Agenda
Public Policy Committee
Via Zoom Meetings

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

A. Reports

1. Approval of April 22, 2021 minutes
2. Public Policy Report

B. Court Rules

1. ADM File No. 2002-37: Proposed Amendment of MCR 1.109

The proposed amendment of MCR 1.109 would address e- Filing issues relating to updating authorized user accounts and e-service of documents that are returned as undeliverable to a registered e-mail address.

Status: 07/01/21 Comment Period Expires.
Referrals: 03/15/21 Referrals: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice; Appellate Practice Section; Business Law Section; Consumer Law Section; Criminal Law Section; Family Law Section; Negligence Law Section; Probate & Estate Planning Section.
Comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Kim Warren Eddie

2. ADM File No. 2020-36: Proposed Amendments of MCR 3.903, 3.966, 3.975, and 3.976

The proposed amendments of MCR 3.903, 3.966, 3.975, and 3.976 would make procedural changes for cases involving the placement of foster care children in a qualified residential treatment program as required by state and federal statutory revisions.

Status: 07/01/21 Comment Period Expires.
Referrals: 03/12/21 Access to Justice Policy Committee; Children's Law Section.
Comments: Access to Justice Policy Committee.
Liaison: E. Thomas McCarthy, Jr.

3. ADM File No. 2021-09: Amendments of MCR 3.903 and 3.925

The amendments of MCR 3.903 and 3.925 make the rules consistent with MCL 712A.28(5)(d) by requiring that previously-public juvenile case records be made nonpublic and accessible only to those with a legitimate interest. The effective date makes the rule change consistent with the statutory revision effective date in 2020 PA 362.

Status: 07/01/21 Comment Period Expires.
Referrals: 03/12/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Nicholas M. Ohanesian

4. ADM File No. 2021-09: Amendment of MCR 3.944

The amendment of MCR 3.944 incorporates new requirements for courts that detain juvenile status offender violators in secure facilities, in accordance with MCL 712A.15(3) and MCL 712A.18(1)(k). The effective date of these amendments is consistent with the effective date of the new statutory provisions included in 2020 PA 389.

Status: 07/01/21 Comment Period Expires.
Referrals: 03/12/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Nicholas M. Ohanesian

5. ADM File No. 2018-29: Proposed Amendments of MCR 6.302 & 6.610

The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the "sentencing offense alone," not the charged offense. Further, an "offense to which defendant is pleading" would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the "charged offense" clause may well be unnecessary.

Status: 07/01/21 Comment Period Expires.

Referrals: 04/01/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

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

Liaison: Valerie R. Newman

C. Legislation

1. HB 4164 (Berman) Courts: records; online attorney access to court actions and filed documents without fees; provide for. Amends secs. 1985 & 1991 of 1961 PA 236 (MCL 600.1985 & 600.1991) & adds sec. 1991a.

Status: 04/29/21 Passed the House as a substitute version H-2 with a vote of 61 to 49. Referred to the Senate Committee on Judiciary & Public Safety.

Referrals: A identical bill from the 2019-20 legislative session, HB 5806, was referred to Access to Justice Policy Committee, Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, and all Sections.

Comments: Comments provided to House Oversight Committee are included in materials. Comments received on HB 5806 are included in the materials.

Liaison: Mark A. Wisniewski

2. HB 4195 (Hornberger) Family law: marriage and divorce; public disclosure of divorce filings; modify. Amends 1846 RS 84 (MCL 552.1 - 552.45) by adding sec. 6a.

Status: 02/10/21 Referred to the House Committee on Judiciary.

Referrals: This bill is a reintroduction of HB 5296 from the 2019-2020 Legislative Session. HB 5296 was referred to Access to Justice Policy Committee, Civil Procedure & Courts Committee, and the Family Law Section in 2020. At the April 24, 2020, meeting, the Board of Commissioners voted to support HB 5296 with an amendment that the word "public" be clarified to mean "non-party." The Family Law Section has submitted a new position on the bill and has requested that the Board either reconsider the State Bar's position or permit the section to advocate their position.

Comments: Family Law Section.
Comments received on HB 5296'19-20 are also included in the materials.

Liaison: Lori A. Buiteweg

3. SB 408 (Victory) Civil procedure: other; new trial; revise procedure for granting. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 309a.

Status: 05/27/21 Passed the Senate with a vote of 25 to 11. Moved onto the House Committee on Judiciary.

Referrals: 05/14/2021 to Civil Procedure & Courts Committee; Appellate Practice Section; Business Law Section; Consumer Law Section; Litigation Section; Negligence Section.

Comments: Civil Procedure & Courts Committee; Negligence Law Section.

Liaison: Thomas G. Sinas

MINUTES
Public Policy Committee
April 22, 2021 – 12 p.m. to 1:30 p.m.

Committee Members: Dana M. Warnez, Lori A. Buiteweg, Kim Warren Eddie, E. Thomas McCarthy, Jr., Valerie R. Newman, Takura N. Nyamfukudza, Nicholas M. Ohanesian, Brian Shekell, Thomas Sinas, Judge Cynthia D. Stephens, Mark A. Wisniewski
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune, Samantha Zandee

A. Reports

1. Approval of January 21, 2021 minutes
The minutes were approved unanimously (10).

2. Public Policy Report
The Governmental Relations staff provided an oral report.

B. Legislation

1. HB 4174 (Lightner) Criminal procedure: records; criminal justice system data collection; provide for. Creates new act.
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The committee voted unanimously that this legislation is *Keller*-permissible in affecting the functioning of the courts and the availability of legal services to society.
The committee voted (11) to support the proposed bill in concept.

2. HB 4181 (Anthony) Civil procedure: evictions; residential evictions during the COVID-19 state of emergency; prohibit. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 5740.
The following entities offered recommendations: Access to Justice Policy Committee.
The committee agreed 10 in favor with 1 abstention that the legislation is not *Keller*-permissible.

3. SB 0159 (MacDonald) Courts: juries; provision related to allowance of a one man grand jury; eliminate. Amends 1927 PA 175 by repealing secs. 3, 4, 5, 6, 6a & 6b, ch. VII (MCL 767.3 et seq.).
The following entities offered recommendations: Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The committee voted unanimously (11) that the legislation is *Keller*-permissible in affecting the functioning of the courts.
The committee voted unanimously (11) to table the legislation for further review and recommend forming a workgroup to invite stakeholders to review the one-man grand jury system.

4. Executive Budget for the Michigan Indigent Defense Commission for the 2021-2022 Fiscal Year
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee voted unanimously (11) that the budget referenced is *Keller*-permissible in affecting the functioning of the courts and the availability of legal services to society.
The committee voted 10 in favor with one abstention to support the Executive Budget for the Michigan Indigent Defense Commission for the 2021-2022 fiscal year.

5. Executive Budget for the Department of the Judiciary for the 2021-2022 Fiscal Year

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

The committee voted unanimously (11) that the budget referenced is *Keller*-permissible in affecting the functioning of the courts.

The committee voted unanimously (10) to support the Executive Budget for the Department of the Judiciary for the 2021-2022 fiscal year, with the two additions to fund the problem-solving courts and swift-and-sure programs, and the Justice For All proposal.

Order

Michigan Supreme Court
Lansing, Michigan

March 10, 2021

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2002-37

Proposed Amendment of
Rule 1.109 of the Michigan
Court Rules

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

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

Rule 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1) Definitions. For purposes of this subrule:

(a) "Authorized user" means a user of the e-filing system who is registered to file, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach. If an authorized user needs to change user accounts, he or she must provide notice to the court and the other authorized users on the case in accordance with MCR 1.109(G)(3)(j).

(b)-(f) [Unchanged.]

(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(i) [Unchanged.]

(j) An authorized user must notify the court and other authorized users on the case regarding any change to the user account, including a change of email address. The notice must be in writing and filed with the court with service on the parties immediately after the user account is changed. Once the notice is filed with the court, all future e-service must be served using the updated user account information.

(j)-(l) [Relettered (k)-(m) but otherwise unchanged.]

(4)-(5) [Unchanged.]

(6) Electronic-Service Process.

(a) General Provisions.

(i)-(iii) [Unchanged.]

(iv) If a document is electronically served to a party's known email address but is returned to the filer as undeliverable, this will constitute proper service when the transmission to the recipient's email address is sent, in accordance with MCR 1.109(G)(6)(b). Neither the filer nor the court will need to take any further action regarding the undeliverable message.

(~~i~~v)-(vi) [Renumbered but otherwise unchanged.]

(b)-(c) [Unchanged.]

(7) [Unchanged.]

Staff comment: The proposed amendment of MCR 1.109 would address e-Filing issues relating to updating authorized user accounts and e-service of documents that are returned as undeliverable to a registered e-mail address.

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 July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. 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.

March 10, 2021

Clerk

Public Policy Position
ADM File No. 2002-37

OPPOSE

Explanation

The Civil Procedure and Courts Committee opposes the proposed changes to MCR 1.109. The changes are premature and should be reconsidered after Michigan has fully implemented a statewide e-filing system.

The proposed amendments to MCR 1.1090(G)(6)(a)(iv) states that service is effectuated when an electronically served document is returned to the filer as undeliverable. This amendment fails to recognize that transmission issues are not only due to the recipient having an invalid email address but can be caused by (1) issues with the sender's server; (2) issues with the recipient's server beyond the recipient's control; and (3) file size limitations, which particularly arise with discovery issues. Further, the committee is concerned about what happens when an attorney's email account gets locked due to identity theft. Given that Michigan does not currently have a statewide e-filing system with one place to update email addresses, attorneys need time to change their email address with the various courts in which they have cases pending. Until we implement a statewide e-filing system, when electronic service is returned as undeliverable, the filer should be required to serve by mail.

The committee also notes that MCR 1.109(d)(1)(B) does not require that attorneys include an email address in the caption. This is only required in the rules concerning alternative electronic service, MCR 2.117(C)(4), which do not apply to e-filed cases.

Position Vote:

Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 13

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

Public Policy Position
ADM File No. 2002-37 – Proposed Amendment of MCR 1.109

Support with Additional Amendments

Explanation
The committee supports the proposed amendments with the exception of the provision contained in (6)(a)(iv) regarding the issue of undeliverable emails. The committee was concerned of cases where an individual's email may still be listed as point of contact in TrueFiling, but that individual is no longer at the address, having changed employment. This email would not come back to the sender as "undeliverable," but for all intents and purposes it would be.

Position Vote:
Voted For position: 14
Voted against position: 1
Abstained from vote: 1
Did not vote (absence): 7

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

Public Policy Position
ADM File No. 2002-37

Oppose

Explanation
The Criminal Law Section of the State of Michigan opposes ADM File No. 2002-37.

Position Vote:
Voted for position: 16
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 9

Contact Person: Kahla Crino
Email: kcrino@ingham.org

Order

Michigan Supreme Court
Lansing, Michigan

March 10, 2021

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2020-36

Proposed Amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing 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 3.903 Definitions

(A)-(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1)-(13) [Unchanged.]

(14) "Qualified Residential Treatment Program" means a residential program that has met all of the following criteria:

(a) Use of a trauma-informed treatment model;

(b) Registered or licensed nursing staff and other licensed clinical staff must be on-site or available 24 hours a day, 7 days a week;

(c) Accredited by an independent not-for-profit organization as described in 42 USC 672(k)(4)(G);

(d) Integration of families into treatment, including sibling connections;

(e) Discharge planning and aftercare support for at least six months post discharge; and

(f) Does not include a detention center, forestry camp training school, or other facility operated primarily for minor children determined to be delinquent.

(15) "Qualified Individual" means a trained professional or licensed clinician who is not an employee of the department and who is not connected to, or affiliated with, any placement setting in which children are placed by the department, and who is responsible for conducting an assessment of a child placed in a qualified residential treatment program pursuant to MCL 722.123a.

(D)-(F) [Unchanged.]

Rule 3.966 Other Placement Review Proceedings

(A)-(C) [Unchanged.]

(D) Review of Child's Placement in a Qualified Residential Treatment Program

(1) Ex Parte Motion for Review. Within 45 days of the child's initial placement in a qualified residential treatment program, the Agency shall file an ex parte motion requesting the court to approve or disapprove of the placement.

(a) Supporting Documents. The motion shall be accompanied by the assessment, determination, and documentation made by the qualified individual.

(b) Service. The Agency shall serve the ex parte motion and accompanying documentation on all parties.

(2) Judicial Determination. Within 14 days of filing, the court, or an administrative body appointed or approved by the court independently, shall review the motion, and any supporting documentation filed pursuant to this subrule, and issue an order approving or disapproving of the placement. The order shall include individualized findings by the court or administrative body as to:

(a) whether the needs of the child can be met in a foster family home, or if not,

(b) whether the placement of the child provides the most effective and appropriate level of care for the child in the least restrictive environment, and

(c) whether the placement is consistent with the goals in the permanency plan for the child.

The court shall serve the order on parties. The court is not required to hold a hearing on the ex parte motion under this subrule.

Rule 3.975 Post-Dispositional Procedures: Child in Foster Care

(A) Dispositional Review Hearings. A dispositional review hearing is conducted to permit court review of the progress made to comply with any order of disposition and with the case service plan prepared pursuant to MCL 712A.18f and court evaluation of the continued need and appropriateness for the child to be in foster care; and to permit the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment program.

(B)-(E) [Unchanged.]

(F) Criteria.

(1)-(2) [Unchanged.]

(3) Review of Placement in Qualified Residential Treatment Program. Where a child remains placed in a qualified residential treatment program, the court shall review the evidence submitted by the Agency, approve or disapprove of the placement, and make individualized findings as to:

(a) whether the needs of the child can be met through placement in a foster home; or if not,

(b) whether the placement provides the most effective and appropriate level of care for the child in the least restrictive environment; and

(c) whether the placement is consistent with the short- and long-term goals for the child, as specified in the permanency plan for the child.

(G)-(H) [Unchanged.]

Rule 3.976 Permanency Planning Hearings

(A)-(D) [Unchanged.]

(E) Determinations; Permanency Options.

(1) [Unchanged.]

(2) Determining Whether to Return Child Home. At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child. Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being. In addition, the court shall consider any condition or circumstance of the child that may be evidence that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being. If the court does not order the child returned home, and the child remains in a qualified residential treatment program, the court shall:

(a) review the evidence submitted by the Agency, approve or disapprove of the placement, and make individualized findings as to:

(i) whether the needs of the child can be met through placement in a family foster home; or if not,

(ii) whether the placement provides the most effective and appropriate level of care for the child in the least restrictive environment; and

(iii) whether the placement is consistent with the short- and long-term goals for the child, as specified in the permanency plan of the child.

(3)-(4) [Unchanged.]

Staff comment: The proposed amendments of MCR 3.903, 3.966, 3.975, and 3.976 would make procedural changes for cases involving the placement of foster care children in a qualified residential treatment program as required by state and federal statutory revisions.

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 July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-36. 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.

March 10, 2021

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

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

April 14, 2021

ADM File No. 2020-36

Amendment of Orders Entered on March 10, 2021 and April 1, 2021

On order of the Court, the orders entered on March 10, 2021 (Proposed Amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules) and April 1, 2021 (Proposed Amendment of Rule 3.945 and Proposed Addition of Rule 3.947 of the Michigan Court Rules) in ADM File No. 2020-36 are now effective immediately. The comment period will continue to run through July 1, 2021, and August 1, 2021, respectively, as previously ordered.

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.

April 14, 2021

Clerk

Public Policy Position
ADM File No. 2020-36 – Proposed Amendments of MCR 3.903, 3.966, 3.975, and 3.976

Support

Explanation

The committee voted unanimously (20) to support the proposed amendments, which set forth a clear process and standards for a court to determine whether the initial or continuing placement is appropriate for that child..

The amendments create a mandate for court's review of a child's initial placement in a qualified residential treatment program by requiring that the placing agency file an *ex parte* motion for review within 45 days of the initial placement. The court, or a duly appointed/approved administrative body, must review the motion and issue an order approving or disapproving the placement within 14 days of the filing of the *ex parte* motion, and must include individualized findings as to whether:

1. The needs of the child can be met through placement in a foster family home;
2. The placement provides the most effective and appropriate level of care in the least restrictive environment; and
3. The placement is consistent with the permanency plan for the child.

The court is not required to hold a hearing on the *ex parte* motion.

The court rule amendments also require courts to include essentially the same individualized findings in post-disposition review hearings when approving or disapproving continued placement in a qualified residential treatment center. Finally, the court must also include essentially the same findings if the court does not return a child to home at the conclusion of the permanency planning hearing but continues the child in the qualified residential treatment center.

The proposed amendments provide a necessary mechanism for court review of child placements in residential treatment programs, with clear standards and written reasoning by the Court for determining whether the initial or continuing placement is appropriate for that child.

This process may also facilitate better compliance with the spirit of the Indian Child Welfare Act (ICWA) and Michigan Indian Family Preservation Act (MIFPA), with State Court Judges, as well as Tribal Judges when a case is transferred to a Tribal Court pursuant to ICWA and MIFPA, required to articulate findings in relation to the specific child and his, her, or their placement.

Accordingly, the committee supports the proposed amendments.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

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

Order

Michigan Supreme Court
Lansing, Michigan

March 10, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-09

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

Amendments of Rules
3.903 and 3.925 of the
Michigan Court Rules

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On order of the Court, this is to advise that the amendments of Rules 3.903 and 3.925 of the Michigan Court Rules are adopted, effective March 24, 2021. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at Administrative Matters & Court Rules page.

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

Rule 3.903 Definitions

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2) [Unchanged.]

(3) "Confidential file" means

(a) records of a case brought before the court under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq.* ~~that part of a file made confidential by statute or court rule~~, including, but not limited to,

(i)-(vii) [Unchanged.]

(b) [Unchanged.]

(4)-(8) [Unchanged.]

(9) ~~An authorized~~ petition is deemed "filed" when it is delivered to, and accepted by, the clerk of the court.

(10)-(20) [Unchanged.]

(21) "Petition authorized to be filed" refers to written permission given by the court to proceed with placement on the formal calendar~~file the petition among the court's public records as permitted by MCR 3.925~~. Until a petition is authorized, it remains on the informal calendar~~must be filed with the clerk and maintained as a nonpublic record, accessible only by the court and parties. After authorization, a petition and any associated records may be made nonpublic only as permitted by rule or statute~~.

Rule 3.925 Open Proceedings; Judgments and Orders; Records Confidentiality; Destruction of Court Records; Setting Aside Adjudications

(A)-(C) [Unchanged.]

(D) Public Access to Case File Records; Social~~Confidential~~ File.

(1) General. ~~Except as otherwise required by MCR 3.903(A)(21), case file records maintained~~Records of a case brought before the court under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq.*, are only open to persons having a legitimate interest~~other than confidential files, must be open to the general public~~. "Persons having a legitimate interest" includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under 1984 PA 422, MCL 722.131 to 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state.

(2) Social~~Confidential~~ Files. Confidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order. Only persons who are found by the court to have a legitimate interest may be allowed access to the confidential files. In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law.

(E) [Unchanged.]

(F) Setting Aside Adjudications and Convictions.

(1) Adjudications. The setting aside of juvenile adjudications is governed by MCL 712A.18e and MCL 712A.18t.

(2) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The amendments of MCR 3.903 and 3.925 make the rules consistent with MCL 712A.28(5)(d) by requiring that previously-public juvenile case records be made nonpublic and accessible only to those with a legitimate interest. The effective date makes the rule change consistent with the statutory revision effective date in 2020 PA 362.

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 amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-09. 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.

