Justice

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

ADM File 2017-10

Proposed Addition of Rule 6.417
of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering an addition of MCR 6.417. 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.

Rule 6.417 Mistrial

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Staff Comment: This proposed new rule, based on FR Crim P 26.3, would require a trial court to provide parties an opportunity to comment on a proposed order of mistrial, to state their consent or objection, or suggest alternatives. The proposal was pursued following the Court's consideration of *People v Howard*, docket 153651.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201.

Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-10. 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.

January 17, 2018

Clerk

Public Policy Position
ADM File No. 2017-10

SUPPORT WITH AMENDMENT

Explanation
The rule proposal seeks to eliminate the uncertainty that arises when a party is silent in response to a proposed order for a mistrial. Supporters of the proposal believe that it will support constitutional protections against double jeopardy by reducing the number of situations in which a defendant's consent to a mistrial is erroneously inferred from the defendant's silence.

The Access to Justice Policy Committee supports the addition of Rule 6.417 to the Michigan Court Rules because it will promote certainty in cases where a mistrial is proposed, thereby promoting just outcomes and judicial efficiency. In addition, the new rule would protect defendants' constitutional rights, and this safeguard outweighs any administrative burdens created by the court giving the parties an opportunity to comment before entering an order for a mistrial.

The Committee also supports the amendments proposed by the Prosecuting Attorneys Association of Michigan, as follows (proposed amendment shown in underline and strikethrough):

> Before ordering a mistrial, the court must, on the record, give each defendant and the ~~government~~ prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Number who voted in favor and opposed to the position:
Voted For position: 17
Voted against position: 1
Abstained from vote: 2
Did not vote: 6

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

Public Policy Position
ADM File No. 2017-10

The Criminal Jurisprudence & Practice Committee Supports ADM File No. 2017-10 with an Amendment.

Explanation
The committee voted unanimously to support the rule amendment with the following amendments:

> Before ordering a mistrial, the court must give each defendant and the ~~government~~ prosecutor an opportunity to comment on the record regarding the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

Prosecuting Attorneys Association of Michigan

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(517) 334-5050 – Fax (517) 334-6351
www.michiganprosecutor.org

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

Re: ADM File No. 2017-10; Adoption of MCR 6.417 Mistrial

Dear Mr. Royster,

On behalf of the Prosecuting Attorneys Association of Michigan, I write to support the proposed adoption of MCR 6.417, but ask the Michigan Supreme Court to include a requirement that such comments be made on the record.

PAAM supports adoption of the following language:

> Before ordering a mistrial, the court must, on the record, give each defendant and the ~~government~~ prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Discussions between attorneys and the court regarding mistrial often occur in chambers. Adding the above language to the proposed rule ensures that appellate courts have the information necessary to evaluate any claims regarding the propriety of the grant or denial of a mistrial. Additionally, the word prosecutor is generally used in the court rules more frequently than government, so we recommended using that term.

Thank you for your consideration,

Joseph T. Hubbell

Joseph Hubbell
Leelanau County Prosecutor
Chair, Prosecuting Attorneys Association of Michigan Amicus and Court Rule Committee

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37211 Goddard Road
Romulus, Michigan 48174
Phone: (734) 941-8800

January 31, 2018

Michigan Supreme Court
925 W. Ottawa St.
Post Office Box 30048
Lansing, MI 48909

Re: Proposed Addition of MCR 6.417
ADM File No. 2017-10

I am a private practitioner with 20 years of trial experience, handling mainly drunk driving cases and criminal defense. I take a relatively large number of cases to jury trial every year, and I have had a number of mistrials declared over the course of my career. I have consented in almost every instance where a mistrial has been necessitated through a mistake or a deadlocked jury.

I am also the past president of CDAM, the Criminal Defense Attorneys of Michigan, but the opinions I express in this correspondence are exclusively my own.

I strongly support adopting the newly proposed rule contained in MCR 6.417, which would mandate that, before declaring a mistrial, a trial court judge must provide the defendant and the government with an opportunity to comment and to state whether that party consents or objects to the declaration of a mistrial, and to suggest alternatives before ordering a mistrial.

The proposed rule mirrors FR Crim P 26.3, and I believe that requiring this type of discourse on the record before ordering a mistrial simply makes good sense. The rule will eliminate a great deal of uncertainty which is generated every time that the accused's consent is inferred from silence.

In *People v Lett*, 466 Mich 206 (2002), a mistrial was abruptly granted by the trial court judge, without input from either the prosecutor or the defense. On appeal, this Court described the type of inquiry that would be mandated by MCR 6.417 as the "accepted rule," citing cases dating back to *People v Benton*, 402 Mich 47 (1977):

> This has led to the accepted rule that a trial court must consider reasonable alternatives before sua sponte declaring a mistrial and the court should make explicit findings, after a hearing on the record, that no reasonable alternative exists.

Lett at 211.

On further review, the United States Supreme Court cited FR Crim P 26.3 and *Arizona v Washington*, 434 US 497; 98 S Ct 824; 54 L Ed 2d 717 (1978) (extended argument established reasons justifying mistrial), seemingly to encourage the practice of mandating the sort of dialog that would be mandated by the proposed rule contained in MCR 6.417. See, *Renico v Lett*, 559 US 766, 790-91; 130 S Ct 1855; 176 L Ed 2d 678, 697-98 (2010).

The lack of a uniform rule has led to numerous appeals. See *People v Sweeney*, 2017 Mich App LEXIS 920 (Ct App, June 13, 2017) (explicitly rejecting "the accepted rule" described in *Lett* and rejecting *People v Benton* as an "equally divided court"); *People v Ackah-Essien*, 311 Mich App 13 (2015) (characterizing defendant's failure to object to mistrial as an unpreserved double jeopardy claim); *People v Sutherby*, 2010 Mich App LEXIS 2514 (Ct App, Dec. 28, 2010) (holding that a trial court is not required to examine alternatives to mistrial).

In cases where the parties were granted an opportunity to debate the merits of a mistrial, double jeopardy analysis is clear and unambiguous. See, for example, *People v Camp*, 486 Mich 914 (2010) (finding that defendant consented to the mistrial after extensive record and exploration of alternatives to mistrial); *People v Khattar*, 2014 Mich App LEXIS 350 (Ct App, Feb. 25, 2014) (numerous opportunities to object to mistrial offered); *People v Smith*, 2012 Mich App LEXIS 2272 (Ct App, Nov. 15, 2012) (defendant unequivocally consented to the discontinuance of the trial).

In the recent case of *People v Howard*, ___Mich___; 895 NW2d 924 (2017), a hostile and aggressive witness testified in favor of the complaining witness for the prosecution. The prosecutor brought inconsistencies and possibly untruthful statements to the trial court's attention, ultimately seeking a mistrial. The mistrial was granted without the consent of the defense. The defendant was convicted after a new trial in which the hostile witness was not presented. Defendant's double jeopardy appeal was denied based upon his silent consent, which was inferred. This is highly problematic for the reasons set forth in Justice Markman's dissent, and it would have been a simple matter for the trial court to inquire whether the defense concurred in the mistrial.

The decision in *People v Howard* is also problematic because, as the US Supreme Court observed in *Washington*, supra, "there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict . . . ." *Washington* at 507. With the retrial in *Howard*, the prosecution was able to "buttress weaknesses" and enjoy a more "favorable opportunity to convict." But the defendant had a constitutional right to continue his first trial:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and **may even enhance the risk that an innocent**

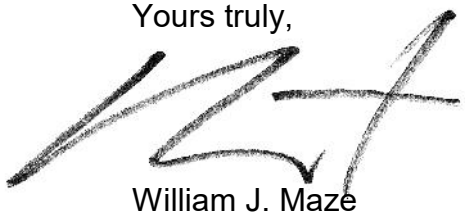
> **defendant may be convicted**. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. **Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial**.

Washington, supra at 503-05 (emphasis added).

It seems that cases such as *Howard*, and perhaps more particularly, *Sweeney*, erode the accepted rule that a trial court must hear arguments and consider reasonable alternatives before declaring a mistrial. The implementation of MCR 6.417 will provide an easy, simple solution.

In my experience, mistrials and double jeopardy issues are relatively rare, but I believe that trial practice and subsequent appellate review will benefit from the adoption of the proposed provisions contained in MCR 6.417.

Yours truly,



William J. Maze

Michigan Judges Association
Founded 1927

President:
Hon. Tracey A. Yokich
16th Circuit Court
40 North Main St.
Mount Clemens, MI 48043
Office: (586) 493-0355

President-Elect:
Hon. Pamela Lightvoet
Kalamazoo County

Vice-President:
Hon. Jon A. Van Allsburg
Ottawa County

Secretary:
Hon. Martha Anderson
Oakland County

Treasurer:
Hon. Christopher P. Yates
Kent County

Immediate Past President:
Hon. Paul Stutesman
St. Joseph County

Court of Appeals:
Hon. Michael F. Gadola

Executive Committee:
Hon. James Alexander
Hon. Laura Baird
Hon. Margaret Z. Bakker
Hon. Annette J. Berry
Hon. Kathleen M. Brickley
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Hon. Thomas Evans
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Hon. Charles T. LaSata
Hon. Alexander C. Lipsey
Hon. George J. Mertz
Hon. Colleen O'Brien
Hon. Lita Popke
Hon. Gerald Prill
Hon. Michelle M. Rick
Hon. Joseph K. Sheeran
Hon. Joseph Toia

Executive Director:
Cami Marie Pendell

February 20, 2018

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

Re: ADM File No. 2017-10
Proposed Addition of Rule 6.147 of the Michigan Court Rules

Dear Clerk Royster:

At the February 13, 2018 meeting of the Michigan Judges Association, the Executive Committee considered and acted upon the ADM No. 2017-10, proposed addition of Rule 6.147 to the Michigan Court Rules. The Michigan Judges Association supports the addition of the court rule which would allow the parties to comment on the propriety of declaring a mistrial prior to a court's order of mistrial. This addition would eliminate the concerns raised in People v Howard, docket 153651.

Sincerely,

Tracey A. Yokich

Hon. Tracey A. Yokich, President
Michigan Judges Association

cc: Hon. Margaret Zuzich Bakker
Hon. Stephen J. Markman
Cami Marie Pendell

Order

Michigan Supreme Court
Lansing, Michigan

January 24, 2018

Stephen J. Markman,
Chief Justice

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

ADM File No. 2015-04

Proposed Amendment of Rule 6.429
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.429 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 6.429 Correction and Appeal of Sentence

(A) Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~b~~But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

(B)-(C) [Unchanged.]

Staff Comment: This proposed amendment is intended to provide trial courts with broader authority to *sua sponte* address erroneous judgments of sentence, following the Court's recent consideration of the issue in *People v Comer*, 500 Mich 278 (2017).

For purposes of publication, the Court included a six-month time period in which such a correction must be made *sua sponte*, and the Court is especially interested in input related to this aspect of the proposed amendments. In balancing the interest in correcting a sentence at any time against the interest in promoting finality and definiteness, adoption of a prescribed time period seems appropriate. Parties have six months to file such a motion under MCR 6.429(B)(3), and a good argument can be made that if the Court adopted a different time period for *sua sponte* corrections, the six-month period for parties would be irrelevant, as a party could simply ask the court to do *sua sponte* what the party could not do by motion.[1] But there may be good reason to adopt a time period longer than that allowed for parties, or to consider a more flexible provision that does not include a specific time period but focuses on application of a standard such as "reasonableness," "good cause," or other language that leaves the determination to the trial court. Therefore, the Court is particularly interested in comments that address this issue.

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 May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

[1] Note that other states have adopted rules with no time limitation on the ability of a court to correct an invalid sentence, but those states may not have, like Michigan, adopted a time limitation for parties to do so. See, for example, Nev Rev Stat 176.555; AK Cr P Rule 35(a).

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.

January 24, 2018

Clerk

Public Policy Position
ADM File No. 2015-04

SUPPORT WITH AMENDMENT

Explanation
This proposal would amend Rule 6.429 of the Michigan Court Rules to provide judges authority and opportunity to amend an invalid sentence *sua sponte* within six months of the entry of judgment.

It is in the interest of all parties that illegal sentences be corrected at any point that an error is found. There may be instances where a court is made aware, or receives notification of an invalid sentence, after 6 months of entry. In certain circumstances it may be helpful to have a more flexible timeframe when good cause is shown. Good cause, however, should be defined since the court would be making its own good cause determination of its authority to act *sua sponte*. Therefore, the Access to Justice Policy Committee supports the language proposed by the Prosecuting Attorneys Association of Michigan, shown in italics below:

> Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~b~~But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence, *except that a sentence the maximum or minimum of which does not conform to the applicable statutory provision, which omits a term required by law, or which includes a term unauthorized by law may be corrected at any time.*

Number who voted in favor and opposed to the position:
Voted For position: 17
Voted against position: 0
Abstained from vote: 3
Did not vote: 6

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

Public Policy Position
ADM File No. 2015-04

The Criminal Jurisprudence & Practice Committee Supports Adding MCR 6.430 Instead of Amending MCR 6.429.

Explanation

MCR 6.429 has always been aimed at what the parties can do, and authorizes the court to change an invalid sentence when the parties move to do so. Letting the court into the act in this rule as an advocate for correcting an invalid sentence changes the landscape, and re-focuses the rule in favor of one side or the other by making the judge an advocate. Also, the concept of an "invalid sentence" is pretty broad, and could include guidelines scoring errors. If a judge concludes that s/he erred in assigning points for some OV (or failing to assign points), which affected the guidelines range, s/he could sua sponte declare the sentence invalid without a "proper motion" per the proposed 6.429, and resentence. Furthermore, the "invalid sentence" concept has been used when any sort of error is alleged at sentencing (Judge X didn't consider mitigating factors, etc). Using specific items that can be corrected, rather than using a broad phrase that covers lots of ground and opens doors quite widely, is a better concept. Most of these errors are simple mistakes at sentencing or in the judgment of sentence. So, a separate court rule (6.430), designed to and aimed at letting a judge correct his or her mistakes with or without prompting from the parties might work best.

As to the proposal's 6-month rule, the majority thought that 6 months was not long enough. Furthermore, a defendant should not have a "right" to a sentence that does not conform to the law until he is done serving his sentence. Generally the requirements imposed by the Legislature take precedence over finality. The requirement that the parties have an opportunity to be heard would provide a chance to explain why correction of the sentence would be unfair in a particular instance.

> Rule 6.430 CORRECTING MISTAKES IN THE SENTENCE AND JUDGMENT OF SENTENCE
> **(A) Clerical Mistakes in the Judgment of Sentence.** Clerical mistakes in the judgment of sentence may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
> **(B) Substantive Mistakes in the Judgment of Sentence.** After giving the parties an opportunity to be heard, the court may correct a sentence the maximum or minimum of which does not conform to the applicable statutory provision, or which omits a provision or condition required by law or includes a provision or condition unauthorized by law, at any time, except in cases in which the defendant has completed the terms of sentence or has been discharged from probation or from parole by the Department of Corrections.

Number who voted in favor and opposed to the position to add MCR 6.430:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Number who voted in favor and opposed to supporting the language "At any time" rather than "6 months" for a time limit:
Voted For position: 7
Voted against position: 3
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

Michigan Judges Association
Founded 1927

February 20, 2018

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

Re: ADM File No. 2015-04

Dear Clerk Royster:

The Michigan Judges Association ("MJA") appreciates the opportunity to provide input on the proposed amendment to MCR 6.429, addressing sentence modifications. The MJA supports the amendment and proposes further language allowing relief from the 6 months provision "on good cause shown."