March 10, 2021

Clerk

Public Policy Position
ADM File No. 2021-09 – Amendments of MCR 3.903 and 3.925

Support

Explanation

The committee voted unanimously (20) to support the amendments to Rules 3.903 and 3.925. The amendments make the rules consistent with MCL 712A.28(5)(d) by requiring that previously-public juvenile case records be made non-public and accessible only to those with a legitimate interest. The effective date makes the rule change consistent with the statutory revision effective date in 2020 PA 362.

Prior to being amended, MCL 712A.28 provided that juvenile court case records were open to the public. The amendatory language provides that such records are not open to the public and are only open to persons having a "legitimate interest." Further, the amendment expands the list of persons having a legitimate interest. See MCL 712A.28(5)(d).

Since the proposed rule amendments appear to be consistent with statutory changes that further limit public access to juvenile proceedings, the committee supports the amendments.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

Contact Persons:

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

Public Policy Position
ADM File No. 2021-09 – Amendments of MCR 3.903 and 3.925

Support as Drafted

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 7

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

Order

Michigan Supreme Court
Lansing, Michigan

March 10, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-09

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

Amendment of Rule 3.944 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the amendment of Rule 3.944 of the Michigan Court Rules is adopted, effective April 4, 2021. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at Administrative Matters & Court Rules page.

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

Rule 3.944 Probation Violation

(A) [Unchanged.]

(B) Detention Hearing; Procedure. At the detention hearing:

(1)-(4) [Unchanged.]

(5) The juvenile must be allowed an opportunity to deny or otherwise plead to the probation violation. If the juvenile wishes to admit the probation violation or plead no contest, the court must comply with subrule (D) before accepting the plea.

(a)-(b) [Unchanged.]

(c) If the juvenile is taken into custody for violating a court order under MCL 712A.2(a)(2) to (4) and is detained in a secure facility, the petitioner shall ensure that an appropriately trained, licensed, or certified mental health or substance abuse professional interviews the juvenile in person within 24 hours to assess the immediate mental health and substance abuse needs of the juvenile. The assessment may alternatively be done upon filing of the petition, prior to any order for placement in a secure facility. The completed assessment shall be

provided to the court within 48 hours of the placement and the court shall conduct a hearing to determine all of the following:

(i) If there is reasonable cause to believe that the juvenile violated the court order.

(ii) The appropriate placement of the juvenile pending the disposition of the alleged violation, including if the juvenile should be placed in a secure facility.

(C)-(D) [Unchanged.]

(E) Disposition of Probation Violation; Reporting.

(1) [Unchanged.]

(2) If, after hearing, the court finds that the juvenile has violated a court order under MCL 712A.2(a)(2) to (4), and the juvenile is ordered to be placed in a secure facility, the order shall include all of the following individualized findings by the court:

(a) The court order the juvenile violated;

(b) The factual basis for determining that there was a reasonable cause to believe that the juvenile violated the court order;

(c) The court's finding of fact to support a determination that there is no appropriate less restrictive alternative placement available considering the best interests of the juvenile;

(d) The length of time, not to exceed 7 days, that the juvenile may remain in the secure facility and the plan for the juvenile's release from the facility; and

(e) The order may not be renewed or extended.

(3~~2~~) [Renumbered but otherwise unchanged.]

(F) [Unchanged.]

Staff Comment: The amendment of MCR 3.944 incorporates new requirements for courts that detain juvenile status offender violators in secure facilities, in accordance with MCL 712A.15(3) and MCL 712A.18(1)(k). The effective date of these amendments is consistent with the effective date of the new statutory provisions included in 2020 PA 389.

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 amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-09. 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.

March 10, 2021

Clerk

Public Policy Position
ADM File No. 2021-09 – Amendments of MCR 3.944

Support with Recommended Amendments

Explanation
The committee voted unanimously (20) to support the proposed amendment and recommend that the rule include (1) more specific criteria about the qualifications of the person conducting the mental health or substance abuse assessment and (2) that the assessment is done in a culturally honoring manner.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

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

Public Policy Position
ADM File No. 2021-09 – Amendments of MCR 3.944

Support as Drafted

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

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

Order

Michigan Supreme Court
Lansing, Michigan

March 25, 2021

ADM File No. 2018-29

Proposed Amendments of
Rule 6.302 and Rule 6.610
of the Michigan Court Rules

_____

The Court, having given an opportunity for comment in writing and at a public hearing, again seeks public comment regarding proposed amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules to eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to the offense to which defendant is pleading guilty or nolo contendere. During the initial comment period, the Court received comments opposed to the proposal, generally noting that the current procedure moves cases along and promotes efficiency for all concerned. But the Court is interested in comment that also addresses the propriety and effectiveness of such a system. Some commentators have characterized a plea in which a defendant provides a factual basis to a crime other than the one to which he or she ultimately pleads guilty or nolo contendere as a "fictional plea" and have raised concerns about courts accepting such pleas. See, e.g., Johnson, *Fictional Pleas*, 94 Ind LJ 855 (2019). In particular, the Court is interested in receiving additional comments addressing the impacts, if any, of so-called fictional pleas on (1) the truth-seeking process; (2) sentencing goals, including rehabilitation and crime deterrence; (3) the scoring of sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility; (4) determining collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender; (5) compilation of crime statistics; and (6) the constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime.

On order of the Court, this is to advise that the Court is again considering amendments of Rule 6.302 and Rule 6.610 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 may 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 6.302 Pleas of Guilty and Nolo Contendere

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) [Unchanged.]

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(E)-(F) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(E) [Unchanged.]

(F) Pleas of Guilty and Nolo Contendere. Before accepting a please of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading, or

(b) [Unchanged.]

(2)-(6) [Unchanged.]

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the ~~offense charged or~~ the offense to which the defendant is pleading if

(a)-(c) [Unchanged.]

A "writing" includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8)-(9) [Unchanged.]

(G)-(I) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the "sentencing offense alone," not the charged offense. Further, an "offense to which defendant is pleading" would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the "charged offense" clause may well be unnecessary.

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 July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-29. 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.

March 25, 2021

Clerk

Public Policy Position
ADM File No. 2018-29 – Proposed Amendments of MCR 6.302 and 6.610

Oppose

Explanation

The committee rejects the term "fictional plea" and is unaware of a pervasive problem with negotiated pleas. Prosecutors, defense attorneys, and judges act as safeguards to ensure that when a plea is taken, it is knowingly, freely, and voluntarily made. As such, if a defendant cannot make a factual basis for a plea, the court will not accept that plea and the integrity of the plea process is protected.

The Supreme Court seeks guidance as to the following factors, which the committee answered below:

(1) **the truth-seeking process:** Prosecutors have a duty to constantly review the current state of a case. As any prosecutor can attest, cases change as the investigation deepens: new evidence, including exculpatory evidence is discovered, witnesses refuse to testify or do not appear, or witnesses will recant, changing the fabric of the case. In response, prosecutors are bound by the oath to pursue justice and be flexible in their management of the case—as the evidence changes, so does the prosecutor's responsibility. This may result in the dismissal of charges, the amendment of charges, or the offering of a plea. Therefore, the truth-seeking process is fluid, and prosecutors must maintain the discretion to offer plea agreements.

(2) **sentencing goals, including rehabilitation and crime deterrence**: Plea agreements are a form of rehabilitation because it offers a chance for a defendant to avoid more severe consequences that may attach to the charged offense. Part of deterring criminal behavior is building respect for the process—if plea bargaining becomes a difficult process because of the court's reluctance to accept pleas, the defendant takes the brunt of that hurt. The defendant loses the benefit of the reduction and the defendant could begin to see the court of law as a place where the technicalities of the court could trump justice.

Negotiated pleas support sentencing goals in the same manner as traditional pleas. The policy of the state of Michigan favors individualized sentencing for every defendant. A proportionate sentence must be tailored to fit the particular circumstances of the offender and the offense. Further, the sentencing court must always consider the factors articulated in *People v Snow*, 386 Mich 586, 592 (1972). "Individualized sentencing furthers the goal of rehabilitation by respecting the inherent dignity of each person the law deprives of freedom, civil rights, or property." *People v Heller*, 316 Mich App 314, 2016, citing *People v Triplett*, 407 Mich 510, 515 (1980).

(3) **the scoring of sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility**:
(a) the sentencing guidelines

For the most part, the impact of so-called "fictional pleas" on the scoring of the sentencing guidelines is no different than traditional plea bargaining which regularly results in pleas to lesser offenses than originally charged. Offense variables are scored based on the facts of the offense as established by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438 (2013). When an individual provides a factual basis to a more serious crime than the one to which he or she ultimately pleads, the sentencing guidelines will be scored based on what was admitted during the plea.

Additionally, many of the offense variables recognize the existence of plea bargaining and build in additional points for it. For example, dismissed counts are accounted for under offense variable ("OV") 12 which instructs the court to assess points for contemporaneous felonious acts that will not result in a separate conviction. MCL 777.42. Similarly, the instructions to OV 16 establish that the amount of money or property involved in "admitted but uncharged offenses or in charges dismissed under a plea agreement" may be considered in scoring OV 16. MCL 777.46(2)(c). Still other variables include an instruction to consider the entire criminal transaction as opposed to just for the sentencing offense. See MCL 777.44(2)(a).

(b) restitution awards

Negotiated pleas impact restitution orders in the same manner as traditional pleas or a conviction after a trial. In all circumstances MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution ordered. This does not mean that when a conviction results from a plea, a defendant must specifically reference each stolen item in order for the prosecution to obtain a restitution order for stolen goods. On the contrary, once an individual is properly convicted, the prosecution is allowed to prove the amount of restitution related to that person's course of conduct by a preponderance of the evidence and by reference to the Presentence Investigation Report. MCL 780.767(2)

(c) habitual offender status

Negotiated pleas have no impact on habitual offender status. The only relevant consideration for determining habitual offender status is whether an individual has previous felony convictions.

(d) parole eligibility

Negotiated pleas have the same impact on parole eligibility as traditional pleas. In most instances, the plea hearing transcript is not part of the Michigan Department of Corrections file and has no bearing on parole eligibility. Instead, the Parole Board typically looks to the Agent's Description of the Offense portion the Presentence Investigation Report for an understanding of the criminal conduct at issue. This description customarily is taken from the police reports and reflects the original charges. The defendant, through counsel, has an opportunity to request corrections to the Presentence Investigation Report, including the Agent's Description of the Offense at sentencing.

(4) determining collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender: There are literally hundreds

of collateral consequences of any conviction on multiple levels: state, federal, immigration, civil, employment, etc. Defendants should be advised of the existence of such consequences at the time of the plea even if no court can reasonably list all of them or even know or predict what they all are. In some cases, these consequences are obvious and glaring such as in cases where a non-citizen is pleading guilty (especially to a felony) or when a defendant pleads guilty to a sex offense. Courts typically specify the consequences in these cases. The collateral consequences are there and should be mentioned whether the defendant pleads guilty to the original charge or to another offense upon plea bargaining. In most situations, these consequences depend on the charge of conviction as opposed to the detailed factual basis. In cases where the factual basis matters (e.g., potential civil liability), defendants typically plead NOLO to avoid admitting to any facts on the record. Therefore, there should be no impact of the negotiated pleas on this factor.

(5) compilation of crime statistics: Crime statistics are a very important tool in helping prevent crime and improve the operation of the courts. To have reliable crime statistics, we need better data collection. The problem our criminal justice system currently faces is the difficulty in gathering data from the different courts and law enforcement agencies because they use different methods and systems, and they are not consistent when it comes to what is being kept track of. But regardless of how data is collected and what method is used, the details of the factual basis provided by the defendant at the time of the plea are not and cannot be included in statistics. At most, the court (or the prosecutor's office) will keep track of the original charge(s) and the charge(s) the defendant pleads guilty to because these items are more easily quantifiable, can be described with accuracy, and can be used to produce statistics and conduct comparisons, unlike a factual basis. Therefore, there should be no impact of the negotiated pleas on this factor.

(6) the constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime. There is a difference between the separation of powers and control of one branch of government over another. While the branches of government have power to check one another, a circuit court (the judiciary) does not have control over prosecuting attorneys (who act on behalf of the executive branch of government). *People v Curtis*, 389 Mich 698, 702–703; 209 NW2d 243 (1973); *Genesee Co Prosecutor v Genesee Co Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). Rather, the prosecutor is the sole authority regarding whom to prosecute, and the trial court violates the separation of powers when it interferes with prosecutorial authority. *People of the State of Michigan v Selesky* (consolidated), unpublished per curiam opinion of the Court of Appeals, issued [May 27, 2021] (Docket Nos. 352414–352417 and 352475 – 352477) (Beckering, J., concurring and Stephens, P.J., dissenting), p. 1, citing *People v Williams*, 244 Mich App 249, 251 – 252; 625 NW2d 132 (2001).

To elaborate, "[a] circuit judge does not enjoy supervisory power over a prosecuting attorney," nor does "a trial court… have authority to review the prosecuting attorney's decision outside [the] narrow scope of judicial function." *People v Cobbs*, 433 Mich 276, 505 NW2d 208 (1993); *People v Williams*, 186 Mich App 606, 612; 564 NW2d 376 (1990). A trial court's authority over prosecutorial duties, then, is limited only to a prosecutor's acts or decisions that are unconstitutional, illegal, or ultra vires. *People v Muniz*, 259 Mich App 176, 675 NW2d 597

(2003); *People v Williams*, 186 Mich App 606, 608–613; 564 NW2d 376 (1990). Plea negotiations do not fall within these limitations – rather, they are well within the bounds of prosecutorial discretion.

Furthermore, the Constitution does not "[contemplate] a complete division of authority between the three branches [of government]." *Nixon v Administrator of General Services*, 433 US 425, 443; 53 LEd2d 867 (1977). Rather, the government is structured so as to "[divide and allocate] the sovereign power among three coequal branches…not intended to operate with absolute independence." Id. Separation of powers is a political doctrine – not an official rule of law. Felix Frankfurter and James M. Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts – A Study in Separation of Powers. 37 Harvard Law Review 1010, 1014 (1924). That is, the separation of powers doctrine has failed to be treated as law in that the Court recognizes the interplay among the branches as necessary; the branches' interaction would be limited, therefore, by analytical divisions set by the Court. Id. An example of the necessary interplay among branches can be found in *Mistretta v US*, 488 US 361; 102 LEd2d 714 (1989), where the unique role of judges is discussed. This role allows judges to fashion sentences and other remedies not readily foreseeable by legislature, some of which may or may not deviate from statutory sentencing guidelines. Id. Judges, then, can deviate from the guidelines because of their unique role and experience in sentencing, and are well within their power to do so. Id.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

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

Public Policy Position
ADM File No. 2018-29 – Proposed Amendments of MCR 6.302 & 6.610

Oppose

Explanation:
The committee voted unanimously (20) to oppose the proposed amendments to Rules 6.302 and 6.610. When the committee previously commented on these proposed amendments, it was noted that the language stricken-out – "the offense charged" – removes a valuable tool used by all sides in the criminal justice process.

In reissuing these amendments, the Court invited comments on the impact of "fictional pleas" on the justice system. The committee felt strongly that prosecutors, defense attorneys, judges, and court staff consider sentencing goals, scoring of sentencing guidelines, and the collateral consequences of conviction every time a defendant enters into a plea deal. Additionally, the committee was concerned that these proposed revisions would actually impede the truth-seeking process as defendants may feel compelled to be less honest about the case if the ability to provide a factual basis for the charged offense is eliminated. The proposed amendments would have the effect of upending the current judicial system by reducing the number of plea agreements accepted and dramatically increasing the number of cases that will go to trial well beyond the capacity of our current system.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 3

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

From: Anna White
To: ADMcomment
Subject: ADM File No. 2018.29
Date: Wednesday, April 21, 2021 9:09:05 AM

Good afternoon!

I am writing to make comment on the Proposed Amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules, and I oppose the proposed modifications.

I am a defense attorney with the Ottawa County Public Defender office, and have been practicing in Ottawa County for 9 years now. I have represented hundreds of clients in criminal cases and have utilized plea reductions and negotiations in many of them. The proposed changes would eliminate the option of reducing a charge and allowing a defendant to utilize the facts of the original charge as the basis for the plea.

While I can understand that the intent of this change is to keep the system a "truth-seeking" process, the reality is that our system is limited already in our discovery of truth in every case. In many cases, the truth is hard to know for sure. Victims and defendants and witnesses generally all have different versions of events, and particularly in assaultive crimes, there are limits to whether we can ever truly know exactly what happened. Memories are imperfect, emotions and substances affect recall, and sometimes even a trial will not result in a just or true result to what really transpired. The reality is that attorneys practicing in criminal cases, both defense and prosecution, are trained and experienced in assessing facts and witnesses. We work cases and sometimes need to resolve things somewhere in the middle to avoid clogging the system with trials and completely dismissing cases where the facts are truly in dispute.

Many times, there are several possible ways to charge criminal conduct in a particular event. The prosecutor is endowed with the discretion to charge the appropriate charges, even if some other things may have in fact transpired. If we take the argument that negotiating to reduce charges "disregards penalties prescribed by the Legislature for a certain crime" further, then why should a prosecutor get discretion at all? Shouldn't they just charge everything that could possibly be charged? We know that isn't the way the system is designed to work, and reducing charges and allowing a conviction for a reduced charge is one way that prosecutors are able to use their discretion to fairly prosecute. As a defense attorney, there are many times where I have a client who may have technically violated a statute, but it was incidental or tangential to the real crime committed and their punishment is more appropriately assigned to the lower charge. Allowing prosecutors discretion in charging, and defendants an incentive and opportunity to plead guilty and accept responsibility for a crime are a way to maintain the integrity and efficacy of our system.

I would strongly oppose the proposed changes to Rule 6.302 and 6.610.

Thank you!

Anna C. White

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From: Stephen Adams
To: ADMcomment
Subject: ADM File No. 2018-29
Date: Wednesday, March 31, 2021 10:18:52 AM

The Michigan Supreme Court once again is considering whether to require a factual basis for the crime being pled to instead of the crime that was originally charged, suggesting that, when defendants plead guilty to less serious crimes by admitting the original charges, the guilty plea is a work of fiction. In reality, the defendants who wish to offer a factual basis to the original charges do so because they are guilty of the original charges and they are in fact not guilty of the less serious charges to which they plead guilty. By requiring them to make out a factual basis under oath to the less serious charge, it is the proposed rule change that invites the fiction, sworn fiction, from the defendants' mouth while prohibiting leniency and compromise for those unwilling to lie under oath or for whom the "potential for civil liability" is an obvious fraud.

People are convicted of crimes they did not commit all the time. The prosecutor reduces a charge because of a lack of proof, or out of leniency, or at the victim's request. There's nothing wrong with this, even if the defendant is not actually guilty of the reduced charge. The parties have reached a compromise for reasons more compelling than the accuracy of a conviction. Especially when the defendants are perfectly comfortable making out a factual basis to the original charge -- because they are guilty of the original charge -- this should be encouraged, not prohibited. The criminal justice system is not an end unto itself; it is a means to ends such as rehabilitation, taking responsibility, satisfying a victim's desire for retribution, and justice. Inaccurate pleas are no more a systemic failure than when the guilty go free. By design. The constable blunders, the witness fails to appear, the suspect asks for an attorney or refuses consent to search. Sometimes the accuracy of a result is subjugated to a higher goal. Transparently. Under the current rule, there is no question that the defendant is making out a factual basis to the original charge because that is what he did. Contrast that with all of the defendants who parrot the elements of an offense they did not commit (or that they don't believe they committed) just to get a charge reduction or a sentence agreement or HYTA. Those are the real fictional pleas.

Just last week I represented a 54-year-old man with no prior record who accidentally took too many pills one morning and fell asleep while driving slowly in a residential neighborhood. The car came to rest against a curb, and he was awakened by a police officer. Charged with operating while intoxicated, he was able to satisfy the City Attorney that he had no substance abuse problem and the drugs in his system were lawfully prescribed. The City Attorney agreed to allow him to plead to careless driving so long as he also pled to failure to report an accident. This proposal would allow the defendant to be monitored for a few months to make sure that no changes in his medication schedule would lead to further problems. The defendant made out a factual basis to the original charge -- the very thing that he was actually guilty of. What good would it have done to require him to say that he failed to report an accident that he slept through and wasn't even aware of until awakened by police?

Alternatively, what good does it do to require that everybody gets found guilty of exactly what they did?

Criminal law can be very tough, especially when a prosecutor is charging a defendant on the basis of only a police report. The flexibility offered by the current language of the rule encourages leniency and compromise which can be more helpful to resolve an antagonism than losing a trial. The truth is often somewhere in the middle, and the current rule accommodates that reality. While admittedly it may not lead to entirely accurate crime statistics, it is justice that we seek, not statistics.

Stephen Adams, P-37724
Attorney-at-Law

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Executive Director:
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Michigan Judges Association
Founded 1927

May 6, 2021

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

Re: ADM File No. 2018-29
Proposed amendments of MCR 6.302 and MCR 6.610
ADM File No. 2019-06
The proposed amendment of MCR 6.302

Dear Clerk Royster:

At the April 20, 2021 meeting of the Michigan Judges Association, the Executive Committee considered and acted upon proposed amendments to the Michigan Court Rules.

ADM file 2018-29: The proposed amendments of MCR 6.302 and MCR 6.610 would
eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere.

This proposed amendment would preclude the court from accepting a guilty or nolo contendere plea to a reduced or lesser charge based upon a factual basis establishing the charged offense listed in the information. We oppose the change as it interferes with judicial discretion and impairs the parties' ability to resolve cases.

ADM file 2019-06: The proposed amendment of MCR 6.302 would eliminate the Court's previously-adopted language requiring a trial court to advise defendant whether the law permits or requires the court to sentence defendant consecutively. If such advisement is not given, then the defendant will be allowed to withdraw the plea under MCR 6.310. We oppose the change. The best practice is for the defendant to be fully informed of the likelihood of consecutive sentencing at the time of the plea. However, if the warning is not given in a case where a consecutive sentence is not imposed it should not be grounds to withdraw a plea.

Thank you for considering the Associations input on these matters. If we can provide any additional information or assistance, please do not hesitate to contact us.

Sincerely,

Martha Anderson

Hon. Martha Anderson President
Michigan Judges Association

Cc: Honorable Paul Stutesman
Honorable Prentis Edwards, Jr.
Co-Chairs Criminal Law Committee, Michigan Judges Association

2019 Proposal and Comments

Order

Michigan Supreme Court
Lansing, Michigan

September 11, 2019

ADM File No. 2018-29

Proposed Amendments of
Rule 6.302 and Rule 6.610
of the Michigan Court Rules

_____

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

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

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.302 and Rule 6.610 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 6.302 Pleas of Guilty and Nolo Contendere

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) [Unchanged.]

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(E)-(F) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a please of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading, or

(b) [Unchanged.]

(2)-(9) [Unchanged.]

(F)-(H) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the requirement for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the "sentencing offense alone," not the charged offense. Further, an "offense to which defendant is pleading" would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the "charged offense" clause may well be unnecessary.

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 January 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-29. 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.

September 11, 2019

Clerk

2019 Proposal and Comments

SBM STATE BAR OF MICHIGAN

p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

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

December 12, 2019

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

RE: ADM File No. 2018-29: Proposed Amendment of Rules 6.302 and 6.610 of the Michigan Court Rules

Dear Clerk Royster:

At its November 22, 2019 meeting, the State Bar of Michigan Board of Commissioners (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, Criminal Jurisprudence & Practice Committee, and Criminal Law Section, all of which opposed the rule amendments.

Based on this review, the Board voted unanimously to oppose the rule amendments. These amendments will take away an important tool in the criminal justice process and reduce the options available when negotiating a plea, which has the potential to harm the government, defendants, and victims. For example, a victim may want the defendant to admit to the facts charged, and it is not clear why the court rules should deprive them of that option. These amendments are not only unnecessary but detrimental to the criminal justice process.

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
Dennis M. Barnes, President, State Bar of Michigan

2019 Proposal and Comments

From: Ed Black
To: ADMcomment
Subject: MCR 6.302
Date: Thursday, September 26, 2019 8:54:00 AM

To Whom It May Concern:

I am writing in regard to the proposed changes to MCR 6.302, and specifically to the changes in paragraph (D)(1). The current rule allows pleas taken to lesser offense with a factual basis for the greater offense. This assists in the taking of pleas as it allows the parties to come to a mutually agreed upon solution. Changing the rule and requiring facts only for the lesser offense will make the options for a plea more limited and make settlement more difficult.

While having more trials may not always be a bad thing, it will serve to frustrate the just, speedy, and economical determination of every action. This will merely promote trials in instances where one was not otherwise necessary.

The recent changes to indigent defense through the MIDC have increased the pressure on the judicial system as a whole. Going forward with this amendment will add to that. In short, in my opinion, this is an ill advised modification which does not take into account the ability of the attorneys to negotiate meaningful solutions for their clients and the public.

Very Respectfully,

K. Edward Black

Alpena County Prosecuting Attorney
719 W. Chisholm St., Ste 2
Alpena, Michigan 49707
Phone: (989)354-9738
Fax: (989) 354-9788

2019 Proposal and Comments

From: Michael Roehrig
To: ADMcomment
Subject: ADM File No. 2018-29 - Proposed Amendments to MCR 6.302 and 6.610 - Comment
Date: Tuesday, October 1, 2019 11:30:38 AM

I am writing to comment on the proposed amendments to Rule 6.302 and Rule 6.610 of the Michigan Court Rules.

I read the changes to require defendants to put on the record the elements of (only) the offense to which they are pleading guilty (which is invariably a less serious offense) while eliminating the option to offer facts satisfying the elements of the charged offense. The amendments appear to want to offer a solution for a non-existent problem, and fail to account for a myriad of situations where a plea to a lesser offense is warranted by the interests of justice.

These proposed changes would, instead, create a problem by impeding plea agreements for (factually unsubstantiated) lesser offenses because the defendants would not be able to establish a factual basis to satisfy the elements of the less serious offense. This would inure to the detriment of both defendants and the interests of justice.

Michael G. Roehrig
Prosecuting Attorney

OFFICE OF PROSECUTING ATTORNEY
Monroe County Courthouse
125 E. Second Street
Monroe, Michigan 48161
(734) 240-7617 (direct)
(734) 240-7600 (main)
(734) 240-7626 (fax)

Prosecuting Attorneys Association of Michigan

116 W. Ottawa Street – Suite 200
Lansing, Michigan 48913
(517) 334-6060 – Fax (517) 334-6351
www.michiganprosecutor.org

January 7, 2020

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

RE: ADM File No. 2018-29

Dear Justices,

The proposed amendments to MCR 6.302 and 6.610 eliminate the ability of a defendant to offer a factual basis satisfying the elements of the offense charged as an alternative to the lesser offense that will become his or her conviction of record. The practical impact of this proposal would be to severely restrict the plea negotiation process to the detriment of both the defendant and the prosecutor. Accordingly, PAAM opposes the proposed changes.

The benefits of negotiated plea agreements to resolve criminal cases short of trial are numerous and well-known to this Court. Defendants can minimize their exposure to incarceration and receive shorter sentences. Crime victims may be spared the experience of testifying about a traumatic experience and can take comfort in the finality that a plea agreement brings. Trial courts may move cases expeditiously through the system, allowing those defendants whose guilt is not at issue to waive their right to a trial and be sentenced quickly.

The parties to a criminal case are in the best position to negotiate a meaningful and appropriate plea resolution, taking into account the interests of the defendant, the interests of justice, the safety of the public, and the input from the victim(s) of the crime. MCR 6.302 and 6.610, as presently worded, allow the parties to do this and to satisfy the requirement that there be an accurate factual basis placed on the record to support a guilty plea.

Many criminal courts throughout the state do not entertain sentence agreements. Therefore, all negotiation occurs in the decision of what lesser charge to offer as a plea. There are many factual situations where both sides of a criminal case are served by a plea to a lesser offense, but the factual elements of that lesser offense are not present in the criminal

incident, necessitating a factual basis to the charged offense. A few examples illustrate:

- A defendant has sexually penetrated a 12-year-old-child and is ultimately charged with Criminal Sexual Conduct First Degree. The sentencing ranges that would result from a plea to Criminal Sexual Conduct 2nd Degree, Attempted Criminal Sexual Conduct First Degree, or Assault with Intent to Commit Sexual Penetration—which are the only crimes for which the defendant could make a factual basis under the proposed amendment—are all too low to serve the interests of the People and the victim. Accordingly, the People offer a plea to Criminal Sexual Conduct Third Degree. However, under the proposed amendment, the defendant could not make an accurate factual basis because the victim is under the age of 13.
- A defendant is charged with Felonious Assault, a four-year felony, for threatening a victim with a weapon. The parties wish to resolve the case with a plea to Aggravated Assault, a one-year misdemeanor. But because the victim suffered no aggravated injury as required for the misdemeanor, the defendant would be unable to provide a factual basis to the lesser charge.
- A defendant is charged with Criminal Sexual Conduct Third Degree based solely on a statutory rape theory. While the parties might wish to resolve the case with a plea with Assault with Intent to Commit Penetration or Fourth Degree Criminal Sexual conduct, the defendant would be unable to provide a factual basis to lesser charges because of a lack of force, coercion, or assault.
- A defendant is charged with Carrying a Concealed Weapon, a five-year felony. There is almost no applicable relevant misdemeanor for which a defendant could provide an adequate factual basis.
- A defendant is charged with Assault and Battery or Malicious Destruction of Property. The parties wish to resolve the case with a plea to Disorderly Conduct. But because such a violation requires intoxication in a public place, a defendant might be unable to provide a factual basis to that charge.
- A defendant is charged with Retail Fraud Third Degree. The parties might wish to resolve the case with a plea to a lesser charge of Trespassing. Again, the defendant would be unable to provide a factual basis to the lesser charge.

The Staff Comment to the Proposed Amendment cites concerns with scoring offense variables as a reason to amend the court rules. It is unclear, at least from the perspective of prosecutors, what practical effect these concerns would actually have in practice. Typically, the parties to a plea agreement have calculated sentencing guidelines and anticipated which variables will be scored on the offense as charged, and as pled. The sentencing benefit to the defendant under a plea agreement is usually clear; otherwise, the defendant would not accept the plea. Furthermore, the benefit to the parties of having some flexibility for the factual basis of a plea far outweighs the risk that such a factual basis may create a sentencing guideline issue

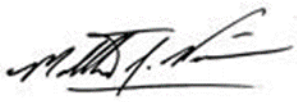
in the occasional case. To the extent there is a dispute about the guidelines, it is one that the trial courts are well-equipped to resolve.

Amending MCR 6.302 and 6.610 as proposed would needlessly frustrate the plea negotiation process and could force defendants who wish to plead to a lesser offense that the prosecutor wishes to offer to proceed instead to trial, simply because they could not make a factual basis without referring to the facts of the initially charged offense. We urge the Court to leave the language of these rules unchanged.

Thank you for your consideration.

Respectfully submitted,

William J. Vailliencourt
Livingston County Prosecutor
President, Prosecuting Attorneys Association of Michigan



Matthew J. Wiese
Marquette County Prosecutor
President-Elect, Prosecuting Attorneys Association of Michigan

Douglas R. Lloyd
Eaton County Prosecutor
Vice President, Prosecuting Attorneys Association of Michigan

Thomas J. Weichel
Alcona County Prosecutor
Secretary-Treasurer, Prosecuting Attorneys Association of Michigan

2019 Proposal and Comments

Michigan District Judges Association

November 1, 2019

Dear Ms. Boomer:

The Michigan District Judges Association has reviewed the proposed amendments to court rules, MCR 6.302 and 6.610. We strongly object to the changes. One of our members has accurately referred to this as "a solution in search of a problem". The plea bargains which keep our dockets moving often involve a plea to a lesser charge. The defendant has usually had the option of presenting proofs to either the original charge or the charge to which he/she is pleading. Eliminating the possibility of taking proofs regarding the original charge will make it more difficult to negotiate resolutions of some cases. The busy schedules of many judges would be negatively impacted by a court rule change that makes it more difficult for attorneys and defendants to negotiate guilty pleas to reduced charges.

We realize that MCR 6.302 and 6.610 are not included in MCR 6.001(B) which is the list of rules that apply to district court The portions of those court rules which we so commonly use should probably be included in MCR 6.001(B). These would be MCR 6.302(D) and MCR 6.610(E)(1).

Thank you for considering our position.

Sincerely,

2019 Proposal and Comments

Julie H. Reincke
Chair, Michigan District Court Judges
Court Rules Committee

Cc: Beth Gibson

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 4, 2021

Re: HB 4164 – Online Access to Court Actions

Background
As introduced, HB 4164 was a reintroduction of HB 5806 from the 2019-2020 legislative session, and both bills sought to expand e-filing and reduce costs for practitioners accessing court filings. The introduced version of the bill did this by adding municipal courts to the list of courts that would be included within the SCAO e-filing system and would require courts that currently accept documents by facsimile to also accept documents by e-mail. Under Section 1991a, courts would provide attorneys with fee-free access to register of actions and digital images of all documents filed with the court.

After receiving comments from committees and sections, the Board of Commissioners reviewed HB 5806 at the July 2020 meeting. At that time, the Board postponed taking a position on the bill. Despite general support for the goals of expanding e-filing and reducing costs for accessing court records, there were significant concerns over flaws in the bill concerning costs and feasibility.

HB 4164 was introduced in February 2021 and quickly received a hearing in the House Oversight Committee. The State Court Administrator testified in committee that SCAO, "supported, opposed and was neutral" on the bill. The bill was amended and passed the House (61-49) in late April as an H-2 substitute version.

The H-2 substitute made several significant changes. H-2 expands free access to e-filed documents to anyone, not just attorneys. H-2 would also require that any court not an authorized court under Section 1991 would have to accept the filing of document through e-mail upon the enactment of the legislation.

***Keller* Considerations**
The Civil Procedure & Courts Committee, the Access to Justice Policy Committee, the Criminal Jurisprudence & Practice Committee, and Family Law Section all discussed HB 5806 in 2020 and found it to be *Keller*-permissible because the legislation would impact the functioning of the courts.

The Family Law Section and the Access to Justice Policy Committee found the legislation to be *Keller*-permissible on the additional ground that it would improve the quality of legal services to society. When attorneys are unburdened from the costs associated with accessing documents, they are better able to serve their clients in an efficient and cost-effective way.

***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 satisfies the requirements of *Keller* and can be considered on its merits.

House Bill 4164 (2021) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2021-HB-4164

Sponsors

Ryan Berman (district 39)
Kelly Breen, Steven Johnson
(click name to see bills sponsored by that person)

Categories

Courts: records;

Courts: records; online attorney access to court actions and filed documents without fees; provide for. Amends secs. 1985 & 1991 of 1961 PA 236 (MCL 600.1985 & 600.1991) & adds sec. 1991a.

Bill Documents

Bill Document Formatting Information
[x]
The following bill formatting applies to the 2021-2022 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 (2/11/2021)
This document analyzes: HB4164

Summary of Proposed H-1 Substitute (3/11/2021)
This document analyzes: HB4164

Revised Summary as Reported from Committee (4/28/2021)
This document analyzes: HB4164

Summary of H-2 Substitute (4/28/2021)
This document analyzes: HB4164

History

(House actions in lowercase, Senate actions in UPPERCASE)

NOTE: a page number of 1 indicates that the page number is soon to come.

Date ▲	Journal	Action
02/04/21	HJ 7 Pg. 108	introduced by Representative Ryan Berman
02/04/21	HJ 7 Pg. 108	read a first time
02/04/21	HJ 7 Pg. 108	referred to Committee on Oversight
02/09/21	HJ 8 Pg. 112	bill electronically reproduced 02/04/2021
03/11/21	HJ 22 Pg. 311	reported with recommendation with substitute (H-1)
03/11/21	HJ 22 Pg. 311	referred to second reading
04/15/21	HJ 31 Pg. 499	read a second time
04/15/21	HJ 31 Pg. 499	substitute (H-1) not adopted
04/15/21	HJ 31 Pg. 499	substitute (H-2) adopted
04/15/21	HJ 31 Pg. 499	placed on third reading
04/28/21	HJ 36 Pg. 594	read a third time
04/28/21	HJ 36 Pg. 594	passed; given immediate effect Roll Call # 154 Yeas 61 Nays 49 Excused 0 Not Voting 0
04/28/21	HJ 36 Pg. 594	transmitted
04/29/21	SJ 37 Pg. 579	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

SUBSTITUTE FOR
HOUSE BILL NO. 4164

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"

by amending sections 1985 and 1991 (MCL 600.1985 and 600.1991), section 1985 as added by 2015 PA 230 and section 1991 as added by 2015 PA 233, and by adding section 1991a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1985. As used in this chapter:

(a) "Authorized court" means a court accepted by the state court administrative office under section 1991 for access to the electronic filing system.

(b) "Automated payment" means an electronic payment method authorized by the state court administrative office at the direction of the supreme court, including, but not limited to, payments made with credit and debit cards.

(c) "Civil action" means an action that is not a criminal case, a civil infraction action, a proceeding commenced in the probate court under section 3982 of the estates and protected individuals code, ~~1988~~ **1998** PA 386, MCL 700.3982, or a proceeding involving a juvenile under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(d) "Clerk" means the clerk of the court referenced in the rules of the supreme court and includes the clerk of the supreme court, chief clerk of the court of appeals, county clerk, probate register, district court clerk,

municipal court clerk, or clerk of the court of claims where the civil action is commenced, as applicable.

(e) "Court funding unit" means 1 of the following, as applicable:

(*i*) For circuit or probate court, the county.

(*ii*) For district court, the district funding unit as that term is defined in section 8104.

(*iii*) For the supreme court, court of appeals, or court of claims, the state.

(*iv*) For municipal court, the city in which the municipal court is located.

(f) "Electronic filing system" means a system authorized after ~~the effective date of the amendatory act that added this chapter~~ **January 1, 2016** by the supreme court for the electronic filing of documents using a portal contracted for by the state court administrative office for the filing of documents in the supreme court, court of appeals, circuit court, probate court, district court, **municipal court,** and court of claims.

(g) "Electronic filing system fee" means the fee described in section 1986.

(h) "Party" means the person or entity commencing a civil action.

(i) "Qualified vendor" means a private vendor selected by the state court administrative office by a competitive bidding process to effectuate the purpose of section 1991(3).

Sec. 1991. (1) A court may apply to the supreme court for access to and use of the electronic filing system.

(2) If the supreme court accepts a court under subsection (1), the state court administrative office shall use money from the judicial electronic filing fund established under section 176 to pay the costs of technological improvements necessary for that court to operate electronic filing.

(3) The supreme court may select a qualified vendor for the electronic filing system.

(4) A court that is not an authorized court must accept the filing of documents through email.