As written, the proposal allows the court 6 months to correct an invalid sentence on its own initiative. This mirrors the timeframe allowed the parties under MCR 6.429(B)(3) and there is merit to this approach. The MJA notes, however, that there are instances when a court is alerted to a sentence impropriety after the 6 month period. The court may receive notification from the Michigan Department of Corrections after this timeframe. As well, there are occasions when the court receives correspondence from a defendant, even if relating to another topic that causes the court to review an older court file.

In these types of instances, a flexible standard is necessary to promote the interest in correcting erroneous judgments of sentence. The MJA, therefore, recommends that the final sentence to proposed MCR 6.429(A) allow for correction beyond the 6 month time period when necessary. The sentence could read, for example:

> Any correction of an invalid sentence on the court's own initiative must occur within 6 months of entry of judgment of conviction and sentence, *or later upon good cause shown.*

With the addition of this language, or something similar to it, we believe the amendment appropriately balances the interest in correcting sentences at any time against the interest in promoting finality in sentencing. On behalf of the MJA, thank you for the opportunity to comment on this important amendment.

Sincerely,

Hon. Tracey A. Yokich, President
Michigan Judges Association

cc: Hon. Kathleen Brickley
Hon. Thomas Cameron
Hon. Stephen J. Markman
Cami Marie Pendell

Prosecuting Attorneys Association of Michigan

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

Re: ADM File No. 2015-04, MCR 6.429, correction of an illegal sentence

Dear Mr. Royster,

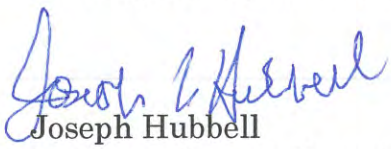
On behalf of the Prosecuting Attorneys Association of Michigan, I write to support the proposed adoption of MCR 6.429, with addition of language that would allow correction of illegal sentences not conforming to statutory requirements.

PAAM supports adoption of the following language:

> (A) Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~b~~But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence, *except that a sentence the maximum or minimum of which does not conform to the applicable statutory provision, which omits a term required by law, or which includes a term unauthorized by law may be corrected at any time.*

In cases where the sentence is illegal in that it does not conform to statutory requirements regarding a maximum or minimum sentence, imposes a term not allowed by law, or omits one required by law correction of that sentence at any time should be permitted. To allow otherwise would circumvent the intent of the legislature and violate the legislative will. It is in the interest of not only the prosecution, but defendants as well that illegal sentences be corrected at any point the error is found.

Thank you for your consideration,



Joseph Hubbell
Leelanau County Prosecutor
Chair, Prosecuting Attorneys Association of Michigan Amicus and Court Rule Committee

KYM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
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From the Desk of
TIMOTHY A. BAUGHMAN
SPECIAL ASSISTANT PROSECUTING ATTORNEY

e-mail: tbaughma@waynecounty.com.

Anne M. Boomer
Office of the Administrative Counsel
P.O. Box 30052
Lansing, MI 48909

Re: MCR 6.429, correction of an illegal sentence; Adm File 2015-04

Dear Ms. Boomer:

The result in *People v. Comer*, 500 Mich. 278 (2017) was that a legal sentence—one containing the mandatory term of lifetime electronic monitoring—was set aside, and an illegal sentence—one that did not contain that mandatory term—was reinstated. The Court so required because it determined that MCR 6.429 does not allow the trial court to correct an invalid sentence on its own motion, and the trial court, after receiving notice of the sentencing error from the Department of Corrections, had ordered a hearing on its own motion, and corrected the sentence somewhat short of 7 months after it had been entered. It seems to me that the setting aside of a legal sentence in favor of an illegal sentence is something of an embarrassment, and so a repair to the system should occur. The result came about because MCR 6.429(A), which provides that "A motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law," was held by the Court not to authorize a trial court to correct an invalid sentence *sua sponte*, but only on motion of a party, as provided in MCR 6.429(B).

The Court suggested in footnote 54 the possibility of an amendment to the court rule, saying that "While the result here is dictated by the plain language of MCR 6.429, in the future this Court may exercise our rulemaking authority to expressly provide courts with the power to correct sentences on their own initiative. We note that courts have this broader power in other jurisdictions." The Court has now proposed an amendment (I include unchanged paragraph (B) for context):

Rule 6.429 Correction and Appeal of Sentence

(A) Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~b~~But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

(B) Time For Filing Motion.

(1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

The Court has requested comment on the proposal, particularly the six-month time period in which a trial court may correct an invalid sentence on its own motion, asking whether there should be a more flexible period, such as allowing correction of an invalid sentence at any time on "good cause."

I have a somewhat bolder suggestion.

Suggested Amendment to MCR 6.429 and MCR 6.431 That Would Allow Correction of a Statutorily *Illegal* Sentence at *Any Time*

Everyone knows that the sentence is as much a part of the judgment as the conviction; indeed, the SCAO form titles the order the "judgment of sentence." And see *People v. Coles*, 417 Mich. 523, 535 (1983); *People v. Mitchell*, 454 Mich. 145, 172 (1997) "[A] sentence following a conviction is as much a part of the final judgment of the trial court as is the conviction itself." With regard to timing of relief, MCR 6.431 on motions for new trial and MCR 6.429 on motions for resentencing *are identical*:

Motion for new trial/MCR 6.431	**Motion for resentence/correction of sentence**: **MCR 6.429**
A motion for new trial may be filed before the filing of a timely claim of appeal.	A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
If a claim of appeal has been filed, a motion for new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B)	If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B)
or the remand procedure set forth in MCR 7.211(C)(1).	or the remand procedure set forth in MCR 7.211(C)(1).
If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for new trial may be filed within 6 months of entry of the judgment of conviction and sentence.	If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.
If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.	If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

These timing requirements regarding these two motions may readily be combined in a single rule, and MCR 6.429 then limited to correction of *illegal* sentences; that is, sentences that are, *on their face*, inconsistent with statutory provisions, and which should, with a possible exception, be correctable at *any* time, as is true in many jurisdictions. First, my proposed amendments, and then the further justification

Rule 6.429 Correction ~~and Appeal of Sentence~~ <u>of an Illegal Sentence</u>

<u>(A) The court may correct an illegal sentence at any time, either on its own motion after a hearing, or on motion filed by either party.</u>

<u>(B) An illegal sentence is one the maximum or minimum of which does not conform to the applicable statutory provision, which omits a term required by law, or which includes a term unauthorized by law. The court may not modify a valid sentence after it has been imposed except as provided by law.</u>

~~(B) Time For Filing Motion.~~

~~(1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.~~

~~(2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).~~

~~(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.~~

~~(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.~~

~~(C) Preservation of Issues Concerning Sentencing Guidelines Scoring and Information Considered in Sentencing. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.~~

Rule 6.431 New Trial, Correction of Invalid Sentence

(A) Time for Making Motion.

(1) A motion for a new trial or correction of an invalid sentence may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, ~~a motion for a new trial~~ the motion may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, ~~a motion for a new trial~~ the motion may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(B) Reasons for Granting New Trial. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

(C) Trial Without Jury. If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.

(D) Inclusion of Motion for Judgment of Acquittal. The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal.

(E) Preservation of Issues Concerning Sentencing Guidelines Scoring and Information Considered in Sentencing. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Reasons to Limit MCR 6.429 to Correction of Inherently Illegal Sentences, and Allow Correction at Any Time, Save for a Possible Exception

A number of states have rules that permit the correction of an "illegal" sentence at any time, and by that is meant a sentence that on its face does not compart with statutory requirements. Some define what is meant by an illegal sentence in the rule, others by case decision.

- Alaska (Alaska R. Crim. P. 35):

  (a) Correction of Sentence. The court may correct an illegal sentence at any time.

- Arkansas (Ark. Code Ann. § 16-90-111):

  (a) Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

- Colorado (CO ST RCRP Rule 35):

  (a) Correction of Illegal Sentence. The court may correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

- Connecticut (Conn. Practice Book Sec. 43-22):

  The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.

- Delaware (Del. Super. Ct. Crim. R. 35):

  (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

- District of Columbia (D.C. Super. Ct. R. Crim. P. 35):

  (a) Correcting the Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

- Hawaii (Haw. R. Penal P. 35)

  (a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

- Iowa (Iowa R. Civ. P. 2.75):

  The magistrate may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

- Kansas (Kan. Stat. Ann. § 22-3504):

  (1) The court may correct an illegal sentence at any time. The defendant shall receive full credit for time spent in custody under the sentence prior to correction. ***

  *****

  (3) "Illegal sentence" means a sentence: Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced. A sentence is not an "illegal sentence" because of a change in the law that occurs after the sentence is pronounced.

- Maryland (Rule 4-345, Sentencing—Revisory Power of Court):

  (a) Illegal Sentence. The court may correct an illegal sentence at any time.

- Nevada (Nev. Rev. Stat. Ann. § 176.555):

  The court may correct an illegal sentence at any time.

- North Dakota (N.D. R. Crim. P. 35):

  (a) Correction of Sentence.

  (1) Illegal Sentence. The sentencing court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for reduction of sentence in Rule 35(b)(1).

- Rhode Island (Super. R. Crim.P. 35)

  (a) Correction or reduction of sentence. The court may correct an illegal sentence at any time.

- South Dakota (S.D. Codified Laws § 23A-31-1):

  A court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

- Utah (Utah R. Crim. P. 22):

  (e) The court may correct a sentence when the sentence imposed:

  (1) exceeds the statutorily authorized maximums;
  (2) is less than statutorily required minimums;
  (3) violates Double Jeopardy;
  (4) is ambiguous as to the time and manner in which it is to be served;
  (5) is internally contradictory; or
  (6) omits a condition required by statute or includes a condition prohibited by statute.

  (f) A motion under (e)(3), (e)(4), or (e)(5) shall be filed no later than one year from the date the facts supporting the claim could have been discovered through the exercise of due diligence. A motion under the other provisions may be filed at any time.

- Vermont (Vt. R. Crim. P. 35):

  (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

- West Virginia (WV R MAG CTS RCRP Rule 27):

  (b) Correction of Sentence. The magistrate who entered judgment, or such magistrate's successor, may correct an illegal sentence at any time.

- Wyoming (Wyo. R. Crim. P. 35)

  (a) Correction. The court may correct an illegal sentence at any time. Additionally the court may correct, reduce, or modify a sentence within the time and in the manner provided herein for the reduction of sentence.

As can be seen, these jurisdictions all use the term "illegal" sentence, and by that term are not referring to a sentence that can be challenged in the ordinary process for its manner of imposition, including such things as the accuracy of information considered, or guidelines calculation, but a sentence that *on its face* does not comport with statutory requirements. As Judge Moylan puts it in considering the Maryland rule in *Carlini v. State*, 81 A.3d 560, 567 (2013), "There are countless illegal sentences in the simple sense. They are sentences that may readily be reversed, vacated, corrected or modified on direct appeal, or even on limited post-conviction review, for a wide variety of procedural glitches and missteps in the sentencing process. Challenges to such venial illegalities, however, are vulnerable to such common pleading infirmities as non-preservation and limitations. There is a point, after all, beyond which we decline to revisit modest infractions. There are, by contrast, *illegal sentences* in the pluperfect sense. Such illegal sentences are subject to open-ended collateral review. Although both phenomena may casually be referred to as illegal sentences, there is a critically dispositive difference between a procedurally illegal sentencing process and an inherently illegal sentence itself." The "illegal" sentence that is correctable at any time, then, is one that is "inherently illegal" in the sense that "it is a sentence that the court had never been statutorily authorized to impose." This would include situations such as the imposition of a concurrent sentence when a consecutive sentence is required, or vice versa, the imposition of a sentence term that is either longer or shorter than authorized by statute, the failure to include a sentence term required by statute, and the inclusion of a term not authorized by the statute. For definitions within state rules, see Kansas and Utah above.

I submit that MCR 6.429 should be limited to correction of illegal sentences in the sense above described, which should be correctable at any time, and that sentences may otherwise be appealed in the normal process, under MCR 6.431.

Timing

My suggestion is that sentences the illegality of which is "inherent" should be correctable at any time; while in an extreme case due process may preclude the correction of a sentence that enhances the sentence imposed, such a case is so unlikely to occur that leaving the matter to litigation rather than attempting to capture it in a rule seems the better course. In the case of a sentence that is illegal to the detriment of the criminal defendant—a sentence that is simply

inconsistent with the statute because the maximum or minimum does not conform to the applicable statutory provision, or which omits a term required by law or includes a term unauthorized by law—the sentence should be correctable at any time, and the defendant can currently seek its correction at least through the various processes allowed on direct appeal, and even after the direct appeal on a motion for relief from judgment, so no great innovation would be worked. But correction of an illegal sentence that enhances the sentence in some way by correcting it, brought about on the court's own motion or on a prosecution motion, is currently limited.

Allowing an illegal sentence to stand is contrary to the will of the legislature, and something of an embarrassment. And it is "well-established that a prisoner cannot escape punishment simply because the court committed an error in passing sentence." *Evans v. Sec'y Pa. Dep't of Corr*., 645 F.3d 650, 662 (CA 3, 2011). That is to say, ""[a] defendant ... does not automatically acquire a vested interest in a shorter, but incorrect sentence." But "in an extreme case . . . a later upward revision of a sentence is so unfair that it is inconsistent with the fundamental notions of fairness found in the due process clause." *United States v. Davis*, 112 F.3d 118, 123 (3d Cir.1997); *Evans*. One court has said that due process may be denied "when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them. . . . '[T]he power of a sentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit. . . . After a substantial period of time . . .it might be fundamentally unfair, and thus violative of due process for a court to alter even an illegal sentence in a way which frustrates a prisoner's expectations by postponing his parole eligibility or release date far beyond that originally set.'" *United States v. Lundien*, 769 F.2d 981, 987 (CA 4, 1985).

And so in dealing with the unusual situation of correcting an statutorily illegal sentence, the correction of which enhances the sentence in some way, some temporal limitation may be appropriate in a particular extreme case, but it is difficult to capture the notion that "when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them" in a court rule without being either too specific or too vague, particularly given Michigan's indeterminate sentencing scheme, where the minimum is effectively the earliest parole date possibility, but the sentence authorizes service of the maximum, which may be many years later than the minimum, even on relatively shorter sentences (say a sentence of 2-10 years). The jurisdictions noted above place no such time limits on the correction of an inherently illegal sentence, even when that correction enhances the sentence imposed, leaving the due process question to adjudication, which appears to be the better course. A correction of the sentence on the court's own motion or prosecution motion that enhances the sentence in some manner made so long after imposition of sentence to constitute the "extreme case" referred to in *United States v. Davis* is very likely so rare that attempting to capture the due process limitation in a rule appears bootless; the matter is better left to litigation, if it ever arises. Seeking the perfect may be the enemy of the good here, particularly when the situation may well never arise. Certainly correction of the sentence after 7 months as in *Comer* would hardly offend due process.

Conclusion

I suggest, then, that MCR 6.431 encompass both motions for new trial and to correct an invalid sentence, as the rules are identical in their timing requirements as is, and that MCR 6.429 be limited to the correction of an *illegal* sentence—one which is contrary to statute on its face as above described—which is correctable at any time, either on the court's own motion (after a hearing), or on motion of a party.