Sec. 1991a. (1) Except as otherwise prohibited by law, by January 1, 2023, a court must make available to the public through a website the register of actions and a digital image of all documents filed after January 1, 2023 in any case in that court. Unless a court has previously digitized documents, this section does not apply to a court document filed before January 1, 2023.

(2) The website and information provided under subsection (1) must be easily accessible, including, but not limited to, all of the following:

(a) Free of charge.

(b) Accessible without requiring an individual to register or establish a user account or password.

(c) Accessible without requiring an individual to provide personal identifying information.

Legislative Analysis

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

ELECTRONIC ACCESS TO COURTS

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

House Bill 4164 (H-2) as adopted on the House floor
Sponsor: Rep. Ryan Berman
Committee: Oversight
Complete to 4-28-21

SUMMARY:

House Bill 4164 would amend Chapter 19A (Electronic Access to Courts) of the Revised Judicature Act to do all of the following:

- Require a court to allow the public to access, through a website, the register of documents and digital images of documents filed in that court.
- Require certain courts to accept documents filed by email.
- Revise some provisions to specifically include municipal courts.

Chapter 19A provides for the creation and maintenance of a statewide electronic filing system by which documents can be filed online in addition to or instead of being filed in person at a courthouse. State courts may apply to the Supreme Court for access to and use of the electronic filing system. If the Supreme Court accepts a court, the State Court Administrative Office (SCAO) is required to use money from the Judicial Electronic Filing Fund to pay the costs of technological improvements necessary for that court to operate electronic filing. (The Judicial Electronic Filing Fund receives an electronic filing system fee collected, in addition to the fee for filing the civil action, when a civil action is commenced.) Nothing in Chapter 19A may be construed to require a person to file a document electronically, and a court or court funding unit may not require or allow a person to file a document electronically except as directed by the Supreme Court.

Access to register of actions and document images

The bill would add a new section to require, by January 1, 2023, and except as otherwise prohibited by law, a court to make available to the public, through a website, the register of actions and a digital image of all documents filed in any case in that court. The new section would not apply to a court document filed before January 1, 2023, unless the court has previously digitized documents.

The website, register, and digital images would have to be accessible without charge, without having to register or set up a user account or password, and without having to submit personal identifying information.

Nonauthorized courts

Under the act, a court may apply to the Supreme Court for access to and use of the electronic filing system. The bill would require a court that is not an authorized court to accept the filing of documents through email.

Municipal courts

Four cities in Michigan operate a municipal court, which has limited powers, instead of a district court. However, unlike the other courts of the state, municipal courts are not now referenced in Chapter 19A. The bill would revise the definitions of the following terms:

Clerk, to include a municipal court clerk.

Court funding unit, to include, for a municipal court, the city in which the municipal court is located.

Electronic filing system, to include a municipal court in the list of courts for which documents may be filed electronically through the system.

[**Note**: Among other things, section 1986 of the act specifies the amount a clerk may collect as an electronic filing system fee when a civil action is commenced. In its current form, the bill does not amend this section to provide a fee specific to municipal courts.]

MCL 600.1985 and 600.1991 and proposed MCL 600.1991a

BRIEF DISCUSSION:

Currently, although attorneys may file court documents electronically in state courts, access to digital court documents by attorneys and the public is not universally available across the state. By contrast, many federal court documents can be accessed electronically by anyone, for a nominal fee, through the Public Access to Court Electronic Records (PACER) system. Although attorneys and members of the public may search Michigan court documents in person at a court, the ongoing COVID-19 pandemic, which has seen closures of state offices or restrictions on access, as well as hesitancy by some to be in an indoor setting to obtain documents, underscores the importance of the state to provide a service similar to the PACER system.

In a separate matter, some courts allow court documents to be filed by fax, but do not accept documents filed via email. As fax machines are quickly becoming extinct, and almost any business can be conducted over the internet, some feel that a court that is not currently part of the statewide e-filing system but accepts filings by fax should be required to also accept filings sent by email.

House Bill 4164 would address both of the issues described above. However, several concerns have been raised in opposition. Of primary concern is that full implementation of the statewide electronic filing system (MiFILE) is still several years out and is unlikely to be completed before the January 1, 2023, date required under the bill. Since 2017, five pilot courts and three model courts have transitioned to MiFILE and been testing MiFILE 2.0. It is expected that a series of probate courts will go online by the end of 2021. Cost and time challenges are due to the need to transition a multitude of software programs and case management programs used by the many district, circuit, and probate courts with each other and the state appellate and supreme court into a single, modern, electronic case

management system that is flexible and easily updated. According to information provided by SCAO, if additional funding of $1.5 million annually were appropriated, with an additional $3.2 million to further accelerate completion of the project, approximately 90% of the state courts could be on the MiFILE system by about 2025 (rather than about 2027 without the additional funding). However, making legislative changes that could require additional software changes when the MiFILE system is still in process of being implemented could impede the statewide rollout of the e-filing system.

As to requiring courts to accept filings by email, this could increase costs to counties by requiring additional staff time for county clerk offices to first print email documents and then file them in a digital format compatible with that court's system. According to testimony offered by the Michigan Association of Counties and the Michigan Association of County Clerks, this would create new burdens, in addition to software and maintenance costs to create a new, secure online presence, and unless money were appropriated to counties to cover the implementation of the requirement, the bill would result in an unfunded mandate on counties at a time when many county budgets are already strained.

FISCAL IMPACT:

House Bill 4164 would have an indeterminate fiscal impact on local units of government. According to SCAO, the costs associated with local trial courts providing online access to the register of actions and digital images of all documents filed in courts are not known at this time.

POSITIONS:

The following entities indicated opposition to the bill (3-11-21):

- State Court Administrative Office (SCAO)
- Michigan Municipal League
- Michigan Association of Counties
- Michigan Association of County Clerks

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

MiFILE

MiFILE – Backgrounder • February, 2021

Purpose

For FILERS: Significantly improve customer service and cut user costs by allowing case filing anytime from anywhere with a consistent user experience regardless of jurisdiction or case type.

For COURTS: Achieve the biggest advancement in efficient court administration in a generation by dramatically reducing the need to process and manage paper files.

For BOTH: Allow filers and courts to share documents through a central backbone.

Courts on MiFILE

Pilot Courts

3rd Circuit – Wayne*
6th Circuit – Oakland*
13th Circuit – Antrim / Grand Traverse / Leelanau*
16th Circuit – Macomb*
20th Circuit – Ottawa*

Model Courts

22nd Circuit – Washtenaw
37th District – Macomb, Warren
70th Probate – Ottawa

Timeline

2015 National Center for State Courts recommends statewide e-filing system with integrated electronic document management systems (EDMS).
SCAO, state bar, and key stakeholders develop plan approved by legislature and governor.

2016 Legislation authorizing MiFILE takes effect January 1 and collection of new $25 Electronic Filing System (EFS) fee begins March 1. Procurement process results in detailed RFP with more than 400 requirements.

2017 Following extensive review and demonstrations for stakeholders, a vendor was chosen as the statewide e-filing service provider. Pilot courts begin transition to MiFILE 1.0.

2018 Pilot courts complete transition. Circuit, district, and model courts chosen to develop and test MiFILE 2.0 that will be implemented statewide.

2019 Model courts go live in October. Pilot and model courts reach 2 million filings in December.

2020 Delayed all releases due to COVID-19 to maximize system stability and minimize disruption to courts.

2021 Based on experiences of model courts, revised rollout plans, and surveyed courts to identify initial candidates ready to implement MiFILE.
User testing of MiFILE 2.0 and document management system development. Planned focus is implementing a series of probate courts expected to go online by end of year.

2022 - 50 to 75 additional court locations annually, implemented based on resource availability and court capabilities.

FACT: There is no additional fee for using MiFILE. Filers pay the standard filing fees as authorized by the Legislature in any court regardless of whether they use MiFILE.

FACT: Local court clerks will not be able to charge their own fees.

Important Funding Considerations Going Forward

- An additional $1.5 million annually over three years (2022 through 2024) would speed MiFILE implementation and, as a result, 90+ percent of courts would be on the MiFILE system.
- Implementation of MiFILE is linked to transitioning courts to a modern, agile case management system that is flexible and more easily updated. SCAO estimates that an additional $3.245 million is needed to accelerate completion of this project.

MAC
MICHIGAN ASSOCIATION OF COUNTIES

Feb. 11, 2021

Rep. Steven Johnson
Chair
House Oversight Committee
124 N. Capitol Ave.
Lansing, MI 48933

Dear Chair Johnson and members of the House Oversight Committee,

The Michigan Association of Counties (MAC) and the Michigan Association of County Clerks (MACC) oppose House Bill 4164, which would require all courts to accept electronic mailed filings. It would also require courts to provide free access for attorneys to all court documents of any case in that court.

As a general principle, MAC and MACC oppose unfunded mandates, which would be created under HB 4164. County general funds are the primary funding source for Michigan courts, and records are overseen by our elected County Clerks. The additional staff time our clerk's offices would encounter to print emailed documents and file them in a digital format would create new burdens, not to mention any software and maintenance costs to create a new, secure online presence. Software and maintenance fees are not cheap for governments to maintain their current systems, so additional state requirements will cause further financial stress on already strained county budgets.

Most importantly, Michigan courts are working through implementation of the MiFile system led by the State Court Administrative Office. MAC and MACC would caution the Legislature against any additional changes while the courts are in the middle of this current technological transition.

MAC and MACC appreciate the intent of this legislation and the greater goal of accessibility to our local courts, and counties are currently striving for digitization and electronic access of records. However, at this time, this legislation may impede the current e-filing rollout happening across the state.

As always, please feel free to contact our association representatives with any questions you may have about our opposition or concerns outlined here.

Sincerely,

Meghann Keit-Corrion
Governmental Affairs Associate
Michigan Association of Counties

Sharon Tyler, Berrien County Clerk
President
Michigan Association of County Clerks

cc: Rep. Ryan Berman

Michigan Supreme Court
State Court Administrative Office
Michigan Hall of Justice
P.O. Box 30048
Lansing, Michigan 48909
517-373-0128

Thomas P. Boyd
State Court Administrator

MEMORANDUM

DATE: November 9, 2020

TO: All Judges
CC: Court Administrators, Probate Registers, and County Clerks

FROM: Thomas P. Boyd

SUBJECT: Electronic Access Fees

In its recent administrative orders, the Michigan Supreme Court has spoken clearly that courts must take steps to facilitate the public's access to court proceedings and documents using remote technologies. The Court's directives to the trial bench reflects both the need to protect the public during the pandemic and the fact that remote technologies enable courts to be more accessible, transparent, and efficient.

Contrary to the Michigan Court Rules, some courts are charging for electronic records searches or online access to the register of actions (ROA) even when the search is conducted remotely on a person's own device. MCR 8.119(J)(1) provides:

> A court may not charge a fee to access public case history information or to retrieve or inspect a case document irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided (including whether a record is retained onsite or offsite), and the technology used to create, store, retrieve, reproduce, and maintain the case record.

MCR 8.119(H)(1) similarly states that "any person may inspect" a record that is not restricted.

In addition, every trial court has a local administrative order that states in part:

> Any person may access and inspect, at no charge, any case record or information contained in those records, regardless of means of access and record format, unless access is restricted by statute, court rule, or a court order entered pursuant to MCR 8.119(I), and may make photographic copies in accordance with MCR 8.115(C)(5)(a) or obtain copies subject to the following regulations established in accordance with MCR 8.119(J).

The court rules do allow courts to charge a fee for reproducing a document. MCR 8.119(J)(2) ("a court may charge a reproduction fee for a document pursuant to MCL 600.1988, except when required by law or court rule to provide a copy without charge to a person or other entity"). Under MCR 8.119(J)(4)(a), "a court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case document and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce the document." Fees typically authorized for document reproduction pertain to the copy costs and staff time necessary to provide those copies of a record.

The authorization to charge a fee does not apply, however, to the electronic reproduction of documents by someone on their own electronic device. MCR 8.115(C)(5) states:

> Attorneys, parties, and members of the public may use a portable electronic device to reproduce public court documents in a clerk's office as long as the device leaves no mark or impression on the document and does not unreasonably interfere with the operation of the clerk's office.

Charging fees that are not authorized by statute or court rule for accessing court records is prohibited, and any court charging such fees must immediately discontinue that practice. This includes searching for a case on the court's website and reproducing a document or ROA that is available online when using one's own computer and printer.

HOUSE BILL NO. 5806

May 20, 2020, Introduced by Reps. Berman and Warren and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending sections 1985 and 1991 (MCL 600.1985 and 600.1991), section 1985 as added by 2015 PA 230 and section 1991 as added by 2015 PA 233, and by adding section 1991a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1985. As used in this chapter:

(a) "Authorized court" means a court accepted by the state court administrative office under section 1991 for access to the electronic filing system.

(b) "Automated payment" means an electronic payment method authorized by the state court administrative office at the direction of the supreme court, including, but not limited to, payments made with credit and debit cards.

(c) "Civil action" means an action that is not a criminal case, a civil infraction action, a proceeding commenced in the probate court under section 3982 of the estates and protected individuals code, ~~1988~~ **1998** PA 386, MCL 700.3982, or a proceeding involving a juvenile under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(d) "Clerk" means the clerk of the court referenced in the rules of the supreme court and includes the clerk of the supreme court, chief clerk of the court of appeals, county clerk, probate register, district court clerk, **municipal court clerk**, or clerk of the court of claims where the civil action is commenced, as applicable.

(e) "Court funding unit" means 1 of the following, as applicable:

(*i*) For circuit or probate court, the county.

(*ii*) For district court, the district funding unit as that term is defined in section 8104.

(*iii*) For the supreme court, court of appeals, or court of claims, the state.

(*iv*) For municipal court, the city in which the municipal court is located.

(f) "Electronic filing system" means a system authorized after ~~the effective date of the amendatory act that added this chapter~~ **January 1, 2016** by the supreme court for the electronic filing of documents using a portal contracted for by the state court administrative office for the filing of documents in the supreme court, court of appeals, circuit court, probate court, district court, **municipal court**, and court of claims.

(g) "Electronic filing system fee" means the fee described in section 1986.

(h) "Party" means the person or entity commencing a civil action.

(i) "Qualified vendor" means a private vendor selected by the state court administrative office by a competitive bidding process to effectuate the purpose of section 1991(3).

Sec. 1991. (1) A court may apply to the supreme court for access to and use of the electronic filing system.

(2) If the supreme court accepts a court under subsection (1), the state court administrative office shall use money from the judicial electronic filing fund established under section 176 to pay the costs of technological improvements necessary for that court to operate electronic filing.

(3) The supreme court may select a qualified vendor for the electronic filing system.

(4) A court that is not an authorized court must accept the filing of documents through electronic mail if the court accepts the filing of documents through facsimile.

Sec. 1991a. Except as otherwise prohibited by law, a court must allow an attorney to access, through a website, the register of actions and a digital image of all documents filed in any case in that court. A court or a court funding unit must not charge a fee for access to the website under this section.

SBM State Bar of Michigan | ACCESS TO JUSTICE POLICY COMMITTEE

Public Policy Position
HB 5806

Support with Amendments

Explanation

The committee voted to support HB 5806 with amendments. The committee recommends amending Sec. 1991a to grant pro se litigants the same rights as attorneys to access "through a court's webite, the register of actions and a digital images of all documents filed in any case in that court" on a fee-free basis.

Making a court's digitized documents available without a fee to both attorney and pro se litigants and allowing for expanded e-filings generally, would increase access to justice.

Position Vote:

Voted for position: 16
Voted against position: 0
Abstained from vote: 1
Did not vote (due to absence): 10

***Keller* Permissibility:**

The committee agreed that the legislation is *Keller* permissible because it improves the function of the courst and improves the quality of legal services.

Contact Persons:

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

SBM State Bar of Michigan | CIVIL PROCEDURE & COURTS COMMITTEE

Public Policy Position
HB 5806

Support & Oppose

Explanation
The committee supports the proposed amendments to MCL 600.1991(4) Subsection 4 as written but opposes MCL 600.1991a because it micromanages the court's administration of its own records and would impose significant financial costs.

Position Vote:
Voted For position: 20
Voted against position: 1
Abstained from vote: 0
Did not vote (due to absence): 6

***Keller* Permissibility:**
The legislation is *Keller* permissible in affecting the functioning of the courts.

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

SBM State Bar of Michigan | CRIMINAL JURISPRUDENCE & PRACTICE COMMITTEE

Public Policy Position
HB 5806

Oppose

Explanation
The committee voted oppose HB 5806. While supportive of the spirit of the bill, the committee opposes the use of the legislative process to govern the way courts administer electronic filings and document access. The committee instead recommends that such issues are more appropriately addressed through court rule amendment(s).

Position Vote:
Voted For position: 14
Voted against position: 4
Abstained from vote: 0
Did not vote (absent): 3

***Keller* Permissibility:**
The legislation is *Keller* permissible in that it affects the functioning of the courts.

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

SBM State Bar of Michigan | APPELLATE PRACTICE SECTION

Public Policy Position
HB 5806

Support with Recommended Amendments

Explanation
The State Bar of Michigan Appellate Practice Section Council supports HB 5806 in principle because it recognizes the importance of providing electronic access to court records.

The Council does, however, have two concerns. First, it will take considerable resources for courts to implement the necessary electronic document management systems that will be required to provide access to court documents. We are hopeful that the Legislature will provide appropriate funding should the measure pass.

Second, there are privacy issues that need to be considered. Court filings may contain personal identifying information or sensitive facts or allegations that are not appropriate for widespread public dissemination. These special considerations may justify exceptions or special protections in appropriate cases or case types.

While we are hopeful that the Legislature will take these concerns into consideration, we support in principle the goals of greater public access to the courts and a more transparent judicial process.

Position Vote:
Voted for position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 3

***Keller* Permissibility:**
The improvement of the functioning of the courts

Contact Person: Bradley R. Hall
Email: bhall@sado.org

SBM State Bar of Michigan | FAMILY LAW SECTION

Public Policy Position
HB 5806

Support

Explanation:
The Family Law Section believes that allowing attorneys free on-line access to register of actions and digital images of filings will be of great help to attorney and promote access to justice for clients.

Position Vote:
Voted for position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 1

***Keller* Permissibility:**
The improvement of the functioning of the courts
The availability of legal services to society
Allowing free on-line access of court filings to attorneys will increase the ability of attorneys to assist client, particularly in the instance of time-sensitive matters.

Contact Person: James Chryssikos
Email: jwc@chryssikoslaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 4, 2021

Re: HB 4195 – Public Disclosure of Divorce Filings

Background
HB 4195 is a reintroduction of HB 5296 from the 2019-2020 Legislative Session. At the April 24, 2020 meeting, the Board of Commissioners voted to support HB 5296 with an amendment that the word "public" be clarified to mean "non-party." With the introduction of HB 4195, the Family Law Section submitted a new position on the bill (different than the position that the Section submitted on HB 5296), and has requested that the Board either reconsider the State Bar's position or permit the Section to advocate its position.

HB 4195 would delay making complaints for divorce publicly available until the defendant has been served or otherwise notified of the complaint. Currently, when a person files for divorce, the complaint is immediately available to the public, including online for those courts that have implemented electronic filing. This practice allows attorneys to review the list of publicly posted divorce complaints and contact defendants and offer to provide legal services before defendants are even aware that their spouse has filed for divorce, a marketing practice sometimes colloquially described as trolling.