Sincerely,

/s/ Timothy A. Baughman

Order

Michigan Supreme Court
Lansing, Michigan

February 28, 2018

ADM File No. 2017-14

Proposed Administrative Order to Require Circuit Judges and County Clerks to Enter into an Agreement on the Assignment and Performance of Ministerial Duties

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On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order regarding ministerial duties to be performed by the county clerk. 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. 2018-XX

The Michigan Constitution of 1963, Article VI, § 14, and MCL 600.571(a) designate the county clerk as the clerk of the circuit court for that county. As such, the county clerk in their role as clerk of the circuit court, performs functions in the judicial branch of government and is therefore subject to the direction of the circuit court in all matters of court administration that are reserved exclusively for the judiciary under the Michigan constitution, article 3, §2, article 6, §1, and article 6, §5. In addition, MCL 600.571(b) requires the county clerk to attend all circuit court hearings, MCL 600.571(c) provides for the assignment of any deputy clerk to be approved by the chief judge, and MCL 600.571(f) provides for the county clerk to "have the care and custody of all the records, seals, books and papers pertaining to the office of the clerk of such court, and filed or deposited therein, and shall provide such books for entering the proceedings in said court, as the judge thereof shall direct."

In *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146 (2003), the Michigan Supreme Court stated:

> Beyond having the care and custody of the court's records, the circuit court clerk is also to perform noncustodial ministerial duties as directed by the court. The determination of the precise noncustodial ministerial duties that are to be performed by the clerk, including their existence, scope, and form, is a matter of court administration and is therefore reserved exclusively for the judiciary under Const 1963, art 3, § 2, Const 1963, art 61, and Const 1963, art 6, § 5. This judicial authority includes the discretion to create, abrogate, and divide between the clerk and other staff, noncustodial ministerial functions concerning court administration.

On order of the Court, in order to promote the efficient administration of justice and to clarify the extent of the responsibilities of the clerk of the circuit court that are not addressed in statute or court rule, the Michigan Supreme Court adopts this administrative order.

Each chief circuit judge shall consult with and enter into an agreement with each county clerk in their jurisdiction and submit a plan to the Supreme Court for approval that identifies the following, as applicable:

1. The case processing staff employed by the county clerk that are responsible for managing the court's records.

2. The courtroom clerks employed or deputized by the county clerk to attend court sessions.

3. The method by which the chief circuit judge and county clerk approve of the appointment of deputy clerks or employees of the court deputized by the county clerk before hiring.

4. The ministerial court duties, not subject to MCR 8.119, which are assigned to staff of the county clerk in their role as clerk of the circuit court.

5. The method by which performance issues involving county clerk staff assigned to circuit court or court staff deputized by the county clerk are addressed.

The State Court Administrative Office shall develop guidelines for the proposed plan and directions regarding the submission of the plan for approval by the Court. The chief judge and county clerk must meet before XXX, XX, 2018 and submit their plan by XXX, XX, 2018. If a circuit court and county clerk have an agreement in place on the effective date of this order, and that agreement includes the provisions required to be

included in this order, that agreement may be submitted to the Supreme Court for approval. If the agreement does not include all the provisions listed herein, it shall be revised before submission to the Court.

Staff Comment: This administrative order would direct circuit courts in collaboration with county clerks to establish an agreed upon plan that outlines those duties not codified in statute or court rule that must be performed within the scope of the county clerk's role as clerk of the circuit court. The plan would be required to be approved by the Supreme Court.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-14. 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.

February 28, 2018

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

January 17, 2018

ADM File No. 2016-49

Proposed Addition of Rule 1.18 and
Proposed Amendment of Rule 7.3 of
the Michigan Rules of Professional Conduct

On order of the Court, this is to advise that the Court is considering an addition of Rule 1.18 and an amendment of Rule 7.3 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter 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.

[Proposed Rule 1.18 is a new rule, and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.18 Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comments:

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information,

except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(l), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 7.3 Solicitation~~Direct Contact With Prospective Clients~~

(a) A lawyer shall not solicit professional employment from a person~~prospective client~~ with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The

term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).

(b) A lawyer shall not solicit professional employment from a person~~prospective client~~ by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the person~~prospective client~~ has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

Comments: There is a potential for abuse inherent in direct contact by a lawyer with a person~~prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject a~~the~~ ~~lay~~person to the private importuning of the trained advocate in a direct interpersonal encounter. A person~~The prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of a~~the~~ lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

However, the United States Supreme Court has modified the traditional ban on written solicitation. *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Paragraph (a) of this rule is therefore modified to the extent required by the Shapero decision.

The potential for abuse inherent in direct solicitation ~~of prospective clients~~ justifies its partial prohibition, particularly since lawyer advertising and the communication permitted under these rules are alternative means of communicating necessary information to those who may be in need of legal services.

Advertising and permissible communication make it possible for a person~~prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting a person~~the prospective client~~ to impermissible persuasion that may overwhelm a person's~~the client's~~ judgment.

The use of general advertising and communications permitted under *Shapero* ~~to transmit information from lawyer to prospective client~~, rather than impermissible direct contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. The contents of some impermissible direct conversations ~~between a lawyer and a prospective client~~ can be disputed and are not subject to third-party scrutiny. Consequently they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and detail concerning, the plan or arrangement that the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific <u>person</u>~~prospective client~~ known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under these rules.

Staff Comment: The proposed addition of new rule MRPC 1.18 and amendment of MRPC 7.3 would clarify the ethical duties that lawyers owe to prospective clients and create consistency in the use of the term "prospective client." This proposal was submitted to the Court by the Representative Assembly of the State Bar of Michigan.

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 May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-49. 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.

January 17, 2018

Clerk

Public Policy Position
ADM File No. 2016-49

The Professional Ethics Committee Supports ADM File No. 2016-49.

Explanation
The Professional Ethics Committee fully supports adoption of the proposal. The Committee initially made these proposals to the Board of Commissioners. Rule 1.18 addresses that ethical duties of a lawyer regarding prospective clients and serves to codify the analysis presented in ethics opinions issued by the Committee. The amendment of Rule 7.3 is to ensure consistent use of terminology used in Rules 1.18 and 7.3.

Number who voted in favor and opposed to the position:
Voted For position: 13
Voted against position: 0
Abstained from vote: 0
Did note vote: 8

Contact Person: Stephanie LaRose
Email: scrino@law.msu.edu

Order

Michigan Supreme Court
Lansing, Michigan

January 10, 2018

Stephen J. Markman,
Chief Justice

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

ADM File No. 2016-27

Proposed Amendment of
Rule 7.2 of the Michigan
Rules of Professional Conduct

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 7.2 of the Michigan Rules of Professional Conduct. Before determining whether either of the alternative proposals 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

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

Alternative A

Rule: 7.2 Advertising

(a)-(c) [Unchanged.]

(d) Services of a lawyer or law firm that are advertised under the heading of a phone number, web address, image, or icon shall identify the lawyers or law firm providing the services. Any website advertising the services of a lawyer or law firm must contain the name(s) of the attorney(s) providing the services.

Alternative B

Rule: 7.2 Advertising

(a)-(c) [Unchanged.]

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Staff Comment: The first proposed amendment of Rule 7.2 of the Michigan Rules of Professional Conduct (Alternative A) would require certain lawyer advertisements to identify the lawyer or law firm providing services. This proposal was submitted by the State Bar of Michigan Representative Assembly. Alternative B is the model rule provision that relates to providing information about the lawyer or law firm responsible for the advertisement's content.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MCCORMACK, J. (*concurring*). This topic is worth the Court's consideration and I look forward to the public comment. I hope that the public comment process will, at a minimum, address and clarify the following questions:

(1) Is MRPC 7.1 already an adequate mechanism for protecting the public?

(2) Should the proposal's first sentence be targeted only to advertisements that solely consist of a web address or a telephone number, which is how the proposal was described by the State Bar of Michigan in its submission letter, or should it apply to all advertisements, which is how the proposal is currently styled? In other words, should the proposal read "Services of a lawyer or law firm that are advertised under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services," or should it read "Services of a lawyer or law firm that are advertised *only* under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services"?

(3) Will the proposal affect law offices that self-identify by solely listing their telephone number on their physical building or road sign, such as 1-800-LAW-FIRM in the attached photo?

(4) What is the scope of website advertising that would fall within this rule? For example, should it be limited to individual websites owned or managed by lawyers or lawfirms, or will it include third-party media advertising such as Craigslist listings, Facebook places, and Google places?

(5) What are the proper definitions of "image" and "icon" as used in the proposal?

(6) Will this rule regulate online advertising differently than the current rules regulate billboard, transit bus, television/cable, radio, and smartphone pop-up ads? If so, is that appropriate? If not, why not?

Public Policy Position
ADM File No. 2016-27

The Professional Ethics Committee Supports Alternative A.

Explanation
The Committee voted to support Alternative A for the proposed amendment because of its specificity.

Number who voted in favor and opposed to the position:
Voted For position: 12
Voted against position: 1
Abstained from vote: 0
Did note vote: 8

Contact Person: Stephanie LaRose
Email: scrino@law.msu.edu

Public Policy Position
ADM File No. 2016-27

Support Alternative B

Position Vote:
Voted To Support Alternative A: 2
Voted To Support Alternative B: 4
Did not vote: 1

Contact Person: Lee Hornberger
Email: leehornberger@leehornberger.com

Public Policy Position
ADM File No. 2016-27

Support Alternative B with Amendments

Explanation
The Solo Small Firm Section supports Alternative B, provided there is a clarification to the proposed rule that if advertising on a website such as google and similar types of adds are used with link to the information required by the rule, including the name of the attorney or law firm website containing the required information, will not be subject to liability by this rule.

The reasoning behind this clarification is the concern that advertising on something like ad-words, where ads are very brief, and at best have the URL and not the necessarily the name of the attorney would potentially not comply with the proposed rule (either alternative) which could have unintended consequences for any attorney that advertises online.

Position Vote:
Voted For position: 4
Voted against position: 2
Abstained from vote: 0
Did not vote: 0

Contact Person: Lesley Hoenig
Email: lesley@hoeniglaw.com

1-800-LAW-FIRM
AMERICA'S LAW FIRM

Ari Kresch
Managing Partner
akresch@1800lawfirm.com
(248)565-2099

March 1, 2018

Office of Administrative Counsel
PO Box 30052
Lansing, MI 48909

Via email only to:
ADMcomment@courts.mi.gov

RE: **ADM File No. 2016-27**
Comment on the Proposed Amendments to Rule 7.2 of the Michigan Rules of Professional Conduct

Dear Chief Justice Markman and Esteemed Justices of the Michigan Supreme Court,

I write to respectfully encourage the Court to reject both of the proposed amendments to Rule 7.2 of the Michigan Rules of Professional Conduct contained in ADM File No. 2016-27, as the inherent qualities of MRPC 7.2, and the safeguards of MRPC 7.1, already sufficiently accomplish the objectives sought by the two proposed ADM amendments in File No. 2016-27.

ADM File No. 2016-27 proposes two alternative amendments to Rule 7.2 of the Michigan Rules of Professional Conduct, which specifically address the role and scope of allowable legal advertising. An adoption of "Alterative A" would leave Rule 7.2(a)-(c) unchanged, while adding subsection (d), requiring "services of a lawyer or law firm that are advertised under the heading of a phone number…" to "identify the lawyers or the law firm providing the services." ADM File No. 2016-27. Proposed "Alternative B" would also leave Rule 7.2(a)-(c) unchanged, while adding subsection (d), which provides: "Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content." *Id.*

For the following reasons, this Honorable Court should reject both of these proposed additions.

First, both of the proposed amendments to MRPC 7.2 are contrary to the fundamental purpose ingrained in the rule, as the proposals place additional prohibitive obligations upon firms that would only serve to limit the stream of information to consumers seeking legal services.

As outlined by the American Bar Association, provided in the commentary of Rule 7.2 of the Model Rules of Professional Conduct, "Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public,

particularly persons of low and moderate income," and therefore, any limitation placed upon those forms of communication "would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."[1]

While the proposed amendments to MRPC 7.2 seek to require a firm's advertisements to contain the lawyer or firm providing the services by adding additional requirements, these proposed amendments will not only be burdensome in several material respects, but additionally, will frustrate the purpose of providing legal services to the public, impeding "the flow of information about legal services to many sectors." If the purpose of MRPC 7.2 is to allow lawyers to provide individuals of low and moderate income with access to information regarding readily available legal services, restrictions constraining the flow of information to consumers will initially hinder the objectives underlying MRPC 7.2.

Second, the proposed amendments to MRPC 7.2 are superfluous, as the safeguards outlined in MRPC 7.1, as well as the inherent qualities of a firm's interest in preserving its identity and reputation, already retain the objectives sought in the ADM proposed amendments to MRPC 7.2.

The Michigan Rules of Professional Conduct commentary specifies its purpose is to "assist the public in obtaining legal services," and as such, in addition to advertisements, "lawyers should be allowed to make known their services" through "reputation." MRPC 7.2. The commentary notes maintain, "The interest in expanding public information about legal services ought to prevail over considerations of tradition." *Id.*

If the purpose of MRPC 7.2 is to ensure the public is protected from false advertisements and misrepresentations, while simultaneously expanding public information regarding legal services and assisting the public in obtaining representation, I contend that the requirements of Michigan Rules of Professional Conduct already expressly and impliedly ensure transparency and accountability in advertising, protecting the general public from the possibly predatory marketing materials ADM File No. 2016-27 amendment advocates seek to eliminate.

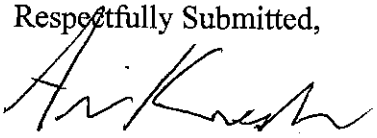
As Henry Ford once said, "You can't build a reputation based on what you're going to do." Rather, firms like 1-800-Law-Firm build their reputation, and pride themselves on, years of advocacy and social justice efforts. Identification through a phone number, like 1-800-Law-Firm, not only signifies a firm's identity, but also represents the firm's reputation. A beacon to consumers, corroborated by a simple Google search, validates the consumer's belief in what the firm represents, while additionally protecting against any false, fraudulent, or misleading tactics incorporated in MRPC 7.1. The consumer protections outlined in MRPC 7.1, and current advertisement rules of MRPC 7.2, need no amendments to protect the public, as the inherent commitment of firms to maintain their identity and reputation firmly safeguard those needs.

[1]https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/comment_on_rule_7_2.html

An adoption of either of the proposed amendments to MRPC 7.2 will not only discourage the advancement and flow of legal services, but also additionally, frustrate the original purpose the drafters of MRPC 7.2 endorsed.

I thank the Court for the opportunity to advocate for 1-800-Law-Firm's position.

Respectfully Submitted,



Ari Kresch
Managing Partner
akresch@1800lawfirm.com
(248)565-2099

To: ADMcomment
Subject: Proposed Amendment of MRPC 7.2
Date: Monday, March 26, 2018 10:23:44 AM

The Court should adopt Alternative A:

(d) Services of a lawyer or law firm that are advertised under the heading of a phone number, web address, image, or icon shall identify the lawyers or law firm providing the services. Any website advertising the services of a lawyer or law firm must contain the name(s) of the attorney(s) providing the services.