This attorney contact can potentially create vulnerabilities for the plaintiff, particularly if that party is a survivor of domestic abuse. The Michigan Poverty Law Program stated in a January 21, 2020 letter to the House Families, Children & Seniors Committee that "the time when a survivor leaves the abuser, including filing a divorce complaint which signals the end of the relationship, can be a dangerous time." HB 4195 amends MCL 552.1-552.45 by adding Section 6a to prohibit a complaint for divorce filed with the court from being made available to the public until the proof of service has been filed with the court.

In 2010, the Representative Assembly (RA) considered similar issues to those presented by HB 5296. From 2008-2010, the Family Law Section Council was deeply involved in efforts to address and limit the practice of attorneys making unsolicited offers of legal services to potential family law clients. The Council's efforts culminated in a resolution to the RA that presented two options for curtailing attorney trolling in divorce cases: (1) a change to the Michigan Rules of Professional Conduct (MRPC) or (2) a change to the Michigan Court Rules (MCR). The specific language of their proposal read as follows:

> In any matter involving a family law case in a Michigan Trial Court, a lawyer may not initiate contact or solicit a party for the purposes of establishing a client-lawyer relationship, where the party and lawyer had no pre-existing relationship, until the first to occur of the following: service of process upon the party or fourteen (14) days has expired from the date of filing of the particular case.

The RA passed the resolution on March 27, 2010. The Michigan Supreme Court ultimately declined to adopt the RA's recommendations. Importantly, the Family Law Section's proposal addressed the conduct through regulation of attorney conduct, whereas HB 5296 addresses the conduct through statutory regulation of court processes.

Keller Considerations

At the April 24, 2020 meeting, the Board of Commissioners found the identical, previous version of this bill to be *Keller*-permissible because it affects access to legal services.

From the *Keller* memo on HB 5296 in April 2020:

> Although the bill would modify the operational functions of the court, this change does not appear to either improve or diminish the functioning of the courts. The bill may, however, impact the availability of legal services to society, as survivors of domestic violence may feel more comfortable filing for divorce, knowing that they have control over when to serve the defendant and that he or she will not receive early notice of the action by an attorney soliciting business. Alternatively, it could be (and has been) argued that the type of trolling addressed by the bill expands consumer knowledge of and access to lawyer resources.
>
> Unlike the proposal approved by the RA, HB 5296 did not regulate attorney behavior, rather defines court process with no impact on the function of the court.

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 Board of Commissioners has previously found this bill to be *Keller*-permissible because it would affect access to legal services.

House Bill 4195 (2021) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2021-HB-4195

Sponsor
Pamela Hornberger (district 32)
(click name to see bills sponsored by that person)

Categories
Family law: marriage and divorce; Records: divorce;

Family law: marriage and divorce; public disclosure of divorce filings; modify. Amends 1846 RS 84 (MCL 552.1 - 552.45) by adding sec. 6a.

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2021-2022 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

History
(House actions in lowercase, Senate actions in UPPERCASE)
NOTE: a page number of 1 indicates that the page number is soon to come.

Date	Journal	Action
02/10/21	HJ 9 Pg. 126	introduced by Representative Pamela Hornberger
02/10/21	HJ 9 Pg. 126	read a first time
02/10/21	HJ 9 Pg. 126	referred to Committee on Judiciary
02/11/21	HJ 10 Pg. 134	bill electronically reproduced 02/10/2021

HOUSE BILL NO. 4195

February 10, 2021, Introduced by Rep. Hornberger and referred to the Committee on Judiciary.

A bill to amend 1846 RS 84, entitled

"Of divorce,"

(MCL 552.1 to 552.45) by adding section 6a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 6a. Beginning January 1, 2022, a complaint for divorce filed with the court shall not be made available to the public until the proof of service has been filed with the court.

Public Policy Position
HB 4195

Support with Recommended Amendments

Explanation

A bill that would make a Complaint for Divorce non-public until a proof of service is filed with the court. There was concern about making the filing of the proof of service the sole triggering event for the documents to become available, as some Plaintiffs may choose to delay filing the proof of service for strategic purposes. Purposefully delaying filing the proof of service could be done for financial reasons (e.g., one spouse moving money while the other spouse is unaware of the filing). Also, there could be unintended consequences whereas the Plaintiff may fail to file a proof of service where the Defendant files an Answer to Complaint right away, resulting in the documents being unavailable to the public indefinitely. Moreover, in pro se Plaintiffs may be unaware of the requirement to file a proof of service, again, resulting in the documents remaining non-public indefinitely. The addition of a 42-day trigger to make the documents public would serve as a safety net to avoid the many unanticipated consequences of failure by the Plaintiff to file the proof of service.

Recommended amendments to HB 4195:

a. **The bill should apply to more than just divorce but all family court filings under MCR 3.200 et seq.**
b. **The law should require a suppression of all "case initiating documents", as opposed to the current language limiting the suppression to the Complaint for Divorce.**
c. **The suppression shall continue for 42 days or until a Proof of Service is filed with the court, whichever is earlier.**

Position Vote:
Voted for position: 18
Voted against position: 1
Abstained from vote: 1
Did not vote (absent): 1

Contact Person: James W. Chryssikos
Email: jwc@chryssikoslaw.com

SBM State Bar of Michigan | ACCESS TO JUSTICE POLICY COMMITTEE

Public Policy Position
HB 5296

Support with Amendment

Explanation
The committee voted to support the bill with an amendment. The bill would be beneficial to domestic violence survivors filing divorce cases because it would provide survivors with a period of time to safety-plan before the defendant is served and learns about the action. The bill's requirement that the complaint is not available "until the proof of service is filed with court" prevents a defendant from learning about the case from an attorney who reviews the court website or files and contacts the defendant before the defendant is served with the pleadings.

However, the committee recommends the bill be amended to clarify that the term "the public" means anyone who is not party to the action, including attorneys who are not on record as representing a party to the action.

Position Vote:
Voted for position: 19
Voted against position: 0
Abstained from vote: 1
Did not vote (due to absence): 7

***Keller* Permissibility:**
The committee agreed that the bill is *Keller*-permissible because it addresses the improvement of the functioning of the court by limiting public access to divorce pleadings that may contain personal information about individuals and children.

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

SBM State Bar of Michigan | FAMILY LAW SECTION

Public Policy Position
HB 5296

Support with Recommended Amendments

Explanation

The Family Law Section supports the concept of the bill, but has concerns about the approach taken in the bill. Council would support this bill, or an alternative bill, stating as follows:

> LIMITS ON ATTORNEY SOLICITATION IN FAMILY LAW MATTERS REQUESTING EX-PARTE RELIEF
>
> A lawyer shall not directly or indirectly, individually or by their agent or anyone working on their behalf, solicit a person with whom the lawyer has no family or prior professional relationship, who is named as a Defendant and/or Respondent in a family law matter with a circuit court case code of DC (Custody), DM (Divorce, with minor children), DO (Divorce, no children), DP (Paternity), DS (Other Support), or DZ (Other Domestic Relations Matters), or PP (Personal Protection Matter) seeking to provide a service to the Defendant and/or Respondent for a fee or other remuneration where the Complaint or Petition filed in that matter seeks ExParte Relief, unless and until 21 days have elapsed from the filing of such case, or after service of the Complaint or Petition seeking Ex-Parte Relief in such case, whichever is less. Term "solicit" does not include letters addressed or advertising distributed by a lawyer generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but are so situated that they might in general find such services useful.

The Section believes that plaintiffs in divorce and domestic cases often have a need to enter Ex Parte Orders for various reasons, including but not limited to, domestic violence, financial abuse, and other forms of conduct the plaintiff seeks to be prohibited through an ex parte order. By allowing unregulated solicitation of legal services to defendants, thus alerting them to the legal action before service of process and before an ex parte order may be granted, the solicitation can have the effect of causing the very conduct plaintiff sought to deter by the proposed ex parte order. By requiring attorneys soliciting their services to wait 21 days where an ex parte order has been requested before contacting defendant, this would allow time for plaintiff to obtain ex parte orders and provide plaintiff the protection they need, while still allowing defendant his/her due process, and without curbing the attorney's commercial free speech.

Position Vote:

Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 3

SBM State Bar of Michigan | FAMILY LAW SECTION

Contact Person: James Chryssikos
Email: jwc@chryssikoslaw.com

 #3

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February 18, 2020

Michigan House of Representatives
Families, Children and seniors Committee
Hon. Kathy Crawford, Chair
Hon. Daire Rendon, Majority Vice Chair
Hon. Diana Farrington
Hon. Michele Hoitenga
Hon. Douglas Wozniak
Hon. LaTanya Garrett, Minority Vice Chair
Hon. Frank Liberati
Hon. Brenda Carter
Hon. Cynthia Johnson

Re: State Bar of Michigan Family Law Council support of the underlying purpose of House Bill 5296 and Council's proposed amendment.
Hearing date: Wednesday, February 19, 2020 @ 9:00 a.m.
House Office Building Room 308, Lansing Michigan

Dear Chairwoman Crawford, Vice Chairwoman Rendon, Minority Chairwoman Garrett, and Representatives Farrington, Hoitenga, Wozniak, Liberati, Carter and Johnson,

I am writing on behalf of the State Bar of Michigan Family Law Section Council. The Family Law Council has long supported efforts to put reasonable limits on attorney solicitation of Defendants in family law cases, and applauds Rep. Pamela Hornberger and this Committee for taking on this problem with House Bill No. 5296. While several attempts over the last 10 years to enact protective rules to govern such conduct have been attempted as either a modification of the Michigan Rules of Professional Conduct or legislation, they were not successful. But that does not mean that it is impossible to craft a rule that passes constitutional muster, while reasonably addressing unreasonable solicitation of legal services in family law matters.

This legislature has for years, crafted laws to protect Michigan's citizens, and particularly so when they are experiencing one of the most difficult, vulnerable times of their lives. There are numerous examples throughout Michigan's statutes, but one, while not dealing with family law matters, is directly on point in terms of putting reasonable limits on solicitation.

In the weeks immediately following an automobile accident, the injured party is in a vulnerable position. While they may require legal assistance, they should not be unreasonably pursued by lawyers seeking their business. This legislative body decided there needed to be limits. In what many call the "ambulance-chaser" statute, in 2013, this legislative body passed and the Governor signed legislation to do just that. Effective January 1, 2014, MCL 750.410b of Michigan's Penal Code prohibits a person's intentional contact with a person they know has sustained a personal injury as a direct result of a motor vehicle accident, or an immediate family member of that individual, with a direct solicitation to provide a service until the expiration of 30 days after the date of that motor vehicle accident. The exception being if the accident victim or their immediate family members acting on their behalf, request such contact, or the contact is by a person acting on behalf of an insurance company attempting to adjust a claim.

A first violation for such solicitation, can result in a fine of not more than $30,000. A second or subsequent violation, can result in imprisonment for not more than 1 year or a fine of not more than $60,000, or both, in addition to the cost of prosecution. This is established Michigan law, and has been for over 6 years now.

While the State Bar of Michigan Family Law Council is supportive of the intent of House Bill No. 5296, there is concern that it may have some of the same constitutional defects that prevented prior attempts to limit solicitation from being enacted. In order to try to better meet the United States Supreme Court's three-part test outlined in Central Hudson Gas and Elec Corp v Public Serv Comm of NY, 477 US 557 (1988), the Family Law Council crafted the following proposed language that may better stand the constitutional challenges that are sure to be made.

On Monday February 17th, 2020, the State Bar of Michigan Family Law Council voted 18-0 (3 members not voting) to present the following proposal to this committee in order to provide reasonable limits on solicitation in family law matters:

LIMITS ON ATTORNEY SOLICITATION IN FAMILY LAW MATTERS REQUESTING EX-PARTE RELIEF

A lawyer shall not directly or indirectly, individually or by their agent or anyone working on their behalf, solicit a person with whom the lawyer has no family or prior professional relationship, who is named as a Defendant and/or Respondent in a family law matter with a circuit court case code of DC

(Custody), DM (Divorce, with minor children), DO (Divorce, no children), DP (Paternity), DS (Other Support), or DZ (Other Domestic Relations Matters), or PP (Personal Protection Matter) seeking to provide a service to the Defendant and/or Respondent for a fee or other remuneration where the Complaint or Petition filed in that matter seeks ExParte Relief, unless and until 21 days have elapsed from the filing of such case, or after service of the Complaint or Petition seeking Ex-Parte Relief in such case, whichever is less.

The term "solicit" does not include letters addressed or advertising distributed by a lawyer generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but are so situated that they might in general find such services useful.

It is the decided hope of the Family Law Council that the aforesaid proposed language may better address the constitutional challenges that have faced prior attempts at putting reasonable limits on solicitation at this most difficult time of a person life, while still being within the parameters of the US Supreme Court's 3 prong analysis in the Central Hudson Gas case.

1. **Does the proposed regulation protect a substantial interest?**

    a. The proposal doesn't apply to every family law case filed, because it's not just any family law matter that requires specific limits on solicitation. It seeks to protect a Plaintiff/Petitioner in a family law case from harm at a particularly vulnerable time. For that reason, it's directed at family law cases that are filed where an ExParte Order is being sought.

    Getting an ExParte Order under Michigan Court Rule 3.207 is not easy. It's typically done at the very outset of the family law case, contemporaneous with the case filing. There have to be specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to give notice to the Defendant that a Court Order is being sought, or that Defendant's notice of the Plaintiff seeking that relief will itself precipitate the adverse action sought to be avoided before an order can be issued.

    For example, the Plaintiff is justly fearful that the Defendant may take off with the children, cause physical harm to them personally or to their children or the marital property, cancel health or auto insurance, transfer assets to third parties to prevent the Court from reaching them for division between the parties, etc.

Once the Court has a chance to review the request for ExParte relief, if the Court believes that the allegations have merit, an ExParte Order can be entered by the Court restraining certain types of conduct, without notice to the Defendant/Respondent. This is because the Michigan Supreme Court, in adopting this Court Rule over 25 years ago, recognized that there is a substantial interest in preserving the status quo because irreparable injury, before the parties can even get to court, is not a desired outcome. Further, that while due process must be followed in every other instance of seeking entry of an Order, if giving the other side notice will precipitate the very adverse action sought to be prevented, the court has the discretion to enter an ExParte Order without notice to the other side, and restrain harmful conduct. But again, this can happen only if certain things exist.

i. The Petition must allege the facts under oath,
ii. Not just any general statements, but specific facts indicating that irreparable injury, loss or damage will result in delay of entry, or…and most important here…
iii. That notice itself will precipitate adverse action before the order can be issues.

The State Bar of Michigan Family Law Council's proposal is designed to protect substantial interests of those filing a family law case.

2. **The regulation must directly and materially advance that interest.**

a. Implicitly, MCR 3.207 recognizes that if a Defendant is tipped off that a Plaintiff has sought an ExParte Order to prevent Defendant from causing irreparable injury, loss or damage, giving the Defendant notice that protection from such harm is being sought may trigger them doing that harmful action BEFORE the Court order is entered and the Defendant served with it. To prevent this foreseeable problem, it's prudent to protect the legal process and implement reasonable steps to prevent notice to the Defendant prematurely, so that the Court has time to enter an appropriate ExParte Order and the Defendant be served with it.

b. Of course, the Court Rule allows for due process immediately thereafter. In fact, the Court Rule requires that a detailed "Notice" be included in the ExParte Order informing the Defendant of their right

to object to the order, and directions of when and how to effectuate their objections being heard by the Court or the issue resolved by the friend of the court. **The problem is, while under MCR 3.207 (B)(3) the ExParte Order is technically in effect upon entry, it is only enforceable upon service.** Council's proposal is directly related to the substantial interests sought by both the Plaintiff and the Court, and permitted under Michigan's Court Rules; specifically, to prevent notice that may precipitate irreparable injury, loss or damage.

Even if the requisite elements of the Court Rule for an ExParte Order are met, thus satisfying the substantial interests of preventing irreparable harm under prong 1 of the Central Hudson Gas case, that substantial interest is undermined if a lawyer, trolling the court's records to solicit business, tips off the Defendant that an ExParte Order is being sought before its entry and a reasonable time for it to be served on the Defendant. This solicitation undermines the very purpose of a valid ExParte Court Order, entered after the Court has reviewed the Plaintiff's sworn-to factual allegations, and concluded that the Defendant must be restrained from certain conduct by its ExParte Order.

3. **The regulation, in this case briefly delaying an attorney's right to solicit Defendants in a family law case when a ExParte Order is sought to prevent irreparable harm, must be narrowly drawn to meet the substantial interest.**

   a. This is where many prior attempts to put reasonable limits on attorney solicitation in family law cases, fail. They are drag net rules, sweeping every type of family law case in, even though many do not involve allegations of impending irreparable harm.

   b. The proposal Council has submitted, narrowly restricts itself to family law cases where the risk of irreparable harm has been alleged, and an ExParte Order sought.

   c. Additionally, the proposed legislation makes clear that this limitation on solicitation will not continue indefinitely…something that prior opponents of such legislation have alleged can happen not only by a meritorious litigant, but someone using the rule to game the system…and it also makes clear what is is not intended to do:

i. It does not prevent a lawyer's protected commercial speech or prevent them from providing legal information given generally.
ii. It will not result in penalties if a lawyer inadvertently sends legal information to the public generally and it gets into the hands of a Defendant in a family law case, so long as the lawyers actions were not directed at a specific Defendant. It's specifically designed to limit solicitation to where the lawyer seeking a fee or other remuneration in a family law matter involving a request for an ExParte Order, tries to solicit a prospective new client.
iii. It also addresses arguments that pose the ethical dilemma: what if a lawyer already has a prior professional relationship with the Defendant, or the Defendant is a member of the lawyers own family. This proposed rule exempts solicitation if there is a prior attorney-client relationship, or involves a member of the lawyer's own family.
iv. Lastly, it can't be gamed, or go on forever. Once filed, the petitioner has a reasonable period of time…21 days… to get it served. Beyond that limited time period, a lawyer can solicit a Defendant in a family law matter for a fee or other remuneration.

Accordingly, the State Bar of Michigan Family Law Council supports this Committee's addressing harmful solicitation of family law clients, suggests the proposed statutory language stated above, and is interested in working with this Committee's members, as well as the sponsor of this legislation, in whatever way necessary to ensure that eventually, and hopefully soon, Michigan's legislature gives Plaintiff's in family law cases where ExParte relief is sought to prevent irreparable harm, a chance to get the protection the court has found that they deserve.

Respectfully Submitted,

Carlo J. Martina

Carlo J. Martina is a former Chair of the State Bar of Michigan Family Law Council, former President of the Wayne County Family Law Bar Association, former President of the Collaborative Practice Institute of Michigan, has served on various State Court Administrative Office committees, written and lectured on various family law topics for the Institute for Continuing Legal Education over the years, and testified before the Michigan Supreme Court on attorney ethics.

STATE BAR OF MICHIGAN FAMILY LAW COUNCIL PROPOSAL

LIMITS ON ATTORNEY SOLICITATION IN FAMILY LAW MATTERS REQUESTING EX-PARTE RELIEF

A lawyer shall not directly or indirectly, individually or by their agent or anyone working on their behalf, solicit a person with whom the lawyer has no family or prior professional relationship, who is named as a Defendant and/or Respondent in a family law matter with a circuit court case code of DC (Custody), DM (Divorce, with minor children), DO (Divorce, no children), DP (Paternity), DS (Other Support), or DZ (Other Domestic Relations Matters), or PP (Personal Protection Matter) seeking to provide a service to the Defendant and/or Respondent for a fee or other remuneration where the Complaint or Petition filed in that matter seeks ExParte Relief, unless and until 21 days have elapsed from the filing of such case, or after service of the Complaint or Petition seeking Ex-Parte Relief in such case, whichever is less.