There appear to be people/businesses advertising that they have lawyers or attorneys without identifying who the lawyer or law firm is. It is very misleading. In reality, some of the advertising is believed to be controlled by nonlawyers or medical providers. For example, see 1-800 I'M INJURED 30 FERUARY 2018

1-800 I'M INJURED 30 FERUARY 2018

This video is about 1-800 I'M INJURED 30 FERUARY 2018

The website http://www.1800iminjured.com/ does not have a lawyer of law firm listed. It is believed 1-800-i'm injured is controlled by 411 Help LLC (aka 411 Therapy). The website http://411therapy.net/ has basically the same form and has the same testimonial from "Jen Margolis".

From: kmogill@bignet.net
To: ADMcomment
Subject: ADM File #2017-27
Date: Sunday, April 01, 2018 1:32:40 PM

Dear Justices:

For the reasons set out below, I support a hybrid of Alternatives A and B of the proposed amendment to Rule 7.2 as follows: "Services of a lawyer or law firm that are advertised under the heading of a telephone number, web address or trade name shall identify the name, office address and business telephone number of at least one lawyer responsible for the content of the advertisement."

Over the past several years, there has been a significant increase in lawyer advertising that leaves the public unaware of the source of the advertisement. These advertisements leave the public unable to identify who the advertising lawyers are, where they are located or anything at all about their practice, their history, their level of expertise, etc. Most Michigan-based lawyers and law firms advertising their practices understandably and appropriately identify themselves so that the public can know who they are and how to contact them. In my experience, advertisements that fail to identify a particular lawyer or law firm are often on behalf of entities based out of state with only a token Michigan presence. While I do not assume that these firms are engaging in the unauthorized practice of law, transparency as to the identity and actual location of the advertising lawyer and the existence or absence of a substantial in-state connection is valuable to the public and imposes no significant burden on the firm being advertised.

There is a significant additional reason to support amending Rule 7.2. It is my impression that some firms engaging in advertising that doesn't identify the lawyer or lawyers responsible for the advertisement are essentially operating for-profit legal referral services that may well violate Rule 6.3. Requiring identification of at least one Michigan-based lawyer who is responsible for the advertisement would likely deter violations of this rule as well as facilitate the ability of the discipline system to enforce Rule 6.3as currently written.

With respect to Justice McCormack's specific questions:

(1) In my opinion, current Rule 7.1 is not adequate to protect the public for the reason that an advertisement that fails to identify the lawyer or lawyers involved is not necessarily false, fraudulent, misleading or deceptive. While it can reasonably be argued that the absence of identifying information is misleading in some circumstances, greater clarity in the rule provides both better guidance to members of the Bar and ease of enforcement to the discipline system.

(2) If the Court is inclined toward adopting Alternative A, I would adopt the current language rather than "advertised *only* ..." language for the reason that the latter language would easy to circumvent. [If Alternative A is adopted, I would also use "telephone" rather than the more informal "phone".]

(3) I would clarify in the Comment to the Rule that while signage is a form of holding out, mere signage is not considered to be advertising. This distinction would not undermine the goal of providing the public with significant information in a firm's advertisements. Moreover, in the absence of a distinction between signage and advertising, the signage of the many long-time law firms that no longer include firm name lawyers among their members would be violating the rule.

(4) In general, it is advisable for the same standard to apply to all forms of advertising. If the lawyer has control over the content of a public statement, it should not matter whether

it is a billboard, a webpage, a Facebook page, etc. The key should be the lawyer's ability to control the content.

(5) I am proposing a hybrid alternative in part because I am not aware of any lawyer advertising that relies exclusively on an image or icon, nor can a mere image or icon be contacted. As such, the use of these terms is irrelevant. Moreover, because Alternative A fails to account for firms operating under trade names, the currently proposed alternative would be easy to circumvent, for example, by substituting "Auto Accident Law Firm" for "1.800.LawFirm".

(6) See my comments re question (4).

Finally, while requiring disclosure of the name and contact information for at least one lawyer responsible for any advertisement is a step in the right direction, this change will not get at the root of the problem. In my opinion, the Court's ability to root out abuses would be more fully served by amending Rule 6.3 to permit for-profit legal referral services and subject them to appropriate regulation. The ABA Model rules permit such services, and the current ban in our rule leaves too many opportunities for individuals to operate in the shadows.

Thank you in advance for your consideration of these comments.

Sincerely,

Kenneth M. Mogill

Mogill, Posner & Cohen

27 E Flint Street, 2nd Floor

Lake Orion MI 48362

(248)814-9470

From:	Jules B. Olsman
To:	ADMcomment
Subject:	Proposed Change to MRCP 7.2
Date:	Sunday, April 01, 2018 8:25:10 PM
Attachments:	image021.png image022.png image023.png image024.png Goldsar Website.pdf Proposed Changes to Rule 7.2(d).PDF

Dear Justices:

I write in full support of the proposed change to MRCP 7.2 (d). I support either Alternative A or Alternative B. Either one will go a long way toward correcting the practice of advertising that one is a lawyer, yet provide no identification of who actually will be performing theses services.

I am the initial proponent of this rule change and believe that the change is a reasonable yet necessary requirement to protect members of the public who are seeking legal services.

This proposal was originally submitted to the State Bar Michigan Representative Assembly at least three years ago. At that time several law firms that operate under trade names spoke against the proposed change at the time as they did not believe that it would be necessary for any law firm that used a trade name be required to identify the name of the attorneys working in the firm. The representative assembly did not approve the initial attempt at strengthening this rule. The Representative Assembly approved the current draft in April, 2016.

The new rule is more narrowly drawn. Obviously if one were to Google Dykema or Dickinson Wright, a website would be made available listing all of the lawyers and the law firm and the services each of them provide.

This rule is aimed at specific types of ventures. as "411 Pain," and Goldstar which prominently advertises its services in the Detroit area. The Goldstar website is attached. These entities are not singled out for any purpose other than they represent why I believe this change is necessary. Goldstar lists no

attorneys anywhere on it's website. I do know that there does not appear to be either a Mr. or Ms. Goldstar.

When the rule was originally proposed, it was vetted with an eye towards First Amendment considerations. The versions that are before the court now have been supported by Professor Robert Sedler, a well-known constitutional law expert. Professor Sedler advises that the rule provides more information to the public which cannot be seen as any kind of restriction on free speech. It should also be noted that we are discussing commercial speech, which may be regulated. The intent of the rule is to provide full disclosure. He is expected to formally comment on the rule change.

In addition to protecting the public I believe that the proposed changes to MRCP 7.2 also help protect members of the Michigan bar who are obligated to comply with the State Bar's ethics requirements. I do not believe that members of the bar in Michigan who have that obligation should be subjugated to other interests who may not be lawyers and basically don't give a hoot what the rules of professional responsibility require.

In response to the questions posed by Justice McCormack:

1) I do not believe that MRCP 7 .1 provides an adequate mechanism to deal with the problem that this revision seeks to address.

2) I do not believe that the revisions to MRCP 7.2 have application to law firms that advertise using a name that can be readily tracked to an existing law firm or attorney.

3) 1-800-LAW-Firm is a law firm. If one goes to the website for that entity, the names of the lawyers and support staff who work there are prominently displayed. That is not true for the other entities I have described.

4) Justice McCormack raises an interesting question with regard to third-party media advertising. I believe that any such entity should be required to

clearly state in writing that it is not a law firm but rather a legal referral service. I realized to members of the public there may not be a difference between those two entities. However there is a major difference to members of the bar. The website for 1-900-411-PAIN is a clear example of how misleading the ads are in terms of the public.

The type of advertising to which this rule should apply includes entities of the type I have already named. Shouldn't an injured person seeking legal counsel when they dial "4-11" pain know who the lawyers are in the group? Wouldn't providing the injured consumer basic information be deemed in the public's best interest? I believe the answer is in the affirmative.

Despite the prominence of advertising for personal injury litigation there is ample advertising for family law, immigration and other areas of the law. I believe that the public deserves a minimum amount of protection. I believe that should start by identifying the name of the lawyer(s) who are paying for the ad that is intended to bring business into their office.

I am a past president of the Michigan Association for Justice. Our law firm does engage in online and print media advertising. Our name has always been prominently displayed. I believe prospective clients have a right to know who they are hiring so that they can make an informed decision about whether the want to be represented by that person.

Thank you for considering the proposed change. I hope that this effort leads to a new court rule that will help protect both the public and the members of the State Bar of Michigan.

Jules B. Olsman | Attorney
2684 West Eleven Mile Road
Jules B. Olsman | Attorney
2684 West Eleven Mile Road

Berkley, MI 48072
248-591-2300 | 248-591-2304 [fax]

Olsman MacKenzie & Wallace
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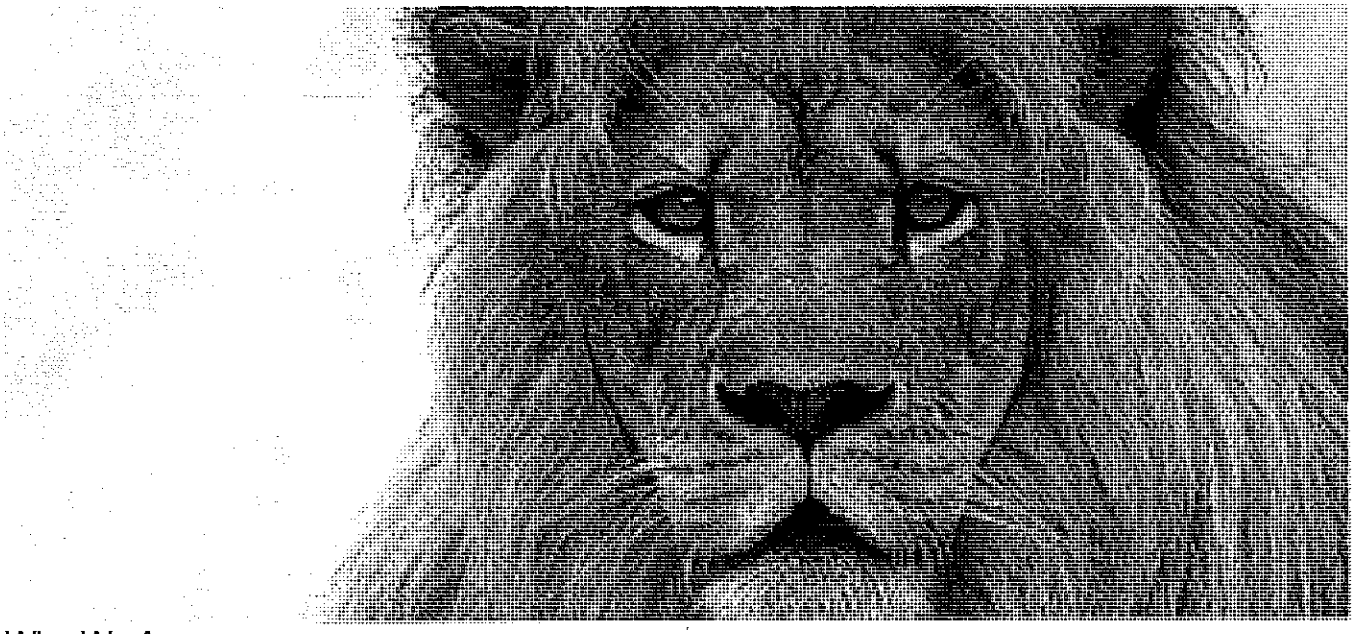
Olsman Law Web | Nursing Home Web

GOLD STAR LAW

248-851-GOLD



Who We Are

A personal injury and employment law firm that will work for you

Gold Star Law is a Michigan-based personal injury and employment law firm representing individuals in a wide range of cases. Some of our areas include workplace harassment, wrongful termination, wage and hour, unpaid overtime, automobile accidents, and police brutality. We are known for our focus on employment law, earning a reputation for being a tough, personable, and competent firm. We also handle personal injury law and have some of the best personal injury lawyers in Michigan.

Employment Law

We understand that proper treatment at your job is an essential right. We work with you – the employee – to ensure that you get the treatment and compensation that you deserve. While our team has experience on the employer's side of workplace disputes, we do not represent employers and will not contact your employer about your case. We have a unique understanding of the legal mistakes that employers make and leverage that knowledge to help employees attain the compensation and treatment that they deserve.

We represent employees in all types of workplace issues, including...

- Discrimination
- Harassment at Work
- Wrongful Termination
- Retaliation
- Wage and Hour Violations
- Unpaid Overtime
- Employee Benefits
- Family and Medical Leave
- Independent Contractor
- Disability Discrimination

Gold Star Law represents individual employees, as well as groups of employees in collective actions. Our multilingual team can also represent non-English speaking clients.

Personal Injury Law

In addition to employment law, Gold Star Law also represents clients in personal injury cases. Our personal injury lawyers have the knowledge and expertise necessary to maximize the value of your case and get you every penny that you deserve. We devote individual time and personal attention to your case to ensure that you understand what is happening, what steps are being taken, and what you should expect. No matter the size of your lawsuit, from $10,000 to $100 million, you can be confident that we will not sell your case off to the highest bidder: we will handle it personally, working closely with you as we strive to reach a favorable outcome.

We represent individuals with all types of personal injury claims, including...

- Auto accidents
- Dog bites
- Premises liability
- Truck accidents
- Motorcycle accidents
- Slip and fall accidents
- Defective consumer products

- Swimming pool accidents
- Brain and spinal cord injuries
- Wrongful death
- Pedestrian accidents
- No-Fault accidents
- Bicycle accidents
- Boating accidents

Call us today to get started: 248-851-GOLD

Gold Star Law

2701 Troy Center Dr | Suite 400
Troy, MI 48084
248-851-GOLD

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Wage & Hour
Employment Discrimination
Workplace Harassment
Retaliation & Wrongful Termination
Family & Medical Leave

Personal Injury Law

Auto Accident
Slip & Fall
Workers' Compensation
Police Brutality

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Sitemap

Order

Michigan Supreme Court
Lansing, Michigan

January 10, 2018

ADM File No. 2016-27

Proposed Amendment of
Rule 7.2 of the Michigan
Rules of Professional Conduct

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 7.2 of the Michigan Rules of Professional Conduct. Before determining whether either of the alternative proposals 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

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

Alternative A

Rule: 7.2 Advertising

(a)-(c) [Unchanged.]

(d) Services of a lawyer or law firm that are advertised under the heading of a phone number, web address, image, or icon shall identify the lawyers or law firm providing the services. Any website advertising the services of a lawyer or law firm must contain the name(s) of the attorney(s) providing the services.

Alternative B

Rule: 7.2 Advertising

(a)-(c) [Unchanged.]

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Staff Comment: The first proposed amendment of Rule 7.2 of the Michigan Rules of Professional Conduct (Alternative A) would require certain lawyer advertisements to identify the lawyer or law firm providing services. This proposal was submitted by the State Bar of Michigan Representative Assembly. Alternative B is the model rule provision that relates to providing information about the lawyer or law firm responsible for the advertisement's content.

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

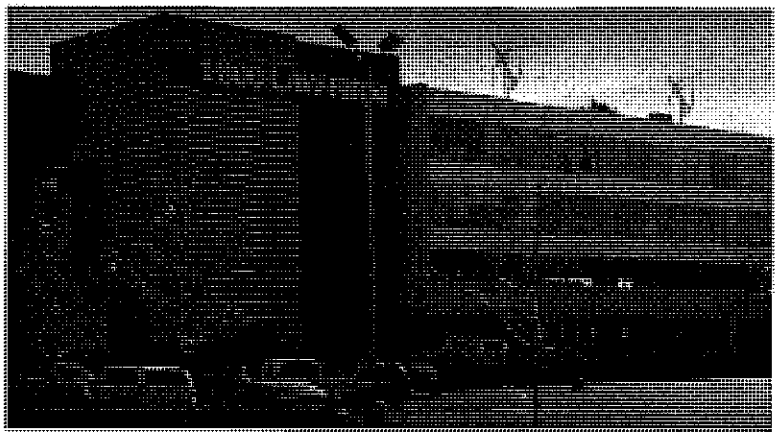
A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MCCORMACK, J. (*concurring*). This topic is worth the Court's consideration and I look forward to the public comment. I hope that the public comment process will, at a minimum, address and clarify the following questions:

(1) Is MRPC 7.1 already an adequate mechanism for protecting the public?

(2) Should the proposal's first sentence be targeted only to advertisements that solely consist of a web address or a telephone number, which is how the proposal was described by the State Bar of Michigan in its submission letter, or should it apply to all advertisements, which is how the proposal is currently styled? In other words, should the proposal read "Services of a lawyer or law firm that are advertised under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services," or should it read "Services of a lawyer or law firm that are advertised *only* under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services"?

(3) Will the proposal affect law offices that self-identify by solely listing their telephone number on their physical building or road sign, such as 1-800-LAW-FIRM in the attached photo?



(4) What is the scope of website advertising that would fall within this rule? For example, should it be limited to individual websites owned or managed by lawyers or lawfirms, or will it include third-party media advertising such as Craigslist listings, Facebook places, and Google places?

(5) What are the proper definitions of "image" and "icon" as used in the proposal?

(6) Will this rule regulate online advertising differently than the current rules regulate billboard, transit bus, television/cable, radio, and smartphone pop-up ads? If so, is that appropriate? If not, why not?

SEAL OF THE MICHIGAN SUPREME COURT · LANSING · DISCITE JUSTITIAM MONITI

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.

January 10, 2018

Clerk

From:	Tucker, Norman
To:	ADMcomment
Subject:	ADM File No. 2016-27 - Proposed Amendment of Rule 7.2 of the Michigan Rules of Professional Conduct
Date:	Sunday, April 01, 2018 9:17:19 PM

Given that lawyers have a legal right to advertise, if the profession is to maintain credibility and quality, the least that can be done is to insure that advertising and marketing is as honest and factual as possible. While these rules may seem stringent to some, the integrity of the profession is a slippery slope. I support the presently proposed changes with the added explanation below.

Justice McCormack raises key questions in the published Order of January 10, 2018 to which I will offer my thoughts:

1. Is MRPC 7.1 already an adequate mechanism for protecting the public?

   Answer: No. Most attorneys are reluctant to publicly express their opinions about advertising and what it is doing to the profession. Rhetorically, is it raising the quality of lawyers handling the cases solicited, does it adequately inform the public about these lawyer's qualifications and abilities, or as H.L. Mencken said, is it all about the money? Promoting professionalism and "protecting the public" requires full and honest disclosure.

2. Should the proposal's first sentence be targeted only to advertisements that solely consist of a web address or a telephone number, which is how the proposal was described by the State Bar of Michigan in its submission letter, or should it apply to all advertisements, which is how the proposal is currently styled? In other words, should the proposal read "Services of a lawyer or law firm that are advertised under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services," or should it read "Services of lawyer or law firm that are advertised *only* under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services"?

   Answer: It should apply to all: "Services of a lawyer or law firm that are advertised under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services". Limiting the rule's scope would only encourage alternative and imaginative methods to circumvent the intent and effectiveness of the rule.

3. Will the proposal affect law offices that self-identify by solely listing their telephone number on their physical building or road sign, such as 1-800-LAW-FIRM in the attached photo?

   Answer: Yes, one rule for all (see 2 above).

4. What is the scope of website advertising that would fall within this rule? For example, should it be limited to individual websites owned or managed by lawyers or law firms, or will it include third-party media advertising such as Craigslist listings, Face book places, and Google places?

Answer: One rule for all (see 2 above).

5. What are the proper definitions of "image" and "icon" as used in the proposal?

   Answer: Image or icon: “a symbol or graphic representation which has a characteristic in common with the thing it signifies” (Oxford Dict.). I doubt anyone would spend time and money putting an “image or icon” in an ad that does anything other than identify and promote the lawyer or law firm advertising.

6. Will this rule regulate online advertising differently than the current rules regulate billboard, transit bus, television/cable, radio, and smartphone pop-up ads? If so, is that appropriate? If not, why not?

   Answer: No. One rule for all forms of advertising. Once guidelines are agreed upon for full, honest and adequate disclosure these should not be compromised because of the medium. That also is a slippery slope.

Thank you for your efforts and please feel free to call if you have any questions.

Norman D. Tucker
Sommers Schwartz, P.C.
One Towne Square, Suite 1700
Southfield, MI 48076
(248) 355-0300
E-mail | Biography | Website

From: Mark Bernstein
To: ADMcomment
Subject: Comment Regarding ADM File #2017-27
Date: Sunday, April 01, 2018 10:00:51 PM

Justices of the Michigan Supreme Court,

Thank you for the opportunity to submit comment regarding the above matter. I greatly appreciate your consideration of my support for an amendment to Rule 7.2 of the Michigan Rules of Professional Conduct.

I join others who suggest a hybrid of Alternative A and B of the proposed amendment to Rule 7.2 as follows: "Services of a lawyer or law firm that are advertised under the heading of a telephone number, web address or trade name shall identify the name, office address and business telephone number of at least one lawyer responsible for the content of the advertisement."

While I believe the current Rule 7.1 adequately addresses issues related to the marketing of legal services, the proposed amendment addresses legitimate concerns involving the identification of a particular lawyer responsible for the marketing of legal services.

Sincerely,
Mark Bernstein
President, The Sam Bernstein Law Firm, PLLC

Mark Bernstein
Attorney
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Farmington Hills, MI 48334
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Client Service Hotline: 866-858-2329
www.CallSam.com

Sam Bernstein is our founder, of counsel, and a retired shareholder.

From: Robert Sedler
To: ADMcomment
Subject: ADM File.No.2016-27
Date: Monday, April 02, 2018 11:28:42 AM

Dear Justices:

I am a Constitutional Law professor at Wayne State University and a member of the Michigan Bar. The purpose of this comment is to explain why, in my opinion, the requirement that an advertisement for legal services shall identify the lawyer or law firm providing these services is fully constitutional under the First Amendment. As a general proposition, the requirement is fully constitutional (1) because it does not interfere in any way with the ability of a lawyer or law firm to advertise that it provides legal services, (2) the requirement provides additional information to the public, and (3) the requirement is substantially related to the advancement of an important governmental interest and is the least restrictive means of advancing that interest.

A party challenging a law or regulation as violative of the First Amendment must first demonstrate that the requirement interferes with the ability of that party to convey information to the public. It is difficult to see how the requirement that lawyer advertising shall identify the lawyer or law firm providing the legal services interferes with the ability of the lawyer or law firm to inform the public that it provides legal services to members of the public. The lawyer or law firm can still advertise with a firm name or phone number and obtain any advantage that follows from advertising in that manner. All that is required is that the lawyer or law firm provide additional information, and providing that additional information in no way diminishes that purported advantage that may come by advertising with a firm name or phone number. Since this is so, the requirement does not interfere in any way with the ability of the lawyer or law firm to convey its message to the public and so could not possibly violate the First Amendment.

In any event, the requirement is fully constitutional under the First Amendment's commercial speech doctrine. Under that doctrine, the government may regulate commercial speech when the regulation advances a substantial governmental interest, the regulation must directly advance that interest, and the regulation may not be more extensive than is necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). The requirement serves two substantial governmental interests. It provides the public with important information with respect to obtaining legal services, specifically the name of an attorney who may be contacted with reference to the advertisement. And it ensures that the firm advertising its services has at least one attorney who is a member of the Michigan State Bar. The requirement directly advances these interests and certainly is not more extensive than is necessary to advance these interests.

For these reasons, it is my considered opinion that the requirement that an advertisement for legal services shall identify the lawyer or law firm providing these services is fully constitutional under the First Amendment.

Thank you in advance for your consideration of these comments.

Sincerely,

Robert A. Sedler
Distinguished Professor of Law
Wayne State University
471 W. Palmer
Detroit, MI 48202

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

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

Date: April 10, 2018

Re: HB 5702

Background

HB 5702 would require prosecutorial review and judicial oversight of civil asset forfeitures to limit local government discretion over the process. The seizing agency would be required to provide the prosecutor a list of the seized property. Upon review, if the prosecutor determines that all or some of the property was lawfully seized, the prosecutor would be required to seek a court order approving the seizure and forfeiture of assets. If the court issues the order, then the prosecutor would notify the seizing agency.

In addition, HB 5702 requires the seizing agency to provide additional notice of its intent to forfeit and dispose of the property to the owner.

***Keller* Considerations**

Under existing law, a person with an interest in the property could request forfeiture proceedings; however, if the owner does not make such a request, there is no judicial oversight. Because HB 5702 requires judicial oversight over all civil asset forfeitures, regardless of whether a challenge has been raised, the bill could be seen as increasing the availability of legal services to society.

In addition, by providing additional notice requirements to the owner of the property, HB 5702 increases the likelihood that the property owner will be able to challenge any defects in the forfeiture process, further increasing the availability of legal services to society.

The Access to Justice Committee reviewed HB 5702. While a committee member raised an argument that HB 5702 was potentially outside the purview of *Keller* because the judicial involvement could be merely ministerial and the bill primarily adds prosecutorial, rather than judicial, oversight to the administrative process, the committee ultimately determined that HB 5702 was *Keller*-permissible because it would increase the availability of legal services by requiring a court order prior to forfeiting property and judicial oversight over the civil asset forfeiture process.

Keller **Quick Guide**

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

Staff Recommendation
The bill likely satisfies the requirements of *Keller* and may be considered on its merits.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Tuesday, April 10, 2018
Michigan Compiled Laws Complete Through PA 56 and includes 58-90 of 2018

House Bill 5702 (2018) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2018-HB-5702

Sponsors

Jim Runestad (district 44)
Pamela Hornberger, Jim Tedder, Gary Glenn, Eric Leutheuser, John Reilly, John Bizon, Martin Howrylak, Hank Vaupel, Peter Lucido, Gary Howell, Beau LaFave
(click name to see bills sponsored by that person)

Categories

Criminal procedure: forfeiture; Civil procedure: remedies;

Criminal procedure; forfeiture; prosecutional review of civil asset forfeiture in controlled substances cases; require. Amends sec. 7523 of 1978 PA 368 (MCL 333.7523).

Bill Documents

Bill Document Formatting Information
[x]
The following bill formatting applies to the 2017-2018 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

Documents

House Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the House
As Passed by the House is the bill, as introduced, that includes any adopted House amendments.

As Passed by the Senate
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

House Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

House Fiscal Agency Analysis

Summary As Introduced (3/19/2018)
This document analyzes: HB5702, HB5703, HB5704

History

(House actions in lowercase, Senate actions in UPPERCASE)

Date	Journal	Action
3/8/2018	HJ 26 Pg. 456	introduced by Representative Jim Runestad

3/8/2018	HJ 26 Pg. 456	read a first time
3/8/2018	HJ 26 Pg. 456	referred to Committee on Judiciary
3/13/2018	HJ 27 Pg. 472	bill electronically reproduced 03/08/2017

HOUSE BILL No. 5702

March 8, 2018, Introduced by Reps. Runestad, Hornberger, Tedder, Glenn, Leutheuser, Reilly, Bizon, Howrylak, Vaupel, Lucido, Howell and LaFave and referred to the Committee on Judiciary.

A bill to amend 1978 PA 368, entitled

"Public health code,"

by amending section 7523 (MCL 333.7523), as amended by 2016 PA 418.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7523. (1) If property is seized under section 7522, forfeiture proceedings ~~shall~~ **MUST** be instituted promptly. If the property is seized without process under section 7522, and the total value of the property seized does not exceed $50,000.00, the following procedure ~~shall~~ **MUST** be used:

(a) The local unit of government that seized the property or, if the property was seized by this state, the state shall notify the owner of the property that the property has been seized, and that the local unit of government or, if applicable, the state intends to forfeit and dispose of the property by delivering a

HOUSE BILL No. 5702

written notice to the owner of the property or by sending the notice to the owner by certified mail. If the name and address of the owner are not reasonably ascertainable, or delivery of the notice cannot be reasonably accomplished, the notice ~~shall~~ **MUST** be published in a newspaper of general circulation in the county in which the property was seized, for 10 successive publishing days.

(b) Unless all criminal proceedings involving or relating to the property have been completed, the seizing agency shall immediately notify the prosecuting attorney for the county in which the property was seized or, if the attorney general is actively handling a case involving or relating to the property, the attorney general of the seizure of the property and the intention to forfeit and dispose of the property.

(c) Any person claiming an interest in property that is the subject of a notice under subdivision (a) may, within 20 days after receipt of the notice or of the date of the first publication of the notice, file a written claim signed by the claimant with the local unit of government or the state expressing his or her interest in the property. Upon the filing of the claim, the local unit of government or, if applicable, this state shall transmit the claim with a list and description of the property seized to the attorney general, the prosecuting attorney for the county, or the city or township attorney for the local unit of government in which the seizure was made. The attorney general, the prosecuting attorney, or the city or township attorney shall promptly institute forfeiture proceedings after the expiration of the 20-day period. However, unless all criminal proceedings involving or relating to

the property have been completed, a city or township attorney shall not institute forfeiture proceedings without the consent of the prosecuting attorney or, if the attorney general is actively handling a case involving or relating to the property, the attorney general.

(d) If no claim is filed within the 20-day period as described in subdivision (c), ~~the local unit of government or this state shall declare the property forfeited and shall dispose of the property as provided under section 7524. However, unless all criminal proceedings involving or relating to the property have been completed, the local unit of government or the state shall not dispose of the property under this subdivision without the written consent of the prosecuting attorney or, if the attorney general is actively handling a case involving or relating to the property, the attorney general.~~**THE FOLLOWING PROCEDURE MUST BE USED:**

(*i*) THE SEIZING AGENCY SHALL IMMEDIATELY PROVIDE A SECOND NOTICE TO THE PROSECUTING ATTORNEY FOR THE COUNTY IN WHICH THE PROPERTY WAS SEIZED OR, IF THE ATTORNEY GENERAL IS ACTIVELY HANDLING A CASE INVOLVING OR RELATING TO THE PROPERTY, THE ATTORNEY GENERAL, AND THE OWNER OF THE PROPERTY IN THE SAME MANNER AS PROVIDED UNDER SUBDIVISION (A) OF THE SEIZURE OF THE PROPERTY AND THE INTENTION TO FORFEIT AND DISPOSE OF THE PROPERTY.

(*ii*) THE SEIZING AGENCY SHALL PROVIDE A LIST OF THE PROPERTY SEIZED TO THE PROSECUTING ATTORNEY FOR THE COUNTY IN WHICH THE PROPERTY WAS SEIZED OR, IF THE ATTORNEY GENERAL IS ACTIVELY HANDLING A CASE INVOLVING OR RELATING TO THE PROPERTY, THE ATTORNEY GENERAL, AND THE OWNER OF THE PROPERTY IN THE SAME MANNER AS THE

OWNER WAS PROVIDED NOTICE UNDER SUBDIVISION (A).