The term "solicit" does not include letters addressed or advertising distributed by a lawyer generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but are so situated that they might in general find such services useful.

To: Jean Doss
From: Rebecca Shiemke
Re: HB 5296
Date: January 21, 2020

On behalf of the family law task force of Michigan Poverty Law Program, I support HB 5296, but suggest possible amendments to fully effectuate its intent. The time when a survivor leaves the abuser, including filing a divorce complaint which signals the end of the relationship, can be a dangerous time. The bill would be helpful to domestic violence survivors filing divorce cases because it would provide survivors with a period of time to safety-plan before the defendant is served and learns about the action. Otherwise, the defendant could learn about the case from an attorney who reviewed the court website or filing and contacted the defendant even before the defendant was served with the pleadings.

The issues to consider include:

Expand the actions to which the bill applies.

- Right now, the bill is limited to filings of divorce complaints. Consider expanding it to all domestic relations actions as delineated in MCR 3.201(A), which includes separate maintenance, annulment, paternity, support and child custody.

Whether it should also apply to Personal Protection Order (PPO) filings.

- PPOs are governed by separate court rules, MCR 3.700 et seq. There is a rule in place now that prohibits courts from posting on a public website any information in a PPO action that would lead to identifying information about the petitioner. However, there may be reasons to include PPO actions in this bill since many survivors file PPOs at or near the same time as filing a divorce action. Consider whether limiting access to PPO files would also help survivors, or whether it's unlikely that PPOs would be linked to divorce actions.

Clarify the meaning of "made available to the public."

- The bill should specifically indicate that the prohibition applies to availability through a court's public websites as well as its paper files.
- It should also be clear that "public" includes attorneys. That may be the case, but it was a question.
- There may need to be a limited exception to disclosure of filings when an attorney is asking the court whether or not the other party has already filed an action, since two actions involving the same parties cannot be filed.

Michigan Poverty Law Program
15 S. Washington Street, Suite 202, Ypsilanti, MI 48197
Phone 734.998.6100 | **Fax** 734.998.9125
mplp.org

Clarify date of service on defendant.

- The bill provides a compliant is not available "until the defendant has been served with or received notice of that complaint." It's not clear how that fact will be known to the court or the public. Rather, the bill could read that the compliant is not available "until a proof of service is filed with the court."

HB 5296 – Divorce Filings
Written Testimony on Behalf of Michigan Poverty Law Program
February 20, 2020

I am Rebecca Shiemke, the family law attorney-specialist with the Michigan Poverty Law Program. Michigan Poverty Law Program (MPLP) provides advocacy, legal support and training to poverty law advocates statewide, including attorneys who provide free legal assistance to indigent Michigan families and individuals in a host of legal issues. In that capacity, I have consulted or co-counseled on hundreds of family law matters, with a priority on assistance to survivors of domestic violence. I have personally represented hundreds of survivors in court proceedings over the past 20 years. On behalf of MPLP, I ask that you support the draft 2 substitute for House Bill 5296.

The bill provides that "a complaint for divorce filed with the court shall not be made available to the public until the proof of service has been filed with the court." It is designed to prevent third parties from accessing new divorce filings in order to provide defendants with advance notice of the action, including any protective orders, before proper service. It maintains control of the process with the plaintiff, including control over when and how the defendant is served.

This bill will protect survivors of domestic violence by providing them with an opportunity to develop a safety plan and serve protective orders along with the divorce complaint before the defendant learns of the filing through other means. Often the most dangerous time for survivors is when they leave the

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relationship because it is the time that the abuser loses control; and power and control over an intimate partner is the primary aim of the abuser. Filing a divorce is a clear message to the abuser that the survivor intends to leave the relationship and doing so puts the victim at risk of retaliation, manipulation and further violence. Even in situations where past abuse has been emotional, the filing for divorce may be the tipping point and cause a violent response. Specifically, in a divorce action the abuser could hide marital and other financial assets from the survivor during the time the abuser learns of the filing and is properly served.

Additionally, not all risks are foreseeable. While many attorneys who represent survivors do assess the risk an abuser poses and develop a practical plan to keep their client safe, not all survivors disclose the abuse to their attorneys, or are represented by attorneys. The abuser may have threatened to hurt the survivor if the survivor tells others about the abuse. The survivor may not identify as a "victim" of abuse. Or, the attorney may have dissuaded the survivor from disclosing to reduce the conflict in the case. If attorneys are not aware the client is a survivor, they are unable to plan for the client's safety prior to filing. A violent or harmful response by an abusive spouse cannot always be prevented by good lawyering.

Thus, a brief window of time to arrange service in a safe matter, such as that provided by HB 5296, is reasonable given the serious potential risks involved

Rebecca Shiemke
Michigan Poverty Law Program
rshiemke@mplp.org

 #2

Hi Kathy:

An overwhelming number of highly ethical and respected attorneys are appalled at Family-Law-Ambulance-Chasing which has gone on unchecked, and unregulated for years.

Long and the short of the issue is: A very small number of bottom feeding lawyers, haunt the county clerks office, obtain daily access to new divorce filings, and generate unasked for solicitations, before the other party even knows a divorce case has been filed; they routinely spark fear and anxiety in the recipients, and tout their family law background, and inferring if not outright claiming that bad, bad things will happen if they don't immediately hire a lawyer.

The noise generated by these half a dozen or so "trollers' is far disproportionate to their standing or status in the legal community. The claims of "constitutional violations" are Fake News, and Fake claims. There are tons of areas in our legal system where there are restrictions on public access to files, or restrictions upon attorney solicitations. Example: (a) all adoption files (b) all juvenile files (c) certain Domestic Violence filings (d) personal injury solicitations (e) airline disaster solicitations, and the list goes on an on…

Kathy is on the committee looking at the statute, and I wanted to let her know that as a family law attorney of 46 years, as a solid Republican, and as a competent professional 95% or more of us solidly support this bill. Within the family law attorney there is broad, bipartisan, support for this bill, and the only internal discussions regard what is the best way to fix this question.

There are a number of our cases where we can petition the Court for immediate issuance of a temporary restraining order, preventing the kidnaping of children, or emptying of bank accounts, or changing beneficiary designations, or running up debt… these restraining orders are not effective until served upon the other party… which means that these solicitations can tip off the defendant before they are served with the restraining orders.

Because these "temporary" orders are, by and large, even handed and apply to both parties, and just preserve the "status quo" it is my professional experience that 95% of the initial orders remain in place throughout the case. Solicitation prior to the defendants even being served is the evil to be avoided.

I am out of the Country on Monday for 14 days, but I did want to personally reach out to Kathy on this critical issues.

These bottom feeders successfully evaded a Court Rule change a number of years ago, and they are just as frenzied at the attempt to use the Legislative route. (Which is the best "fix" for the issue, anyway..)

Thanks

JIM

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February 10, 2020

VIA EMAIL ONLY

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Re: House Bill 5296
Hearing date: Wednesday, February 12, 2020 @ 9:00 A.M.
House Office Building Room 308, Lansing Michigan
Opposition to **House Bill 5296**

Dear Chairman Crawford, Majority Vice Chairman Rendon, Minority Vice Chairman Garrett and Representatives Farrington, Woznmiak, Liberatia, Carter, Hoitenga and Johnson:

I write to you in opposition to House Bill 5296 and request that you vote **no** on House Bill 5296 in committee.

I am a practicing family law attorney and as part of my practice, I often contact Defendants shortly after a Complaint for Divorce has been filed, and many of those I contact, whether or not they become clients of mine, thank me for providing them with notice and allowing them to prepare for divorce proceedings in an orderly and thoughtful manner.

This Bill, imposing in a sealing Court records, is yet another attempt to curtail the ability of individuals to be informed as to the existence of legal proceedings. This matter was previously brought before the Michigan Supreme Court in 2012 and before the Michigan Senate in 2014 and 2015, proposing the same substantive effect in Senate Bill 351, prior to that in S.B. 981. The matter before the Michigan Supreme Court and before the Senate, sought to impose, what I believe, is an unconstitutional waiting period, between the time that a case is filed and the time that individual

litigants can be contacted by attorneys. This legislation, House Bill 5296, seeks to impose the very same type of unconstitutional prohibition on commercial free speech and on contact under the guise of sealing these records initially, rather than allowing them to become matters of public record. There has been no substantiation for this legislation, which itself, like Senate Bill 351 in 2015, and S.B. 981 in 2014 prior to that sought to accomplish the very same unconstitutional goal. There is no quantifiable identifiable problem.

Justice Young in his April 5, 2012 letter to the State Bar of Michigan, in rejecting the same type of probation stated:

To protect against potential [constitutional] challenges that might be raised if the Court adopts the proposed amendment, the Court invites the bar [State Bar of Michigan] to conduct such a study to gather empirical evidence to support the proposed amendment (see attached April 5, 2012 letter from Chief Justice Yung to Janet Welch Executive Director of the State Bar of Michigan)

The State Bar never conducted such a study and again failed to present any empirical evidence and no such evidence was submitted to this committee.

I have enclosed for your review, my letter previously sent to the committee members of the Senate Committee as well as the House Committee concerning Senate Bill 351, in addition, the Order of the Supreme Court of Michigan penned by Justice Robert Young Jr. dated April 5, 2012, indicating that it was the Court's position that such restriction was unconstitutional.

In addition to the foregoing, I submit for your consideration, a letter previously penned by Mr. John Allen, a practitioner with the Varnum Law Firm at the time, which is addressed to then Senator Schuitmaker, outlining the unconstitutionality of the previous Bill submitted as Senate Bill 981, seeking to impose the same restriction as is included in House Bill 5296.

For the reason stated in the documents provided, it is my belief that the restriction sought to be imposed at this time is unconstitutional and undue interference with commercial free speech, and such would likely be challenged in Federal Court as that type of restriction and not be able to be upheld, nor past constitutional muster.

For the foregoing reasons, it is my belief that this matter should not be passed out of committee, and eventually sent to the full house for a vote as there is improper substantiation for an imposition on what is an "end run" around a matter previously put before the Senate and the Supreme Court on at least three different occasions and as indicated by former Chief Justice Young in 2012, such was not appropriately substantiated so as to allow a rule to be implemented by the Supreme Court.

The Supreme Court went on to say that should the Michigan Bar engage in a study to seek substantiation for the imposition of such restriction on viable commercial free speech, the Court would reconsider its determination. The State Bar of Michigan has failed to engage in such a study, nor present any evidence to the Supreme Court, nor to this body for a substantiation of such imposition of an improper restriction on Commercial Free Speech.

Thank you for your consideration and your anticipated **no** vote.

Very truly yours,

Merrill Gordon

MG/mmh

cc: Stephanie Johnson (stephanie@kjlmteam.com)
Elizabeth Bransdorfer (ebransdorfer@micameyers.com)
K.C. Steckelberg (kcs@michiganprosecutor.org)
Mari Manoogian (marimanoogian@house.mi.gov)

Senatebill351.11

HOUSE BILL NO. 5296

December 11, 2019, Introduced by Rep. Hornberger and referred to the Committee on Families, Children, and Seniors.

A bill to amend 1846 RS 84, entitled

"Of divorce,"

(MCL 552.1 to 552.45) by adding section 6a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 6a. Beginning January 1, 2021, a complaint for divorce filed with the court shall not be made available to the public until the defendant has been served with or received notice of that complaint.

Michigan Supreme Court

ROBERT P. YOUNG, JR.
CHIEF JUSTICE

MICHIGAN HALL OF JUSTICE
925 WEST OTTAWA STREET
LANSING, MICHIGAN 48913
313-972-3250

April 5, 2012

Janet K. Welch
Executive Director
State Bar of Michigan
306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

RE: ADM File No. 2010-22

Dear Janet:

After the administrative public hearing held March 28, 2012, the Supreme Court considered the proposal that was submitted by the State Bar of Michigan's Representative Assembly in Administrative File No. 2010-22. As you are aware, the United States Supreme Court has held that although attorneys have a right to send truthful and nondeceptive communications to potential clients (under *Shapero v Ky Bar Ass'n*, 486 US 466 [1988]), a state may restrict that right under *Florida v Went For It*, 515 US 618 (1995), if the regulation meets the three-part test outlined in *Central Hudson Gas & Elec Corp v Public Serv Comm of NY*, 447 US 557 (1988). The Supreme Court's description of the test in *Went for It* states:

> First, the government must assert a substantial interest in support of its regulation; second the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.

In applying this test, the United States Supreme Court discussed the second prong at length. In *Went for It*, the Court held that the findings of an extensive study conducted by the Florida state bar, which included both statistical and anecdotal data, were sufficient to satisfy the second prong of the *Central Hudson* test. The Court distinguished the facts in *Went for It* from the facts of another solicitation case (*Edenfield v Fane*, 507 US 761 [1993]), in which no evidence had been offered in support of the regulation, and which was struck down by the Supreme Court for that reason. The Court in *Went for It* (quoting *Edenfield*), explained that meeting the second prong "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

During the Court's discussion relating to the bar's proposed amendment in this file, there was significant concern that adoption of the proposed amendment without a basis of support shown in more empirical terms may violate the second prong of the *Central Hudson* test. Members of the bar who submitted comments and spoke in support of the proposed amendment provided anecdotal references, but United States Supreme Court opinions do not clearly define the type and amount of evidence that would be sufficient to uphold the sort of regulation on commercial speech that is contained in the proposed amendment. To protect against potential challenges that might be raised if the Court adopted the proposed amendment, the Court invites the bar to conduct a study to gather empirical evidence in support of the proposed amendment. Upon completion of such a study, the Court will be happy to consider adoption of the proposed amendment.

Sincerely,

Robert P. Young, Jr.

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Of Counsel
Richard Bloom
Kenneth Bloom

May 22, 2015

VIA EMAIL ONLY

Via email only to:
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sentschuitmaker@senate.michigna.gov
sensbieda@senate.michigan.gov
sentrocca@senate.michigan.gov
senpcolbeck@senate.michigan.gov

Michigan Senate Judiciary Committee Chairman, Senator Rick Jones
Michigan Senate Judiciary Committee Members
Senator Tonya Schuitmaker
Senator Steven Bieda
Senator Tory Rocca
Senator Patrick Colbeck
State Capital
Lansing, MI 48909

Re: Opposition to Senate Bill 351
Senate Judiciary Committee
Committee meeting Tuesday, May 26, 2015 @ 3:00 P.M.

Dear Committee Chairman Jones and Commttee Menmbers Schuitmaker, Bieda, Rocca and Colbeck:

I write the committee in opposition to Senate Bill 351. As part of my practice, I often contact defendants within this 21 day period and many of those I contact, whether or not becoming a client of mine, thank me for providing them notice and allowing them to prepare for divorce proceedings in an orderly and thoughtful manner.

This criminal bill seeks to impose a 21 day waiting period, from the date a summons is

issued for direct solicitation of divorce clients by attorneys. The stated reason for such legislation, proponents state, is to avoid possible spousal abuse. In reality, if an abuser learns of divorce proceedings by a letter or by being served with a Summons and Complaint, his action will likely not change. An abuse victim needs to take protective action from the outset. This proposed legislation is not been demonstrated as warranted, is an unconstitutional incursion on commercial free speech, and has been previously proposed before the Supreme Court and not

implemented, Chief Justice Young stating in his April 5, 2012 letter to the State Bar of Michigan, that the proponents of the proposal failed to present any empirical evidence to support that proposal (in substance much the same as S.B. 981, now S.B. 351) Chief Justice Young stated:

> *To protect against potential [constitutional] challenges that might be raised if the Court adopts the proposed amendment, the Court invites the bar [State Bar of Michigan] to conduct a study to gather empirical evidence to support the proposed amendment. (see attached April 5, 2012 letter from Chief Justice Young to Janet Welch Executive Director of the State Bar of Michigan)*

The State Bar never conducted such a study and again failed to present any empirical evidence.

This proposed legislation should not be passed out of committee nor adopted for the following reasons:

1. S.B. 351 is an unnecessary and unwarranted intrusion on protected commercial free speech (proponents can only point to anecdotal stories).
2. S.B. 351 has not been demonstrated necessary by any empirical evidence, finding or study.
3. S.B. 351 is likely unconstitutional.
4. S.B. 351 invites significant and costly court challenges.
5. The proponents of S.B. 351 were unable to demonstrate the need for this intrusion on legitimate commercial free speech to the Supreme Court and without any further evidence or justification seek to have S.B. 351 passed as law.
6. That the "wrong" seeking to be corrected will be ineffective as any potential abuser will receive notice when served regardless.
7. That Michigan Court Rule 8.119(F), which is already in place and available remedies this perceived problem by allowing the sealing of records by the assigned judge.
8. Other than in the area of personal injury, I am unaware of any other state imposing such restriction.

In support of my opposition to S.B. 351, I have attached the following for your further consideration:

1. Chief Justice Young's April 5, 2012 letter to Janet Welch Executive Director of the State Bar of Michigan, in which the Supreme Court declines to adopt a like measure in 2012 finding it not supported by empirical evidence and likely unconstitutional.
2. My previous letter to the Supreme Court of February 27, 2012 and my cover letter to the Senate Judiciary Committee dated September 12, 2014.
3. A letter of September 13, 2014 from Attorney John Allen, setting out in detail the likely constitutional short falls of S.B. 981of last session and further arguments against adoption of S.B. 981 which is substantially the same as S.B. 351.
4. Senate Bill 351 (for reference).

It is my belief that this matter should not be considered by the committee and if considered rejected by this committee.

Should this committee hearing go forward, I look forward to testifying in opposition.

Should any member wish to discuss this matter with me or should you wish me to provide any additional information, please feel free to contact me.

Very truly yours,

Merrill Gordon

MG/mmh

cc: Senate Judiciary Committee
Nick Plescia (nplescia@senate.michigan.gov) Senatebill351.01.doc

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September 12, 2014

Via email only to:
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Michigan Senate Judiciary Committee Chairman, Senator Rick Jones
Michigan Senate Judiciary Committee Members
Senator Tonya Schuitmaker
Senator Steven Bieda
Senator Tory Rocca
State Capital
Lansing, MI 48909

Re: Senate Bill 981
Senate Judiciary hearing date: September 16, 2014 @ 2:30 P.M.

Dear Chairman Jones and Committee Members Schuitmaker, Bieda and Rocca:

I write this letter with attachments in opposition to S.B. 981 and request an opportunity to be heard before the committee.

There was a previous attempt to adopt the substance of this bill in 2012. In 2012 the Michigan Supreme Court considered a proposal with a less restrictive 14 day waiting period. This was ADM 2010-22 seeking to amend Michigan Rule of Professional Conduct 7.3. Public hearing was held before the Michigan Supreme Court on March 28, 2012, at which time this matter was considered. (Please see attached Michigan Supreme Court Release and Notice of Public Administrative Hearing regarding this matter).

I testified at this hearing in opposition to that proposal and submitted the attached letter dated February 27, 2012 in opposition to the proposed amendment. By attachment hereto, I incorporate that letter to this letter and ask that you consider both regarding this matter and that these letters with attachments be made part of the public record.

After comment period and public hearing the Supreme Court determined not to adopt this proposal as an amendment to the Michigan Rule of Professional Conduct 7.3 and the matter was administratively closed by the Supreme Court on June 6, 2012.

It is my belief that there was not then nor is there now a proper or sufficient basis for the imposition of the restrictions contained in Senate Bill 981.

For the reasons set forth in this letter and those contained in my attached letter of February 27, 2012, I urge this committee to vote against this bill and not pass this bill out of committee.