(*iii*) THE PROSECUTING ATTORNEY FOR THE COUNTY IN WHICH THE PROPERTY WAS SEIZED OR, IF THE ATTORNEY GENERAL IS ACTIVELY HANDLING A CASE INVOLVING OR RELATING TO THE PROPERTY, THE ATTORNEY GENERAL, SHALL REVIEW THE LIST OF THE PROPERTY SEIZED. IF AFTER A REVIEW OF THE SEIZURE THE PROSECUTING ATTORNEY OR ATTORNEY GENERAL DETERMINES THAT ALL OR SOME OF THE PROPERTY SEIZED IS LAWFULLY SUBJECT TO SEIZURE AND FORFEITURE UNDER THIS ARTICLE, THE PROSECUTOR OR ATTORNEY GENERAL SHALL SEEK A COURT ORDER APPROVING THE SEIZURE AND FORFEITURE AND AFFIRMING THAT THE PROPERTY WILL NOT BE MOVED, SOLD, TRANSFERRED, OR DESTROYED WHILE FORFEITURE PROCEEDINGS ARE PENDING.

(*iv*) AFTER OBTAINING AN ORDER UNDER SUBPARAGRAPH (*iii*), THE PROSECUTOR OR ATTORNEY GENERAL SHALL NOTIFY THE SEIZING AGENCY OF THE DETERMINATION UNDER SUBPARAGRAPH (*iii*) AND THE LOCAL UNIT OF GOVERNMENT OR THIS STATE SHALL DECLARE THE PROPERTY FORFEITED AND SHALL DISPOSE OF THE PROPERTY AS PROVIDED UNDER SECTION 7524.

(*v*) EXCEPT AS TO PROPERTY THAT IS REQUIRED TO BE DESTROYED BY LAW, THAT IS HARMFUL TO THE PUBLIC, OR THAT IS EVIDENCE IN A CRIMINAL INVESTIGATION OR PROCEEDING, IF THE PROSECUTING ATTORNEY OR ATTORNEY GENERAL DOES NOT APPROVE THE SEIZURE OF THE PROPERTY UNDER SUBPARAGRAPH (*iii*), THE SEIZING AGENCY SHALL RETURN THE PROPERTY TO THE PERSON FROM WHOM IT WAS SEIZED.

(2) Property taken or detained under this article is not subject to an action to recover personal property, but is deemed to be in the custody of the seizing agency subject only to this section or an order and judgment of the court having jurisdiction

over the forfeiture proceedings. When property is seized under this article, the seizing agency may do any of the following:

(a) Place the property under seal.

(b) Remove the property to a place designated by the court.

(c) Require the administrator to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(d) Deposit money seized under this article into an interest-bearing account in a financial institution. As used in this subdivision, "financial institution" means a state or nationally chartered bank or a state or federally chartered savings and loan association, savings bank, or credit union whose deposits are insured by an agency of the United States government and that maintains a principal office or branch office located in this state under the laws of this state or the United States.

(3) Title to real property forfeited under this article ~~shall~~ **MUST** be determined by a court of competent jurisdiction. A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission.

(4) An attorney for a person who is charged with a crime involving or related to the money seized under this article ~~shall~~ **MUST** be afforded a period of 60 days within which to examine that money. This 60-day period begins to run after notice is given under subsection (1)(a) but before the money is deposited into a financial institution under subsection (2)(d). If the attorney general, prosecuting attorney, or city or township attorney fails

to sustain his or her burden of proof in forfeiture proceedings under this article, the court shall order the return of the money, including any interest earned on money deposited into a financial institution under subsection (2)(d).

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Legislative Analysis

FORFEITURE UNDER PUBLIC HEALTH CODE

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

House Bill 5702 as introduced
Sponsor: Rep. Jim Runestad

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

House Bill 5703 as introduced
Sponsor: Rep. Gary Glenn

House Bill 5704 as introduced
Sponsor: Rep. Beau Matthew LaFave

Committee: Judiciary
Complete to 3-19-18

SUMMARY:

House Bills 5702 and 5704 would amend the Public Health Code to prescribe a new procedure for unclaimed property seized under forfeiture proceedings and to prohibit a local unit of government from enacting an ordinance regulating that process. House Bill 5703 would amend the Michigan Commission on Law Enforcement Standards (MCOLES) Act to require training for law enforcement officers in lawfully seizing property that is subject to forfeiture. Each bill would take effect 90 days after being enacted.

House Bills 5702 and 5704

Section 7523 of the Public Health Code currently provides a procedure to be followed if property was seized under Section 7522 without process (warrant) and the total value of the seized property is $50,000 or less. If no claim of interest in the property is filed within 20 days after the owner receives notice that the property will be forfeited and disposed of, the local unit of government or the state must declare the property forfeited and dispose of the property under Section 7524 (see **Background**, below). However, the government cannot dispose of the property unless all criminal proceedings involving or relating to the property have been completed or the prosecuting attorney or attorney general handling the case gives written consent.

HB 5702 would amend this procedure to require that, if no claim is filed within 20 days of receiving notice, the following procedure would be used:

- The seizing agency would immediately provide a second notice of intent to forfeit and dispose of the property to the prosecuting attorney for the county where the property was seized or the attorney general handling the case *and* to the owner of the property.
- The seizing agency would provide a list of the property seized to the prosecuting attorney for the county where the property was seized or the attorney general handling the case *and* to the owner of the property.
- The prosecuting attorney for the county where the property was seized or the attorney general handling the case would review the list of property seized. After the review, if any of the property would be lawfully subject to seizure and forfeiture under the Public Health Code, the prosecutor or attorney general would seek a court order approving the seizure and forfeiture and affirming that

the property will not be moved, sold, transferred, or destroyed while forfeiture proceedings are pending.

- After obtaining an order, the prosecutor or attorney general would notify the seizing agency of the determination and the local unit of government or the state would declare the property forfeited and dispose of the property under Section 7524 (see **Background**, below).
- If the prosecuting attorney or attorney general does not approve of the seizure, then the seizing agency would return the property to the person from whom it was seized. However, property that is required to be destroyed by law, is harmful to the public, or is evidence in a criminal investigation or proceeding would not be returned.

MCL 333.7523

HB 5704 would add a new section to the Public Health Code to prohibit a ***local unit of government*** (a city, village, or township) from adopting, enacting, or enforcing a local ordinance that in any manner regulates the process for seizure and forfeiture of property that is subject to seizure and forfeiture under the Public Health Code.

Proposed MCL 333.7524c

House Bill 5703

The Michigan Commission on Law Enforcement Standards (MCOLES) Act provides for universal training standards for any individual seeking to become licensed as a law enforcement officer, as defined in Section 2 of the Act.

HB 5703 would add a training requirement for certain individuals seeking to become licensed under the Act. Under the bill, an individual would have to complete training that is designed to assist law enforcement officers in lawfully seizing property that is subject to forfeiture and in following the procedures regarding forfeiture provided under the Public Health Code.

A law enforcement officer licensed before January 1, 2019 who has not previously completed this new training would have to complete the training no later than January 1, 2020 to maintain his or her licensure. Additionally, the bill would require the MCOLES to promulgate rules to establish the minimum standards for the required training.

The new training requirement mandated by HB 5703 would apply to all of the following:

- Law enforcement officers, except sheriffs.
- Tribal law enforcement officers who are subject to written instruments authorizing them to enforce the laws of the state.
- Fire arson investigators from fire departments within villages, cities, townships, or counties in the state who are sworn and fully empowered by the chiefs of police of those villages, cities, townships, or counties.
- Private college security officers under Section 37 of the Private Security Business and Security Alarm Act who seek licensure under the MCOLES Act

and who are sworn and fully empowered by a chief of police of a village, city, or township law enforcement agency or are deputized by a county sheriff as a deputy sheriff, excluding deputization as a special deputy.

The bill would take effect 90 days after being enacted.

MCL 28.609 et al.

BACKGROUND:

Article 7 of the Public Health Code (Controlled Substances) prohibits certain activities, such as the manufacture, delivery, and possession of controlled substances, and establishes penalties for violations. Under Section 7522, certain property involved in drug crimes may be seized with a warrant, or without a warrant under certain circumstances such as incident to a lawful arrest. The types of property subject to forfeiture are listed in Section 7521.

Besides obvious objects such as the illegal drugs and associated paraphernalia and books and records (including formulas) related to drug offenses, vehicles such as cars, boats, and planes can also be seized and forfeited if used to commit or facilitate a drug violation. Anything of value, including cash, may also be seized and subject to forfeiture if used or intended to be used to facilitate a violation or if furnished or intended to be furnished in exchange for a controlled substance, imitation controlled substance, or other drug in violation of Article 7 and traceable to the exchange.

Section 7523, among other things, provides a procedure to be followed if the property was seized under Section 7522 without process (warrant) and the total value of the seized property is $50,000 or less.

Section 7524 allows the local unit of government, or the state, that seized the property to retain it for official use or sell any property that is not required by law to be destroyed and is not harmful to the public. The proceeds, and any money or other things of value, must be deposited with the state treasurer if the state was the seizing entity or with the appropriate treasurer having budgetary authority of a local seizing entity, and must be disposed of as specified: to cover expenses related to the maintenance of the property while in custody, for instance, or costs associated with the sale of the property, among other things. Lights for plant growth or scales that were forfeited may be donated to elementary or secondary schools or colleges or universities for educational purposes.

FISCAL IMPACT:

House Bill 5702 would require the Department of Attorney General to undertake additional legal services associated with reviewing property seizures. It is not yet known what additional resources would be required to satisfy the requirements put forth in the bill. Should the department require additional personnel, the cost of an additional attorney FTE is approximately $180,000.

The bill would not have a substantive fiscal impact on the Department of State Police or local law enforcement agencies. Any administrative costs incurred would be minor and would result from additional reporting requirements to the Attorney General or county prosecutors regarding property seized as a result of controlled substance violations of the Public Health Code.

House Bill 5703 would have an indeterminate fiscal impact on the Michigan Commission on Law Enforcement Standards, the Department of State Police, and local law enforcement agencies.

The requirement to promulgate rules regarding minimum training standards for the seizure of property as a result of controlled substance violations of the Public Health Code would likely not result in any increased administrative costs for the Michigan Commission on Law Enforcement Standards. Any cost increases would likely be covered by existing appropriations.

The requirement that licensed law enforcement officers receive training regarding the seizure of property as a result of controlled substance violations of the Public Health Code would result in increased one-time training costs for the Department of State Police and local law enforcement agencies in order to administer the training to all currently licensed law enforcement officers, as well as increased ongoing training costs for the Department of State Police or local law enforcement agencies that administer their own officer recruit schools.

House Bill 5704 would have no fiscal impact on local law enforcement agencies.

Legislative Analyst: Emily S. Smith
Fiscal Analysts: Kent Dell
Michael Cnossen

Public Policy Position
HB 5702

SUPPORT

Explanation
The Access to Justice Policy Committee supports HB 5702, as it requires judicial oversight of civil forfeitures to better ensure proper procedures are being followed.

This bill requires a court order before forfeiting property. Although under existing law, a person with an interest in the property could request forfeiture proceedings, there is no judicial oversight if no claim is filed. This bill requires that the prosecuting attorney review the local unit of government's decision that the property is forfeitable and make sure persons with an ownership interest in the property have been notified. A court order is required to end the process.

The United States Commission on Civil Rights published a report critical of Michigan's civil asset forfeiture laws. By requiring judicial oversight, this bill could safeguard the abuse of discretion in the civil forfeiture process, by providing the courts a role in ensuring that correct procedures are followed and by providing an increased likelihood that request for formal forfeiture proceedings will be filed. One of the many problems found was too much law enforcement discretion. This bill is an improvement, albeit a mild one, to existing procedure.

The Commission on Civil Rights also found a disparate impact on low-income communities, particularly minority communities. This bill may help alleviate the disparate burden of civil asset forfeiture on these communities.

Number who voted in favor and opposed to the position:
Voted For position: 18
Voted against position: 0
Abstained from vote: 2
Did not vote: 6

***Keller* Explanation**
This bill improves the availability of legal services to society because it requires that a court review of all civil asset forfeitures and a court order before the property can actually be forfeited.

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

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

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

Date: April 10, 2018

Re: SB 895 and 896

Background

In 2016, the Governor signed into law the Wrongful Imprisonment Compensation Act (WICA). The Act allowed those who had been convicted and sent to prison for crimes they did not commit and who were eventually exonerated to receive $50,000 per year for each year of wrongful imprisonment. The WICA went into effect on March 29, 2017 and gave those already-exonerated prisoners 18 months to file compensation claims for wrongful imprisonment.

In a WICA case, however, the Court of Claims determined that the one-year notice requirement in the Court of Claims Act took precedence over the 18-month period set forth in the WICA.[1] The result of this decision meant that anyone who had a claim that rose prior to March 29, 2017 who had not filed before March 29, 2018 was now barred from pursuing a claim under the WICA.

SB 895 and 896 extends the period for individuals exonerated before March 29, 2017 to file a claim under the WICA an additional 18 months.

The proposed changes in SB 895 to the Court of Claims Act specifically exempt WICA claims from certain Court of Claims filing requirements. The changes in SB 895 have no substantive bearing on the Court of Claims Act.

Similarly, the proposed changes in SB 896 amend the WICA to add a new retroactive clause to restart the clock for those filing a retroactive claim, allowing anyone convicted, imprisoned, and released prior to March 29, 2017 18 months from the effective date of "the 2018 amendatory act that amended this section" to file a claim. Again, this language has no substantive bearing on the WICA, but merely resets the time that already-exonerated individuals have to file a claim under the WICA.

***Keller* Considerations**

The Access to Justice Policy Committee considered SB 895 and 896 and determined that they were *Keller*-permissible in that they affected the availability of legal services to individuals who were wrongly

[1] This case is currently pending in the Court of Appeals. *Konrad Montgomery v State of Michigan* (COA Docket No. 342737).

imprisoned before March 29, 2017 to allow them additional time to file a claim against the State, given the Court of Claims ruling that the 1-year Court of Claims Act period applied. Further, the Access to Justice Policy Committee found that these statutory changes only affect the time period for filing a claim in the Court of Claims and have no substantive bearing on the WICA to raise any concerns about the State Bar's involvement with these bills.

***Keller* Quick Guide**

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

Staff Recommendation

Although the Access to Justice Policy Committee concluded that the bills are within *Keller*, staff considers the *Keller*-permissibility of statute of limitations legislation one of the most difficult *Keller* determinations. Statutes of limitation are essentially a way to economically allocate justice system resources, reserving those resources for cases where the evidence is likely to be sufficiently reliable to render a just result. Legislative consideration about whether a particular type of crime or dispute should be different from the generic statute of limitations is generally based on two different types of determinations: 1) that the evidence typically presented to resolve the dispute is more durable than the assumptions about the longevity of reliable evidence that underlies the time limit of the generic statute of limitations, e.g. DNA and paternity; or 2) notwithstanding possible degradation of evidence, the seriousness of the crime or dispute warrants more access to the justice system than would otherwise be accorded, e.g. first-degree murder. Determinations based on the first category are not fundamentally ideological and members of the State Bar are uniquely positioned to weigh in on questions of reliability of evidence as they play out in the courtroom. The second category, however, is essentially ideological and generally off-limits under *Keller*, notwithstanding that an extension or shortening of a statute of limitations period is per se an act that affects the availability of legal services.[2]

SB 895 and 896 don't fit in either category. They are offered as a clarification of what the legislature intended in the original legislation. The question of whether 18 months rather than 12 months is the more reasonable time period needed to afford affected parties sufficient time to become aware of the existence of the act, to find legal assistance, to compile the necessary paperwork, and file a claim in court is not ideological, and falls squarely within the expertise of the Bar. Further, the universe affected consists entirely of individuals for whom the justice system has admitted serious, consequential failure.

[2] Query whether AO 2004-1 means "availability of legal services to society" to encompass all questions of access to courts, or is primarily a reference to access to the services that lawyers provide. What is the import of "to society" rather than "to individuals"?

As an organization encompassing all officers of the court in the State of Michigan, the State Bar of Michigan's view on how to deal with that admitted failure is uniquely relevant.

The bills thus fall within *Keller*.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Tuesday, April 10, 2018
Michigan Compiled Laws Complete Through PA 56 and includes 58-90 of 2018

Senate Bill 0895 (2018) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2018-SB-0895

Sponsors
Steven Bieda (district 9)
Rick Jones
(click name to see bills sponsored by that person)

Categories
Civil procedure: other;

Civil procedure; other; court of claims notification requirements and statute of limitations; exempt claims under the wrongful imprisonment compensation act. Amends secs. 6431 & 6452 of 1961 PA 236 (MCL 600.6431 & 600.6452).

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2017-2018 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
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Documents

Senate Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the Senate
As Passed by the Senate is the bill, as introduced, that includes any adopted Senate amendments.

As Passed by the House
As Passed by the House is the bill, as received from the Senate, that includes any adopted House amendments.

Senate Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

Senate Fiscal Analysis

SUMMARY OF INTRODUCED BILL IN COMMITTEE (Date Completed: 3-20-18)
This document analyzes: SB0895, SB0896

SUMMARY OF BILL REPORTED FROM COMMITTEE (Date Completed: 3-21-18)
This document analyzes: SB0895, SB0896

History

(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
3/8/2018	SJ 26 Pg. 384	INTRODUCED BY SENATOR STEVEN BIEDA
3/8/2018	SJ 26 Pg. 384	REFERRED TO COMMITTEE ON JUDICIARY
3/22/2018	SJ 32 Pg. 489	REPORTED FAVORABLY WITHOUT AMENDMENT
3/22/2018	SJ 32 Pg. 489	COMMITTEE RECOMMENDED IMMEDIATE EFFECT
3/22/2018	SJ 32 Pg. 489	REFERRED TO COMMITTEE OF THE WHOLE

SENATE BILL No. 895

March 8, 2018, Introduced by Senators BIEDA and JONES and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending sections 6431 and 6452 (MCL 600.6431 and 600.6452).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 6431. (1) ~~No~~ **EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, A** claim may **NOT** be maintained against ~~the~~ **THIS** state unless the claimant, within 1 year after ~~such~~ **THE** claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms, or agencies. ~~, stating~~

(2) A CLAIM OR NOTICE UNDER SUBSECTION (1) MUST CONTAIN ALL OF THE FOLLOWING:

SENATE BILL No. 895

(A) A STATEMENT OF the time when and the place where ~~such~~ **THE** claim arose. ~~and in detail~~

(B) A DETAILED STATEMENT OF the nature of the ~~same~~ **CLAIM** and of the items of damage alleged or claimed to have been sustained. ~~, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.~~

(C) ~~(2) Such claim or notice shall designate~~ **A DESIGNATION OF** any department, commission, board, institution, arm**,** or agency of the state involved in connection with ~~such~~ **THE** claim. ~~, and a copy of such~~

(D) A SIGNATURE AND VERIFICATION BY THE CLAIMANT BEFORE AN OFFICER AUTHORIZED TO ADMINISTER OATHS.

(3) A CLAIMANT SHALL FURNISH COPIES OF A claim or notice ~~shall be furnished~~ **FILED UNDER SUBSECTION (1)** to the clerk at the time of ~~the~~ filing ~~of the original~~ for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms, or agencies **OF THIS STATE** designated **IN THE CLAIM OR NOTICE**.

(4) ~~(3) In all actions~~ **FOR A CLAIM AGAINST THIS STATE** for property damage or personal injuries, **THE** claimant shall file **THE CLAIM OR NOTICE UNDER SUBSECTION (1)** with the clerk of the court of claims ~~a notice of intention to file a claim or the claim itself~~ within 6 months ~~following the happening of~~ **AFTER** the event ~~giving~~ **THAT GIVES** rise to the ~~cause of action.~~**CLAIM.**

(5) THIS SECTION DOES NOT APPLY TO A CLAIM FOR COMPENSATION UNDER THE WRONGFUL IMPRISONMENT COMPENSATION ACT, 2016 PA 343, MCL 691.1751 TO 691.1757.

Sec. 6452. (1) Every claim against ~~the~~ **THIS** state, cognizable

by the court of claims, ~~shall be~~ **IS** forever barred unless the claim is filed with the clerk of the court or ~~suit instituted thereon~~ **AN ACTION IS COMMENCED ON THE CLAIM** in federal court as authorized in section 6440, within 3 years after the claim first accrues.

(2) Except as modified by this section, ~~the provisions of~~ RJA chapter 58, relative to the limitation of actions, ~~shall~~ also ~~be applicable~~ **APPLIES** to the limitation ~~prescribed in~~ **UNDER** this section.

(3) The attorney general ~~shall have~~ **HAS** the same right as a creditor under ~~the provisions of~~ the statutes of ~~the~~ **THIS** state ~~of Michigan in such case made and provided,~~ to petition for the ~~granting of letters of administration~~ **APPOINTMENT OF A PERSONAL REPRESENTATIVE** of the estate of ~~any~~ **A** deceased person.

(4) The attorney general ~~shall have~~ **HAS** the same right as a superintendent of the poor under ~~the provisions of~~ the statutes of ~~the~~ **THIS** state ~~of Michigan in such case made and provided,~~ to petition for the appointment of a guardian of the estate of a minor or any other ~~person~~ **INDIVIDUAL** under **A** disability.

(5) THIS SECTION DOES NOT APPLY TO A CLAIM FOR COMPENSATION UNDER THE WRONGFUL IMPRISONMENT COMPENSATION ACT, 2016 PA 343, MCL 691.1751 TO 691.1757.

Enacting section 1. Sections 6431 and 6452 of the revised judicature act of 1961, 1961 PA 236, MCL 600.6431 and 600.6452, as amended by this amendatory act, apply retroactively to March 29, 2017.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Tuesday, April 10, 2018
Michigan Compiled Laws Complete Through PA 56 and includes 58-90 of 2018

Senate Bill 0896 (2018) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2018-SB-0896

Sponsors

Rick Jones (district 24)
Steven Bieda
(click name to see bills sponsored by that person)

Categories

Civil procedure: other;

Civil procedure; other; wrongful imprisonment compensation act; extend the time for claims by individuals who were released before the effective date of the act. Amends sec. 7 of 2016 PA 343 (MCL 691.1757).

Bill Documents

Bill Document Formatting Information
[x]
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Senate Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

Senate Fiscal Analysis

SUMMARY OF INTRODUCED BILL IN COMMITTEE (Date Completed: 3-20-18)
This document analyzes: SB0895, SB0896

SUMMARY OF BILL REPORTED FROM COMMITTEE (Date Completed: 3-21-18)
This document analyzes: SB0895, SB0896

History

(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
3/8/2018	SJ 26 Pg. 384	INTRODUCED BY SENATOR RICK JONES
3/8/2018	SJ 26 Pg. 384	REFERRED TO COMMITTEE ON JUDICIARY
3/22/2018	SJ 32 Pg. 489	REPORTED FAVORABLY WITHOUT AMENDMENT
3/22/2018	SJ 32 Pg. 489	COMMITTEE RECOMMENDED IMMEDIATE EFFECT
3/22/2018	SJ 32 Pg. 489	REFERRED TO COMMITTEE OF THE WHOLE

SENATE BILL No. 896

March 8, 2018, Introduced by Senators JONES and BIEDA and referred to the Committee on Judiciary.

A bill to amend 2016 PA 343, entitled

"Wrongful imprisonment compensation act,"

by amending section 7 (MCL 691.1757).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7. **(1)** An action for compensation under this act must be commenced within 3 years after entry of a verdict, order, or judgment as the result of an event described in section 4(1)(b). Any action by this state challenging or appealing a verdict, order, or judgment entered as the result of an event described in section 4(1)(b) tolls the 3-year period.

(2) An individual convicted, imprisoned, and released from custody before ~~the effective date of this act~~ **MARCH 29, 2017** must commence an action under this act within 18 months after the

SENATE BILL No. 896

effective date of ~~this act.~~**THE 2018 AMENDATORY ACT THAT AMENDED THIS SECTION.**

Enacting section 1. Section 7 of the wrongful imprisonment compensation act, 2016 PA 343, MCL 691.1757, as amended by this amendatory act, applies retroactively to March 29, 2017.

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 895 and 896 (as reported without amendment)
Sponsor: Senator Steven Bieda (S.B. 895)
Senator Rick Jones (S.B. 896)
Committee: Judiciary

CONTENT

Senate Bill 895 would amend the Revised Judicature Act to do the following:

-- Specify that the requirement to file a claim or notice of intent to file a claim with the Court of Claims within six months after the event that gives rise to the claim would not apply to a claim for compensation under the Wrongful Imprisonment Compensation Act.
-- Specify that the periods of limitations for claims against the State would not apply to a claim for compensation under the Wrongful Imprisonment Compensation Act.

Senate Bill 896 would amend the Wrongful Imprisonment Compensation Act to specify that a person convicted, imprisoned, and released from custody before March 29, 2017, would have to commence an action under the Act within 18 months after the bill's effective date.

Sections 6431 and 6452 of the Revised Judicature Act, as amended by Senate Bill 895, and Section 7 of the Wrongful Imprisonment Compensation Act, as amended by Senate Bill 896, would apply retroactively to March 29, 2017 (the effective date of the Wrongful Imprisonment Compensation Act).

MCL 600.6431 & 600.6452 (S.B. 895)
691.1757 (S.B. 896)

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bills would have an indeterminate impact on the State and no impact on local units of government. Senate Bill 895 would prevent a six-month filing deadline found in the Revised Judicature Act, specifically in MCL 600.6431 and 600.6452, from applying to the Wrongful Imprisonment Compensation Act (WICA). Senate Bill 896 would extend the filing deadline for prisoners exonerated before the Act took effect for another 18 months after enactment of the bill. The Act went into effect on March 29, 2017, and gave those exonerated prisoners 18 months to file compensation claims for wrongful imprisonment at $50,000 per year for time spent in prison, plus allowances for fines and attorneys' fees.

Prior analyses of WICA prepared by the House and Senate Fiscal Agencies placed the cost of the Act to the State at $12.8 million and $13.1 million, respectively. Public Act 107 of 2017 appropriated $5.0 million to the Wrongful Imprisonment Compensation Fund as a supplemental for FY 2016-17. The same Act appropriated $1.8 million to the Department of Attorney General to defend the State in claims filed under WICA. To date, no additional appropriations have been made for compensation claims or the State's defense of such claims. As of February 1, 2018, the Wrongful Imprisonment Compensation Fund had an available balance of $707,587.41.

Date Completed: 3-21-18

Fiscal Analyst: Michael Siracuse

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bills 895 and 896 (as introduced 3-8-18)
Sponsor: Senator Steven Bieda (S.B. 895)
Senator Rick Jones (S.B. 896)
Committee: Judiciary

Date Completed: 3-20-18

CONTENT

Senate Bill 895 would amend the Revised Judicature Act to do the following:

- **Specify that the requirement to file a claim or notice of intent to file a claim with the Court of Claims within six months after the event that gives rise to the claim would not apply to a claim for compensation under the Wrongful Imprisonment Compensation Act.**
- **Specify that the periods of limitations for claims against the State would not apply to a claim for compensation under the Wrongful Imprisonment Compensation Act.**

Senate Bill 896 would amend the Wrongful Imprisonment Compensation Act to specify that a person convicted, imprisoned, and released from custody before March 29, 2017, would have to commence an action under the Act within 18 months after the bill's effective date.

Sections 6431 and 6452 of the Revised Judicature Act, as amended by Senate Bill 895, and Section 7 of the Wrongful Imprisonment Compensation Act, as amended by Senate Bill 896, would apply retroactively to March 29, 2017 (the effective date of the Wrongful Imprisonment Compensation Act).

Senate Bill 895

Section 6431 of the Revised Judicature Act specifies that a claim may not be maintained against the State unless the claimant, within one year after the claim has accrued, files with the clerk of the Court of Claims either a written claim or a written notice of intention to file a claim against the State or any of its departments, commissions, boards, institutions, arms, or agencies. The notice must include a signature and verification by the claimant before an officer authorized to administer oaths, a statement of the time and place where the claim arose, a statement of the nature of the claim, and a designation of the department, commission, board, institution, arm, or agency involved in connection with the claim. Also, if the claim is for property damage or personal injuries, the claim or notice must be filed within six months after the event that gives rise to the claim.

Under Section 6452 of the Act, every claim against the State, cognizable by the Court of Claims, is forever barred unless it is filed with the clerk of the Court or a suit is brought on the claim in Federal court, within three years after the claim first accrues. Except as otherwise provided, Chapter 58 of the Act also applies to the limitation prescribed in Section 6452.

(Chapter 58 establishes the periods of limitations for various actions, which limit the time a person has to bring an action.)

The bill specifies that Sections 6431 and 6452 would not apply to a claim for compensation under the Wrongful Imprisonment Compensation Act.

Senate Bill 896

Under the Wrongful Imprisonment Compensation Act, an individual convicted under the law of the State and subsequently imprisoned in a State correctional facility for one or more crimes that he or she did not commit may bring an action for compensation against the State in the Court of Claims.

An action for compensation under the Act must be commenced within three years after entry of a verdict, order, or judgment as the result of an event described in the Act: the plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the plaintiff was found to be not guilty.

An individual convicted, imprisoned, and released from custody before the Act took effect on March 29, 2017, must commence an action within 18 months after that date.

Under the bill, a person convicted, imprisoned, and released from custody before March 29, 2017, would have to commence an action under the Act within 18 months after the bill's effective date.

MCL 600.6431 & 600.6452 (S.B. 895)
691.1757 (S.B. 896)

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bills would have an indeterminate impact on the State and no impact on local units of government. Senate Bill 895 would prevent a six-month filing deadline found in the Revised Judicature Act, specifically in MCL 600.6431 and 600.6452, from applying to the Wrongful Imprisonment Compensation Act (WICA). Senate Bill 896 would extend the filing deadline for prisoners exonerated before the Act took effect for another 18 months after enactment of the bill. The Act went into effect on March 29, 2017, and gave those exonerated prisoners 18 months to file compensation claims for wrongful imprisonment at $50,000 per year for time spent in prison, plus allowances for fines and attorneys' fees.

Prior analyses of WICA prepared by the House and Senate Fiscal Agencies placed the cost of the Act to the State at $12.8 million and $13.1 million, respectively. Public Act 107 of 2017 appropriated $5.0 million to the Wrongful Imprisonment Compensation Fund as a supplemental for FY 2016-17. The same Act appropriated $1.8 million to the Department of Attorney General to defend the State in claims filed under WICA. To date, no additional appropriations have been made for compensation claims or the State's defense of such claims. As of February 1, 2018, the Wrongful Imprisonment Compensation Fund had an available balance of $707,587.41.