Very truly yours,

Merrill Gordon

MG/mmh

Enclosure

cc: Ms. Sandra McCormick, smccormick@senate.michigan.gov
Ms. Renee Edmondson, redmondson@house.mi.gov

Misc.091214.MISenate

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MERRILL GORDON

Of Counsel
Richard Bloom
Kenneth Bloom

February 27, 2012

VIA U.S. MAIL AND
EMAIL MSC clerk@courts.mi.gov

Mr. Corbin R. Davis
Clerk Michigan Supreme Court
P O Box 30052
Lansing, MI 48909

Re: ADM 2010-22 and MRPC7.3

Dear Mr. Davis:

This letter is to advise the Court of my position in opposing the adoption of ADM 2010-22. Although I had been sending letters to prospective clients, based on filings in Circuit Court, and am aware of the proposed rule indicating that there should be a fourteen day waiting period before this type of letter could be sent, I believe that this waiting period is over broad and not warranted. Advising potential clients of the existence of litigation, is a service to these litigants. Further, I am offended at the characterization of this as "Trolling" and the rule being labeled an "anti-trolling" proposal by those in support of this proposal. This proposal seeks to artificially limit information that is a matter of public record. If the sealing of records is necessary, the Plaintiff should seek ex-parte relief to do so. The filing party should not be given an advantage by limiting a responding parties' access to information or representation. Any actions that a Plaintiff could take within 14 days after filing, such Plaintiff could take prior to filing. Thus obviating the need for a fourteen day waiting period, or any waiting period for that matter.

I received phone calls from many individuals to whom I have sent correspondence who have indicated to me that they were thankful that they were made aware that litigation was pending so that they could timely prepare for this litigation and hire counsel, myself or other counsel, to represent them in this matter without waiting an extended period of time, thus avoiding having their spouse or the opposing party gaining an advantage. If this proposal is

adopted, Plaintiffs would have the same advantage this proposal seeks to control responding parties from having.

It seems to me that setting an artificial limit on the ability of a responding party to seek counsel and/or counsel seeking to help those responding parties by offering representation, is unfair and unwarranted. There is no limit to the extent of preparation a Plaintiff has in determining to move forward with divorce litigation, if this proposal is enacted, Defendant's would be severely disadvantaged in their ability to respond and be properly represented.

I bring to the Court's attention, my representation of an, active duty military service member and a resident of Hawaii, who was sued for divorce in the Oakland County Circuit Court. He was served on December 26, 2011, in Michigan while on leave, after filing was made on December 22, 2011, by his wife who had their child here in Michigan. He became a client of mine after I had sent him a letter concerning representation immediately after his wife had filed her Complaint. He had previously instituted divorce proceedings in Hawaii on December 16, 2011. His wife had not yet been served and was avoiding service. If he had not received my letter indicated above and been unaware of counsel to represent him he would have been prejudiced by his return to Hawaii without seeking counsel to respond to his wife's "Emergency Motion", concerning his daughter. Being properly represented by the undersigned resulted in the Oakland County Circuit Court declining jurisdiction in favor of the Court in Hawaii. This is but one of many instances where early representation has resulted in a level playing field for both litigating parties.

To the extent that prior violence is deemed to be an issue to be considered as is noted in the staff comments, surely minor restrictions as to the "solicitation" could be imposed such as a preclusion of "solicitation" of an individual when there is a Personal Protection Order filed. To the extent that Plaintiffs' attorneys need to properly arrange affairs of their clients at the outset of litigation, this should be completed prior to the filing of the Complaint. In reality, what is the difference in a Defendant's first knowledge being served with a Summons and Complaint by a process server or receiving a "solicitation" letter? There seems to be no difference affecting a Defendant's propensity for violence.

There is no limitation on broader market advertising, nor should there be. This restriction on solicitation unfairly limits the sole or small practitioner and others from seeking to timely advise potential clients of available services and puts Defendants at a disadvantage. In my opinion it is an unnecessary restraint. Proponents may cite limited circumstances, which are problematic for the filing spouse, but such anecdotal and infrequent circumstances should not dictate wholesale restrictions on such direct contact. On the whole, it has been my experience that individuals who receive information from me that litigation is pending are pleased that they have adequate timely information about the filing of the initial pleadings and timely information concerning representation.

Should you wish me to provide additional information regarding this matter, I would be happy to do so.

Very truly yours,

Merrill Gordon

MG/mmh

MICHIGAN SUPREME COURT

Office of Public Information

contact: Marcia McBrien | (517) 373-0129

FOR IMMEDIATE RELEASE

PROPOSED JUDICIAL CONDUCT RULES CHANGES ON AGENDA FOR MICHIGAN SUPREME COURT MARCH 28 PUBLIC ADMINISTRATIVE HEARING
Proposal specifies appropriate roles for judges at charity fundraisers and similar events

LANSING, MI, March 27, 2012 – A proposed clarification of ethics rules that prevent judges from soliciting donations for charities and similar organizations is on the agenda for the Michigan Supreme Court's public hearing tomorrow.

Canon 5 of the Code of Judicial Conduct allows judges to participate in "civic and charitable activities" that do not put a judge's impartiality in doubt or interfere with the judge's duties. But, while allowing a judge to "join a general appeal on behalf of an educational, religious, charitable, or fraternal organization," ethics rules bar judges from individually soliciting donations for such groups. The proposed changes would clarify that "[a] judge may speak on behalf of such an organization and may speak at or receive an award or other recognition in connection with an event of such an organization." The proposals would allow a judge to participate in the same ways at a law-related organization's fundraiser. But the amendments would also prohibit a judge from allowing his or her name to be used in fundraiser advertising, unless the judge was simply a member of an honorary committee or participating in a general appeal. **(ADM File No. 2005-11).**

The proposals for all public hearing items and their related comments are available online at http://www.courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

The public hearing, which begins at 9:30 a.m., will take place in the Supreme Court courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

Also on the Supreme Court's agenda:

- **ADM File No. 2010-22**, proposed amendment of Michigan Rule of Professional Conduct 7.3, "Direct Contact with Prospective Clients." The rule prevents attorneys from soliciting "professional employment from a prospective client with whom the lawyer has no family or prior professional relationship …" The proposed amendment would add that, in family law cases, "a lawyer shall not initiate contact or solicit a party to establish a client-lawyer relationship until the initiating documents have been served upon that party or 14 days have passed since the document was filed, whichever action occurs first." The State Bar of Michigan's Representative Assembly suggested the service/14-day restriction to reduce the risk that a defendant in a family law case would assault the other partner, abscond with children, or commit "other illegal actions" before the papers can be served.

MICHIGAN SUPREME COURT

NOTICE OF PUBLIC ADMINISTRATIVE HEARING

Pursuant to Administrative Order No. 1997-11, the Michigan Supreme Court will hold a public administrative hearing on Wednesday, March 28, 2012, in the Supreme Court courtroom located on the sixth floor of the Michigan Hall of Justice, 925 W. Ottawa Street, Lansing, Michigan 48915. The hearing will begin promptly at 9:30 a.m. and adjourn no later than 11:30 a.m. Persons who wish to address the Court regarding matters on the agenda will be allotted three minutes each to present their views, after which the speakers may be questioned by the Justices. To reserve a place on the agenda, please notify the Office of the Clerk of the Court in writing at P.O. Box 30052, Lansing, Michigan 48909, or by e-mail at MSC_clerk@courts.mi.gov, no later than Monday, March 26, 2012.

Administrative matters on the agenda for this hearing are:

1. 2005-11 Proposed Alternative Amendments of the Code of Judicial Conduct.
Published at 490 Mich 1208 (Part 3, 2011).
Issue: *Whether to adopt one of the proposed alternatives of various Canons of the Code of Judicial Conduct, or take other action. Alternative A would combine Canons 4 and 5 so that obligations imposed regarding extrajudicial activities would be the same for law- and nonlaw-related activities. Alternative B would loosely model the ABA Model Code of Judicial Conduct, but the ABA's 15 model rules would be combined within Michigan's current two Canons 4 and 5 and would retain nearly all current language of Canons 4 and 5. Both alternatives would eliminate language in Canon 7 that prohibits judges from accepting testimonials and would clarify Canon 2 so that activities allowed in Canons 4 and 5 would not be considered a violation of "prestige of office." Also both proposals would clarify the scope of activities within which a judge may participate (especially when the activities would serve a fundraising purpose).*

2. 2010-22 Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct.
Published at 490 Mich 1219 (Part 3, 2011).
Issue: *Whether to adopt the proposed amendment of MRPC 7.3 that would limit the ability of an attorney to contact or solicit a defendant in a family-law case for 14 days after the suit is filed, or until the defendant is served (whichever occurs first).*

3. 2010-25 Proposed Amendment of Rule 7.210 of the Michigan Court Rules.
Published at 490 Mich 1205-1206 (Part 2, 2011).
Issue: *Whether to adopt the proposed amendment of MCR 7.210 that would require trial courts to become the depository for exhibits offered in evidence (whether the exhibits are admitted, or not) instead of requiring parties to submit those exhibits when a case is submitted to the Court of Appeals.*

4. 2010-26 Proposed Amendment of Rule 7.210 and Rule 7.212 of the Michigan Court Rules.
Published at 490 Mich 1206-1208 (Part 2, 2011).
Issue: *Whether to adopt the proposed amendments of MCR 7.210 and MCR 7.212 that would extend the time period in which parties may request that a court settle a record for which a transcript is not available and would clarify the procedure for doing so.*

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September 13, 2014

sentschuitmaker@senate.michigan.gov

Senator Tonya Schuitmaker
P.O. Box 30036
Lansing, MI 48909-7536

Re: **Senate Bill 981 Should be Rejected; Hearing September 16, 2014; IMMEDIATE Action Required.**

Dear Tonya:

Thank you for taking time to speak with me about this important issue. Senate Bill 981 is a bad idea, tucked into a package of bills most of which are very good ideas. Not only is SB 981 likely unconstitutional, but also it holds the prospect of harming the very persons it seeks to protect. It requires some detailed examination to see this, and why Senate Bill 981 should be rejected. In this very busy season, I appreciate your taking the time to do that.

It is my understanding that SB 981 is part of a package of Domestic Violence Bills that includes SB 980 and 981, and House Bills 5652-5659. The hearing on Senate Bill 981 is set for hearing before the Senate Judiciary Committee next Tuesday September 16, 2014 at 2:30 PM. Prompt action is required to avoid what will likely be a very bad law.

As you know, I am a partner with Varnum Riddering Schmidt & Howlett LLP (Varnum Attorneys), with over 40 years of experience in Michigan Family Law. In the past, I have also served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section (TIPS) through the ABA Ethics 2000 process. Currently, I serve as the TIPS Liaison to the ABA Committee on Professionalism. In all these capacities, I have had the honor of studying in depth the issues of lawyer solicitation in SB 981.

This letter contains the views of me only, not those of the Varnum Firm, the State Bar of Michigan, the ABA, nor their Committees.

Earlier Versions before the Michigan Supreme Court

Earlier, the Michigan Supreme Court rejected other versions of a very similar proposal, when proposed as amendments to the Michigan Rules of Professional Conduct (MRPC-, sometimes called the "Ethics Rules" for Michigan Lawyers). In 2012, the Court considered proposed amendments to MRPC 7.3 (Supreme Court ADM File No. 2010-22). Much like SB 981, ADM 2010-22 originated from the State Bar of Michigan Family Law Section, in a concern over the practice of "trolling" (that is, a lawyer's using the publicly available information of Family Law court commencement filings to solicit Defendants or Respondents as prospective clients). Most of the submitted Comment Letters supported the proposal, as did a committed group of individuals. In contrast, a smaller but vocal group (including me) opposed the amendment.

After months of careful consideration, the Court rejected the proposal. Among the likely reasons were that the proposal (like SB 981) infringed important Constitutional rights of both respondents and lawyers, and that ample protections already exist within the Michigan Court Rules to accomplish the stated goals. Like SB 981, the MRPC proposal also had very likely, and very bad, unintended consequences. This letter explains more fully those reasons.

1. **It is a dangerous custom to single out one area of law practice (i.e., Family Law) for specific prohibitions under the criminal law.** SB 981 would impose strict criminal liability (First Offense- Misdemeanor- $30,000 fine; Subsequent Offenses- Misdemeanor- 1 year in jail, plus $60,000 fine). The criminal law is a strict liability, penal system. It does not rely on "fault" or "causation" to determine strict culpability; other facts such as care in the past or lack of earlier violations does not enter that finding. If you did it, it is a violation – it is just that simple.

Moreover, any such criminal violation would certainly result in Disciplinary Proceedings against the lawyer by the Attorney Grievance Commission (AGC) before the Attorney Discipline Board (ADB). Thus, even if some violation were the result of negligence or with lack of direct intent or knowledge, nevertheless, some discipline (ranging from Informal Reprimand to full Revocation of License—see MCR 9.106) must almost always be imposed. This is why attempting to regulate the Practice of Law by the Criminal Law is such a bad idea. The real penalty is not "just" the loss the financial fine, nor even "just" the jail term. It is the loss of a career and the other jobs created by that career. Any proposed criminal penalty, to regulate what is now accepted and legal conduct, must be taken with the utmost seriousness. Momentary political popularity should not be a criterion.

It is also a bad idea to single out one area of Law Practice for statutory regulation, or criminal penalties. If SB 981 becomes law, Family Law practitioners might likely be singled out for other such criminal prohibitions or rules in the future, applicable only to Family Law matters. If "trolling" is really that bad, then the prohibitions should apply to all lawyers in all cases – something which would not likely ever be approved, and certainly would be unconstitutional. [In fact, an earlier broader proposal to amend MRPC to limit solicitation more generally was once adopted by the Michigan Supreme Court, then quickly rescinded because of protests by many clients and lawyers, and threats of constitutional challenges. Eventually that proposal was unanimously rejected and withdrawn from Supreme Court consideration. See Supreme Court ADM 2002-24.]

2. There are serious Constitutional Defects in SB 981, under Prong 2 of the *Central Hudson* Test. Like it or not, attorney solicitation is **protected commercial speech** under the U.S. Constitution, Amendment 1, and correlative provisions of the several State Constitutions, including Michigan. *Central Hudson v. PSC*, 447 U.S. 557 (1980). In the comments for ADM 2010-22, the State Bar of Michigan Family Law Section correctly noted the applicability of *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), and *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988) as controlling U.S. Supreme Court Cases, all of which determine whether the restriction or prohibition upon lawyer solicitation is constitutionally permissible by applying the ***Central Hudson* 4-Prong test:**

SBM STATE BAR OF MICHIGAN

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April 30, 2010

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: The solicitation of potential Family Law clients by attorneys

Dear Clerk Davis:

At its March 27, 2010 meeting, the State Bar of Michigan's Representative Assembly voted to support a rule amendment to address the solicitation of clients for matters involving Family Law.

The State Bar of Michigan respectfully submits for consideration by the Michigan Supreme Court the following language that could be adopted either as an amendment to the Michigan Rules of Professional Conduct, §7.3 (adding a new section "c") or as an addition to the Michigan Court Rules §8.xxxx, Administrative Rules of Court:

> In any matter involving a family law case in a Michigan trial court, a lawyer may not initiate contact or solicit a party for purposes of establishing a client-lawyer relationship, where the party and lawyer had no pre-existing family or client-lawyer relationship, until the first to occur of the following: service of process upon the party or fourteen (14) days has elapsed from the date of filing of the particular case.".

To aid your consideration of the proposal, enclosed are both the proposal submitted to the members, which indicates that there was no known opposition to the proposal, and the transcript of the debate on the proposal, which includes concerns voiced by the State Bar's Ethics committee and the responses to those concerns.

If you have any questions or would like any additional information please contact me. Thank you for your consideration of this proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Elizabeth M. Johnson, Representative Assembly Chairperson
Charles R. Toy, President

Proposal Re: Attorney Solicitation

Issue

Should the State Bar of Michigan adopt the following resolution submitted by the Family Law Council on behalf of the Family Law Section of the State Bar of Michigan calling for an Amendment to **either** the Michigan Rules of Professional Conduct **or** the Michigan Court Rules regarding the solicitation of potential Family Law clients by attorneys?

RESOLVED, that the State Bar of Michigan supports an Amendment to **either** the Michigan Rules of Professional Conduct (MRPC) **or** the Michigan Court Rules regarding the solicitation of potential Family Law clients by attorneys.

FURTHER RESOLVED that the State Bar of Michigan proposes either an Amendment to the Michigan Rules of Professional Conduct, §7.3 (adding a new section "c") or an addition to the Michigan Court Rules §8.xxxx, Administrative Rules of Court the following:

"In any matter involving a family law case in a Michigan trial court, a lawyer may not contact or solicit a party for purposes of establishing a client-lawyer relationship, where the party and lawyer had no pre-existing family or client-lawyer relationship, until the first to occur of the following: service of process upon the party or fourteen (14) days has elapsed from the date of filing of the particular case."

Synopsis

Family Law cases involve unique risks to vulnerable parties, as well as innocent children, not present in other areas of our jurisprudence. There are no current restrictions preventing attorneys from soliciting legal representation of parties who may engage in Domestic Violence **prior to** being served with Personal Protection Orders or Ex Parte Orders intended to safeguard the parties' physical safety and preserve the financial *status quo* between litigants in a Family Law case. This proposal is limited to Family Law cases, insofar as general civil litigation cases do not customarily involve high conflict disputes associated with threats of physical or emotional harm, or dissipation of assets associated with the filing of a case.

Information regarding case filings is readily available to attorneys through personal inspection of public filings, newspapers, and the Internet. There is an alarming incidence of attorneys soliciting prospective representations before a party even knows that an action has been filed, as well as prior to *ex parte* Orders having been entered by the Court, received by the attorney and served upon the other party. Courts do not routinely issue Injunctions or ex parte Orders the same day the Family Law case is filed, and there may be a delay between the date of the filing of the case, and the time of issuance or receipt of the *ex parte* Orders by the attorney. This narrow 14 day restriction on solicitation is designed to permit Service of the pleadings prior to a party receiving "notice" via a 3rd party attorney solicitation.

The Family Law Council, on behalf of the Family Law Section, has been working on this issue for a year and a half, and is unanimous in its support for the proposal. In contrast with the initial proposal, the current Resolution is specifically limited to Family Law cases, and the period of restriction is shortened to a bare minimum period of time: fourteen (14) days. The framing of the proposal as either a MRPC Amendment or a Court Rule Amendment is specifically designed to provide maximum flexibility to the Supreme Court in its consideration of these issues.

Background

While the Family Law Council commenced work on this issue in 2008, after lengthy discussion and debate, Council unanimously voted 18-0 on July 30, 2009 to submit a proposed Amendment for consideration by the Representative Assembly at the September 17, 2009 meeting of the Representative Assembly. The initial "information proposal" had been presented at the April, 2009 meeting of the Representative Assembly. At the September 17, 2009 meeting the proposal was "tabled" until the next meeting of the Representative Assembly on March 27, 2010.

The Family Law Council views the issues as of such paramount importance that it recommends that **either** an Amendment to the Michigan Rules or Professional Conduct **or** an Amendment to the Michigan Court Rules address this problem. The Family Law Council does not believe that the "form" of the proposed Amendment (as either a MRPC or Court Rule Amendment) is nearly as important as the critical importance of it being enacted. The proposal "in the alternative" is intended to communicate the flexibility of the Council on the issue.

The current proposal involves far narrower restrictions upon solicitation by attorneys than submitted at the April, 2009 meeting in at least the following respects: (1) the proposal would only apply to Family Law matters, and (2) the *de minimis* restrictions has been reduced from twenty-one (21) days to fourteen (14) days.