Fiscal Analyst: Michael Siracuse

SAS\S1718\s895sa

Public Policy Position
SB 895 & 896

SUPPORT

Explanation
In 2016 the Governor signed into law the Wrongful Imprisonment Compensation Act (WICA). That Act allowed those who had been convicted and sent to prison for crimes they did not commit and who were eventually exonerated to receive $50,000.00/year for each year of wrongful imprisonment. The WICA had an 18 month statute of limitations for anyone who was eligible to file a retroactive claim. The 18 months began on the effective date of the new statute which was March 29, 2017.

The Attorney General, which is responsible for defending the State in these actions, raised an affirmative defense to claims where an untimely notice was made under the one year statute for the court of claims. The counter argument was that the 18 month statute in WICA controlled on these matters.

An appellate court decision finding that the one year notice requirement in the Court of Claims Act trumped the 18 month statute in the Wrongful Imprisonment Compensation Act statute resulted in many people being foreclosed from pursuing relief. The Court of Appeals decision meant that anyone who had a claim that arose prior to March 29, 2017 who had not filed by March 29, 2018 would be barred from being able to pursue a claim.

The proposed changes in SB 0895 to the Court of Claims Act are twofold: (1) the language changes that have no substantive bearing; and (2) the bill specifically exempts WICA from other court of claims filing requirements.

The proposed changes in SB 896 amend the Wrongful Imprisonment Compensation Act to add a new retroactive clause to restart the clock for those filing a retroactive claim. The language is that anyone convicted, imprisoned, and released prior to 3/29/17 has 18 months to file a claim.

Because SB 895 and 896 opens the courts to allow victims of wrongful imprisonment to bring claims against the state within 18 months, as originally envisions by the WICA, the Committee supports SB 895 and 896.

Number who voted in favor and opposed to the position:
Voted For position: 19
Voted against position: 0
Abstained from vote: 1
Did not vote: 6

Keller Explanation
SB 895 and 896 improve the availability of legal services to society by clarifying that individuals who have been wrongly imprisoned by the state have 18 months to file a claim, as explicitly provided in the WICA, and that the 1-year Court of Claims statute of limitations does not apply to WICA claims.

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

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by May 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes new instructions, M Crim JI 11.40, 11.40a and 11.40b, for the "harmful substances" offenses found at MCL 750.200i, 750.200*l*, and 750.200j(1)(c), respectively. (Definitions are found at MCL 750.200h, and a penalty enhancement at MCL 750.212a.)

[NEW] M Crim JI 11.40 Harmful Substances – Unlawful Acts

(1) The defendant is charged with committing an unlawful act with a harmful substance or device. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [manufactured / delivered[1] / possessed / transported / placed / used / released] a [substance / device].

(3) Second, that the [substance / device] that the defendant [manufactured / delivered / possessed / transported / placed / used / released] was a harmful [biological (substance / device) / chemical (substance / device) / radioactive (material / device) / electronic or electromagnetic device].

[*Provide definition by selecting from paragraphs (a) through (g):*][2]

(a) A "harmful biological device" means a device designed or intended to release a harmful biological substance.

(b) A "harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an

organism that can be used to cause death, injury, or disease in humans, animals, or plants.

(c) A "harmful chemical device" means a device that is designed or intended to release a harmful chemical substance.

(d) A "harmful chemical substance" means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.

(e) A "harmful radioactive material" means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.

(f) A "harmful electronic or electromagnetic device" means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.

(g) "Harmful radioactive device" means a device that is designed or intended to release a harmful radioactive material.

(4) Third, that the defendant [manufactured / delivered / possessed / transported / placed / used / released] the harmful [substance / device] for an unlawful purpose. That is, [he / she] did so to frighten, terrorize, intimidate, threaten, harass, injure or kill any person, or did so to damage or destroy any real or personal property without the permission of the owner or a governmental agency with authority over the property, if it is public property.

[*Select from paragraphs (5) through (9) where one of the following aggravating factors has been charged:*]

(5) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the harmful [biological (substance / device) / chemical (substance / device) / radioactive (material / device) / electronic or electromagnetic device] resulted in property damage.

(6) Fourth, that [You may also consider whether[3]] the [manufacture / delivery / possession / transportation / placement / use / release] of the harmful [biological (substance / device) / chemical (substance / device) / radioactive

(material / device) / electronic or electromagnetic device] resulted in physical injury [not amounting to serious impairment of a bodily function[3]] to another person.

(7) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the harmful [biological (substance / device) / chemical (substance / device) / radioactive (material / device) / electronic or electromagnetic device] resulted in serious impairment of a bodily function to another person.[4]

(8) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the harmful [biological (substance / device) / chemical (substance / device) / radioactive (material / device) / electronic or electromagnetic device] resulted in the death of another person.

(9) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the harmful [substance / device] occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[5]

Use Note

1. "Delivery" is defined in MCL 750.200h.

2. MCL 750.200h(f) through (*l)*, provides the definitions.

3. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than causing a "serious impairment of a bodily function."

4. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

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

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

(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

5. MCL 750.212a.

[NEW] M Crim JI 11.40a Harmful Substances – False Statement of Exposure

(1) The defendant is charged with causing another to believe that he or she was exposed to a harmful substance or device. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant did something to inform [*name complainant*] that [he / she] had been exposed to a harmful [biological (substance / device) / chemical (substance / device) / radioactive (material / device) / electronic or electromagnetic device [1]].

[*Provide definition by selecting from paragraphs (a) through (g):*][2]

(a) A "harmful biological device" means a device designed or intended to release a harmful biological substance.

(b) A "harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.

(c) A "harmful chemical device" means a device that is designed or intended to release a harmful chemical substance.

(d) A "harmful chemical substance" means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.

(e) A "harmful radioactive material" means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.

(f) A "harmful electronic or electromagnetic device" means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.

(g) "Harmful radioactive device" means a device that is designed or intended to release a harmful radioactive material.

(3) Second, that [*name complainant*] had not actually been exposed to a harmful [biological substance / chemical substance / radioactive material or device / electronic or electromagnetic device].

(4) Third, the defendant knew that [*name complainant*] had not actually been exposed to a harmful [biological (substance / device) / chemical (substance / device) / radioactive (material / device) / electronic or electromagnetic device], but intended to make [him / her] believe that [he / she] had been exposed.

Use Note

1. The instruction may have to be modified if the false statement involves an electronic or electromagnetic device and the complainant's computer.

2. MCL 750.200h(f) through (*l*), provides the definitions.

[NEW] M Crim JI 11.40b Imitation Harmful Substance or Device

(1) The defendant is charged with manufacturing, possessing, placing or releasing an imitation harmful substance or device for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [manufactured / delivered[1] / possessed / transported / placed / used / released] a [substance / device].

(3) Second, that the [substance / device] that the defendant [manufactured / delivered / possessed / transported / placed / used / released] was an imitation harmful substance or device. An imitation harmful substance or device means something that is claimed to be or is designed or intended to appear to be a harmful biological, chemical, radioactive, or electromagnetic substance or device, but is not such a substance or device.

[*The court may provide any of the following definitions where appropriate:*][2]

(a) A "harmful biological device" means a device designed or intended to release a harmful biological substance.

(b) A "harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.

(c) A "harmful chemical device" means a device that is designed or intended to release a harmful chemical substance.

(d) A "harmful chemical substance" means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.

(e) A "harmful radioactive material" means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.

(f) A "harmful electronic or electromagnetic device" means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or

disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.

(g) "Harmful radioactive device" means a device that is designed or intended to release a harmful radioactive material.

(4) Third, that the defendant [manufactured / delivered / possessed / transported / placed / used / released] the substance or device to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or did so to damage or destroy any real or personal property without the permission of the owner or a governmental agency with authority over the property, if it is public property.

[*Select from paragraphs (5) through (8) where one of the following aggravating factors has been charged:*]

(5) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the imitation harmful substance or device directly or indirectly resulted in property damage.

(6) Fourth, that [You may also consider whether[3]] the [manufacture / delivery / possession / transportation / placement / use / release] of the imitation harmful substance or device directly or indirectly resulted in physical injury [not amounting to serious impairment of a bodily function[3]] to another person.

(7) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the imitation harmful substance or device directly or indirectly resulted in serious impairment of a bodily function to another person.[4]

(8) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the imitation harmful substance or device directly or indirectly resulted in the death of another person.

(9) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the imitation harmful substance or device occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or

railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[5]

Use Note

1. "Delivery" is defined in MCL 750.200h.

2. MCL 750.200h(f) through (*l)*, provides the definitions.

3. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than causing a "serious impairment of a bodily function."

4. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

(a)Loss of a limb or loss of use of a limb.
(b)Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

5. MCL 750.212a.

Public Policy Position
Model Criminal Jury Instructions 11.40, 40a, and 40b

The Criminal Jurisprudence & Practice Committee Supports M Crim JI 11.40, 40a, and 40b with Amendments.

Explanation
The committee voted unanimously to support the proposed jury instruction with the following changes:

For consistency, 11.40(3)(g) should be moved to replace 11.40(3)(e), and the current subsection (e) and (f) should be changed to (f) and (g) respectively.

In subsection (7) the word "bodily" should be replaced with "body."

A standalone section should be added that the Model Criminal Jury Instructions that defines "serious impairment of a body function." and use note 4 in M Crim JI 11.40 and 11.40b should be replaced with reads: "When there is an issue raised over whether the injury amounts to a serious impairment of a body function, the trial court shall read instruction ____ as it is supported by the facts of the case." It was suggested that the standalone jury instruction should go in Chapter 15 of M Crim JI, and could read as, "An injury constitutes a serious impairment of a body function where the injury includes one or more of the following: [list qualifying injuries from the statute, MCL 257.58c.]" There should also be a use note indicating that the trial court should include all definitions that may be supported by the evidence admitted at trial.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by May 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes a new instruction, M Crim JI 11.41, for the "chemical irritant" offenses found at MCL 750.200j. (Definitions are found at MCL 750.200h, and a penalty enhancement at MCL 750.212a.)

[NEW] M Crim JI 11.41 Chemical Irritants – Unlawful Acts

(1) The defendant is charged with committing an unlawful act with a chemical irritant or device for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [manufactured / delivered / possessed / transported / placed / used / released] a [substance / device].

(3) Second, that the [substance / device] that the defendant [manufactured / delivered / possessed / transported / placed / used / released] was a [chemical irritant / chemical irritant device / smoke device].

[*Provide definition for chemical irritants from paragraph (a) or from (b) then (a):*][1]

(a) A "chemical irritant" means a solid, liquid, or gas that, through its chemical or physical properties, alone or in combination with one or more other substances, can be used to produce an irritant effect in humans, animals, or plants.

(b) A "chemical irritant device" means a device designed or intended to release a chemical irritant.

(4) Third, that the defendant [manufactured / delivered / possessed / transported / placed / used / released] the [chemical irritant / chemical irritant device / smoke device] to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or did so to damage or destroy any real or personal property without the permission of the owner or a governmental agency with authority over the property, if it is public property.

[*Select from paragraphs (5) through (9) where one of the following aggravating factors has been charged:*]

(5) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the [chemical irritant / chemical irritant device / smoke device] resulted in property damage.

(6) Fourth, that [You may also consider whether[2]] the [manufacture / delivery / possession / transportation / placement / use / release] of the [chemical irritant / chemical irritant device / smoke device] resulted in physical injury [not amounting to serious impairment of a bodily function[2]] to another person.

(7) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the [chemical irritant / chemical irritant device / smoke device] resulted in serious impairment of a bodily function to another person.[3]

(8) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the [chemical irritant / chemical irritant device / smoke device] resulted in the death of another person.

(9) Fourth, that the [manufacture / delivery / possession / transportation / placement / use / release] of the [chemical irritant / chemical irritant device / smoke device] occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[4]

Use Note

1. MCL 750.200h(a) and (b), provides the definitions. The statute does not provide a definition for a smoke device.

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than causing a "serious impairment of a bodily function."

3. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

(a)Loss of a limb or loss of use of a limb.
(b)Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

4. MCL 750.212a.

Public Policy Position
Model Criminal Jury Instructions 11.41

The Criminal Jurisprudence & Practice Committee Supports M Crim JI 11.41 with Amendments.

Explanation
The committee voted unanimously to approve the proposed jury instruction as written with the addition of the same standalone section defining "serious impairment of body function" recommended in the position for M Crim JI 11.40 along with a corresponding change to use note 3.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by May 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes new instructions, M Crim JI 11.42 and 11.42a, for the "offensive or injurious substances" crimes found at MCL 750.209. (A penalty enhancement is found at MCL 750.212a.)

[NEW] M Crim JI 11.42 Offensive or Injurious Substances – Placement with Intent to Injure

(1) The defendant is charged with placing an offensive or injurious substance for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant placed an offensive or injurious substance or compound[1] in or near to [real / personal] property.

(3) Second, that when the defendant placed the offensive or injurious substance or compound, [he / she] intended to [injure or coerce another person / injure the property or business of another person / interfere with another person's use, management, conduct, or control of his or her property or business].

[*Select from paragraphs (4) through (8) where one of the following aggravating factors has been charged:*]

(4) Third, that the offensive or injurious substance or compound damaged another person's property.

(5) Third, that [You may also consider whether[2]] the offensive or injurious substance or compound caused physical injury [not amounting to serious impairment of a bodily function[2]] to another person.

(6) Third, that the offensive or injurious substance or compound caused the serious impairment of a bodily function to another person.[3]

(7) Third, that the offensive or injurious substance or compound caused the death of another person.

(8) Third, that placement of the offensive or injurious substance or compound occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[4]

Use Note

1. The statute does not provide a definition for an offensive or injurious substance or compound.

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than causing a "serious impairment of a bodily function."

3. A definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

(a)Loss of a limb or loss of use of a limb.
(b)Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

4. MCL 750.212a.

[NEW] M Crim JI 11.42a Offensive or Injurious Substances – Placement with Intent to Annoy

(1) The defendant is charged with placing an offensive or injurious substance with intent to annoy or alarm. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant placed an offensive or injurious substance or compound [1] in or near to [real / personal] property.

(3) Second, that when the defendant placed the offensive or injurious substance or compound, [he / she] intended to annoy or alarm another person.

[*Select from paragraphs (4) through (8) where one of the following aggravating factors has been charged:*]

(4) Third, the offensive or injurious substance or compound damaged another person's property.

(5) Third, that [You may also consider whether[2]] the offensive or injurious substance or compound cause physical injury [not amounting to serious impairment of a bodily function[2]] to another person.

(6) Third, that the offensive or injurious substance or compound caused the serious impairment of a bodily function to another person.[3]

(7) Third, that the offensive or injurious substance or compound caused the death of another person.

(8) Third, that placement of the offensive or injurious substance or compound occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[4]

Use Note

1. The statute does not provide a definition for an offensive or injurious substance or compound.

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than causing a "serious impairment of a bodily function."

3. A definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

(a)Loss of a limb or loss of use of a limb.
(b)Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

4. MCL 750.212a.

Public Policy Position
Model Criminal Jury Instructions 11.42 and 11.42a

The Criminal Jurisprudence & Practice Committee Supports M Crim JI 11.42 and 11.42a with Amendments.

Explanation
The committee voted unanimously to approve the proposed jury instruction as written with the addition of the same standalone section defining "serious impairment of body function" recommended in the position for M Crim JI 11.40 along with a corresponding change to use note 3.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

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