Council is convinced that there is a compelling interest in prohibiting a party from evading the specific terms of *ex parte* Orders involving Domestic Violence & Personal Protection, or Restraining Orders prohibiting illegal transfers of assets, during the period of time from presentation of an Order to the Court, and service upon a Party.

There is also a particular vulnerability to parties receiving initial notice of the filing of a Family Law action from a third party solicitation for legal representation, in contrast with traditional service of a Summons & Complaint and customary legal pleadings. The Family Law Council has grave concern over the nature of the third party solicitations which are occurring with increasing frequency.

The "Case Codes" to which this proposal would apply involve the following specific actions: DC; DM; DO; DP; DS; DZ; NA; PJ; PH; PP; or VP. The application to these particular Case Codes is targeted toward application of this narrow restriction to Family Law cases only, and not apply to the remainder of our civil or criminal cases.

Clearly, attorney solicitation issues involve "Commercial Free Speech". However, *Shapero* v *Kentucky Bar Association* which is referenced in current MRPC 7.3 does **not** preclude all restrictions on attorney solicitation. In fact, *Shapero* affirms that restrictions upon commercial Free Speech are permissible.

Attached is supporting documentation regarding the proposal.

Opposition

None known.

Prior Action by Representative Assembly

This issue was presented to the Representative Assembly as an information item at the April, 2009 meeting. This issue was tabled at the September, 2009 Representative Assembly meeting.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on March 27, 2010

Should the Representative Assembly adopt the above resolution?

(a) Yes

or

(b) No

pro bono service, please indicate by saying aye.

Those opposed say no.

Abstentions.

The motion in favor of the proposed revision of the Michigan Rules of Professional Conduct 6.1, voluntary pro bono service, passes and is approved.

Thank you, Terri Stangl and to Judge Stephens and your committee for your work on this matter.

(Applause.)

The next item is number 16, consideration of a proposal concerning attorney solicitation. At this time would the proponent, Ms. Elizabeth Sadowski from the 6th circuit, please come forward, and I understand there are also two other presenters, Mr. Carlo Martina and Mr. Jim Harrington, if you would also like to come forward.

MS. SADOWSKI: Good afternoon. My name is Elizabeth Sadowski. I represent the 6th circuit. I am also a past chair of the Family Law Section of the State Bar.

As you are by now aware, our section has become quite alarmed at the incidence of attorneys who have sent unsolicited letters to clients who are going through domestic relations cases before the defendants in these actions have had the opportunity to be

personally served with the action for divorce or custody or support and before they have been able to receive the injunctive orders that courts typically enter under our Court Rules.

Now, I understand from some of you that there are concerns that this is merely hypothetical. I can assure it is not merely hypothetical. Domestic violence and removal of children from the jurisdiction of the state to another state, or worse yet to a foreign state, especially a country that is not part of the Hague convention can have disastrous, disastrous effects.

I want to tell you about an incident that happened just within the last 90 days in just one of my cases. In this particular case the husband had retained me but had not yet given me his retainer check. He had borrowed it from his mother. He had it in his pocket. This was a volatile divorce situation to begin with. The wife pulled it out of his pocket, said what's this, became absolutely enraged and started grabbing the children, putting them in the car, telling them to get their clothes and packing, we are leaving for New Hampshire now.

In a fortunate turn of events, she then became so enraged at my client that she began to hit

him and strike him, and he called the police. She was arrested. And during the time she was arrested, I was able to file that case and get an immediate ex parte order restraining her from taking those children.

Now, whether she had found that check or found a letter in the mailbox would have made all the difference in the world, because if she had gotten to that mailbox and gotten notice of a filing that I had done before she could be served, that woman and those children would have been long gone. It was only because I was fortunate enough to have a judge who was able to give me an ex parte order, sign that order within a day or two and fortunate enough to have a defendant to happen to be cooling her heels in jail overnight that I was able to stop this event.

Now we are engaged in an ongoing custody case, custody trial in Oakland County Circuit Court, but for this fortunate chain of events I don't know where those kids would be, but I know they wouldn't be here. They would be gone.

We are asking you to approve a motion that our Family Law Section takes as very, very serious. We are asking you to adopt a resolution that our Family Law Council has unanimously approved. We are asking that the State Bar of Michigan support an

amendment to either the Michigan Rules of Professional Conduct or the Michigan Court Rules regarding solicitation of potential family law clients by attorneys.

Further resolved that the State Bar of Michigan proposes either an amendment to the Michigan Rules of Professional Conduct adding a new section or an addition to the Michigan Court Rules, Administrative Rules of Court as follows:

In any matter involving a family law case in a Michigan trial court a lawyer may not contact or solicit a party for purposes of establishing a client/lawyer relationship where the party and lawyer had no preexisting family or client lawyer relationship until the first to occur of the following: Service of process upon the party or 14 days has elapsed from the date of filing of the particular case.

I am going to ask two of our preeminent members of our Family Law Section to address you next. Mr. Carlo Martina, like I am, is a former chair of the Family Law Section. Mr. Jim Harrington is on our executive board. Both of these individuals are going to talk to you about the seriousness of our situation, and we hope you will give them your attention, because

we do believe this matter is of utmost importance to the families of the state of Michigan and their children. Thank you.

MR. MARTINA: Madam Chair and distinguished members of this Representative Assembly. We are here because of a genuine concern that Michigan families are going to suffer irreparable harm if we don't at least to some degree slightly restrict our conduct in the way that potential clients are contacted in domestic relations matters.

Our proposal is not about prohibiting attorneys from providing direct, truthful, nondeceptive information, as has been suggested. It's about ensuring that the very reasons for issuing an ex parte order, the prevention of irreparable harm, is not abrogated because someone drops a form letter on a defendant telling them they have been served.

Now, I know that there has been concern that we have left two categories out. One has to do with if there is a family member. The other has to do if it's a former lawyer. First, the fact that we left that in this parallels the very language that this august body and the Supreme Court has already approved in the very first sentence of MCR 7.3, that those are exemptions in terms of solicitation.

Someone who is family member, by virtue of that relationship, and is a lawyer may feel compelled to tell them. We can't prohibit that, they are family and a lawyer, but we wouldn't be wanting to prevent a lawyer from contacting, nor would we want to prevent a lawyer from contacting a former client after they have learned that their client has had an action against them. In that particular instance the attorney may be in some better position to be able to give them some perspective.

What we are looking at is a situation where a lawyer who has no idea what the case is about, no idea whether or not a restraining order has been issued and no idea that a circuit court judge has been elected by our citizens who has passed judgment based upon the rules of ex parte orders that there has been a showing that not only is there a risk of irreparable harm but also that notice itself will precipitate adverse action before an order can be issued.

This has been the law of the land forever. What does this mean? This means that we have accepted as lawyers and as jurists that there are instances where irreparable harm can be caused by mere notice. There is a reason why this is here. There is a reason why it's in the PPO statute. This has been well

thought out. There are many instances in which giving somebody notice of that harm is going to precipitate it.

Now, yes, there is always going to be people who no matter what an order says, they are going to do it. We can't stop that. But the Supreme Court and the U.S. Supreme Court has made it incumbent upon us to regulate our actions so we don't make the situation worse.

There are situations like Liz talked about in terms of taking a child where an ex parte order may make a substantial difference. There are situations where threats are made, that if you file for divorce I will clean out the bank accounts, I will change the beneficiary of the health insurance. You won't be able to get health insurance. I will change beneficiaries on the pension. Oftentimes these can't be undone. Harm happens. There is no insurance coverage.

The other interesting thing about this is, besides the fact that Mr. Harrington will talk to you about several U.S. Supreme Court cases that involve very similar rules, realistically speaking, 14 days is a very short period of time. It's less than the time to answer. And, additionally, if the defendant is

served in two or three days, an attorney can solicit them all they want. The problem with it is that so often in domestic relations matters there is a lapse between the time that the action is filed, whether it's a personal protection order, custody matter, divorce matter, or separate maintenance, and it's served.

And there is also one other issue in terms of just basic privacy. I mean, this time right afterwards is very difficult. Most of us, particularly, for example, in domestic violence cases, we want our -- I mean, I have been doing domestic violence work for 25 years. Nancy Diehl and I had the good fortune of getting a lifetime achievement award on the 25th anniversary of the Wayne County Coalition Against Family Violence. We know something about this. We need to be able to give our clients plans on what to do once that person is served, because we know statistically the chance they will be injured or killed in those first several days are through the roof.

And, you know, it's been suggested that the Family Law Section is doing this because we don't want those trollers to take cases from us. Believe me, most of us, just like you, spend enough time doing

this that that's the least of our worries. We are contributing our time towards this Bar. That's not why we are doing this. It's because this problem, which has just started and which we can nip in the bud with a very simple rule, is going to pick up momentum, and sooner or later there are going to be tragic events. People are going to do outrageous things, and then the public is going to ask, This was foreseeable. As lawyers we know we have to take action if we know there is a reasonable risk of foreseeable harm. Why didn't you do anything? I think this is our opportunity, and I believe that we need to do something.

Mr. Harrington will give you a little bit of background on the Supreme Court issues that Mr. Dunn had addressed.

MR. HARRINGTON: Thank you, Carlo. Attached to your materials is an article that I wrote and was published in the March Family Law Journal which I entitled, The Constitutional Case for Controlling Trolling, which is what this petition and motion before you this afternoon is all about. But I would like to briefly give you a little evolution on how we got to where we are today.

Three years ago this matter came up when I

was on a council, and my initial reaction when someone said they wanted to control attorney solicitation was don't we have enough controls already? Why do we need another rule regulating our behavior? And Judge Hammond spoke at that initial meeting, and Judge Hammond said, from Berrien County, a wise gentleman beyond his years, he said, One dead body is one dead body too many. We need to do something here, not after that dead body gets walked into this room or we have to respond to why we didn't do something when we had opportunity to do something today.

The original proposals that we talked about, and we have had a lot of communication back and forth with the Representative Assembly, originally was in all cases you may not solicit direct mail solicitation for a period of 21 days. Then we heard, oh no, that's way too broad. We have to go back and let's just have it in family law case codes, which is what you have here today. And then we heard 21 days is too long. What's the minimum that can possibly be invoked in order to affect this behavior?

What you see before you is the narrowest conceivable proposal which will, we believe, help impact a potentially lethal problem. Will a PPO stop a bullet? No. Have PPO's been an instrumental weapon

to try and preserve health and safety? Absolutely.

I then received feedback, and I am the chair of the Court Rules and Ethics, so feedback comes to me, and my committee, consisting of judges, referees, family law practitioners, nearly all of whom have 20, 25 years of experience, began to hear about the constitutional issues. We have a rule in my office. It's called Rule 11, enough research supports your conclusions. I had concluded that I thought this was constitutional, but I read about the Shapero case, which is actually in our MRPC.

The Shapero case does not say that you can't pass this proposal. The Shapero case by the United States Supreme Court said you cannot ban all direct mail solicitation, which is the opposite of what we are doing here. We are talking about a minimal 14-day or proof of service, whichever comes first. Shapero also opened the door to state regulation, and it's in the body of the case, state regulation. The Shapero case, and it's in your materials, was followed by Central Hudson holding you can regulate nonmisleading commercial speech where a substantial government interest is at stake.

I was asked a question by one of my friends out here who I haven't seen in a while, and said,

Well, Jim, do you any empirical studies to present to us today like they had in the Went For It case. Well, the empirical studies that the United States Supreme Court relied on in the Florida situation were letters, mass mailings that were sent out, and in one part of the response 50 percent of the people felt uncomfortable with direct mail solicitation. These weren't even family law cases. These were ambulance chasers.

Justice Souter in the Went For It opinion says you don't have to have empirical studies. Sometimes you can just rely on good old-fashioned common sense. Common sense says that when a judge has issued an ex parte restraining order or a personal protection order, common sense says that the best way to preserve the intention of those orders is that it be served by a process server, that notice not be given by a direct mail solicitation.

The support for this is not Oakland County support, it's not Wayne County support. We have had unanimous support for this proposal, every single member that has been on the Family Law Council representing 2,200 members of the section for the last three years. That's our empirical study.

Since we have made this proposal, our

committee has not received a single negative response to it representing the Family Law Section, and I can also tell you that I have had 13 of my clients, the other side of which have received these targetted solicitations, and the universal reaction has been offense that my divorce, why am I getting a letter from some lawyer that I never even heard about? And that percentage is 100 percent.

I think we have the opportunity to do the right thing today. Carlo and I and Liz are urging you to do the right thing today. In my materials I have cited federal statutes where they have a 45-day delay from soliciting representation where there has been mass accidents, 45-day delays where you have got Amtrak or other accidents.

The Arizona Bar has passed a 45-day suppression, and some people have suggested, well, why don't we just suppress the files? I submit that that is not a cost effective solution. I submit that we are seeing E-filing in our family law cases in Oakland County. Anything that is going to increase county or state taxes one dollar will be universally opposed, and the message we send out to Lansing with this proposal is we don't want to spend any more dollars. It won't cost any more dollars.

The other thing I want to mention to you is the reason we have put this in the form of either a proposed MRPC or in the form of a Court Rule is we just want it fixed. We don't want to tie ourselves in to whether the Supreme Court will get around it an MRPC two or three years from now or they might get into a Court Rule quicker.

The relief that we are asking you to give us today to send us on with your blessing to Lansing is either/or, whatever works. It's a very serious problem, and I submit there is a constitutional solution to it. Thank you.

CHAIRPERSON JOHNSON: Thank you very much, Mr. Martina and Mr. Harrington. Ms. Sadowski, I would call you again to the podium. At this time I would entertain a motion concerning your presentation.

MS. SADOWSKI: I move the materials as recited in the materials be adopted.

MS. FIELDMAN: Excuse me. I am here on behalf of the State Bar Professional Ethics Committee. I have been told I have an opportunity --

CHAIRPERSON JOHNSON: You are part of the discussion.

MS. FIELDMAN: I am sorry.

CHAIRPERSON JOHNSON: Not a problem.

There is a motion on the floor. Is there a second?

VOICE: Support.

CHAIRPERSON JOHNSON: There is a motion and support.

I do understand Mr. Bill Dunn, who has written you a letter that was in your materials, is not available today. I do understand that a Ms. Elaine Fieldman is here today, and in accordance, pursuant to Rule 3 of our permanent Rules of Procedure, a committee chair is allowed to have a microphone privilege, and in speaking with our parliamentarian, in Mr. Dunn's stead you may come and present at the podium. No objection.

MS. FIELDMAN: Good afternoon. Thank you so much. My name is Elaine Fieldman. I am here representing the State Bar Professional Ethics Committee in opposition to the proposal in front of you this afternoon.

The proposed rule restrains certain, not all, lawyers from soliciting prospective clients who are named parties in family law cases, all family law cases, not family law cases where it is alleged that there is a possibility for domestic violence or a possibility that children will be removed from the

home, all domestic violence cases for 14 days or until the lawsuit has been served.

Listening to the proponents of this rule, it sounds like every family matter case involves children being abducted or violence being committed. The solicitation at issue or the solicitation complained about typically involve a letter being sent to a named defendant saying do you know there has been a case filed against you. I am a divorce lawyer. You can call me.

Proponents concede that this very information of the information that there has been a case filed is readily available, public record, in newspapers, on the internet, matters of public record. People can find out about these things. These clients, the prospective clients, these defendants can hear about them from other people, from the newspaper, from the media, from friends, from their ministers, from others. The rule does not prohibit lawyers who have had relationships with these people in the past from telling them about it.

So, for example, under the proposed rule a lawyer who learns that an 80-year-old man who has filed a divorce case against his 80-year-old wife who is in a wheelchair can't hear about that divorce case

from a lawyer who is trolling, but a 30-year-old man who was previously represented by a lawyer when he beat up his wife can hear about that divorce case being filed from the lawyer who represented him five years ago on that assault case.

That's because the proposed rule is aimed at solicitation and not at the threat of domestic violence. There is no requirement that in preventing the solicitation that there be any allegation of a threat or a reasonable suspicion that there is going to be domestic violence, nothing like that. All you have to do is have the suffix, the prefix, whatever, on your complaint that matches a domestic -- a family matter case, and automatically for 14 days or until proof of service is filed you can't send your trolling letter.

Now, we have heard that, well, it really is a short period of time, and it's probably less than 14 days, because often within two or three days of the proof of service service is made, but there is no requirement that you file a proof of service in two or three days. How does anybody know that service has been made? So for all intents and purposes it's going to be a 14-day period.

The cases that were cited to you involving

the stay periods -- 45 days, 30 days, 20 days -- in ambulance chasing cases simply don't apply. Those involve, as was stated, ambulance chasing. That's for purposes of starting a lawsuit, where you are looking for plaintiffs.

If we are going to analogize it to our situation here, if you saw an article in the paper about a woman in a hospital who was beat up and her husband was under suspicion, he was a person of interest being interviewed by the police, and there was a court rule or there was a statute that said you can't call the wife, the woman sitting in the hospital, and say, you know, you don't have to take this kind of abuse. We are very experienced in handling divorce cases for abused spouses, why don't you let us start a divorce action for you? Then it would be analogous to the ambulance chasing cases. But here we have a case that's already been filed. The solicitation goes to a party, not to a prospective plaintiff.

If we want to analogize to the ambulance chasing cases on the other side, you have already had your complaint filed, you had your plane crash, you are representing the family, somebody is representing the family. Would anybody say you can't write a

letter to United Airlines and say did you know a complaint has been filed against you? Would you have to wait 14 days to send a letter to United Airlines? That's how they are trying to analogize it in this situation. The cases simply do not apply.

I think we all agree that commercial speech is protected. You can have restrictions. They just have to be very narrowly drawn. Here they are not narrowly drawn. While 14 days may be considered narrow, it's not narrow here, because it applies to every family matter case, not just cases where there is some reasonable chance that you have a problem, and it applies to lawyers in certain situations and not other situations. There is no showing here that there is a bigger danger if you find out from a lawyer who doesn't know the plaintiff -- know the defendant versus if you find out about the case from the newspaper, from a different lawyer, from a family member, from another source, from the intermet.

In the example that was given, the very personal example that you heard about where the wife found the check in the pocket, she found out that way about a potential divorce case. She didn't find out about it because a lawyer wrote a letter. So there is no showing that this is going to prevent any harm, and

it's very, very, very overbroad. The Ethics Committee urges you not to adopt the proposed rule, and I thank you very much for your time.

CHAIRPERSON JOHNSON: Thank you. Is there any further discussion on the motion? Hearing none, there is -- I am sorry. If you would please go to the microphone and indicate -- excuse me, we'll have order. If you will please go to the microphone and give your name and your circuit, please.

MS. HAROUTUNIAN: Madam Chair, Ed Haroutunian from the 6th circuit. I have two questions for the proponents. One, what other states have such a rule with regard to the family law area, and, secondly, if a client finds out about a divorce but has not been served, can the attorney ethically deal with that client? Those are the two questions that I have, Madam Chair, and I would hope that someone from the proponent's side would respond.

CHAIRPERSON JOHNSON: Mr. Martina, if you can respond to that.

MR. MARTINA: I have to say, just like Arizona and Florida and other states who have taken, I think, very responsible moves towards dealing with issues like this, I don't know of other states that have done this. I don't know though if in other

states there are people out there who are contacting individuals on family law matters before they are even served. The reality of it is that we know this is a problem for those of us that do family law. You know, a substantial number of cases that get filed do require some sort of ex parte relief, and so what we are trying to do is deal with the problem before it develops a lot of momentum.

I really didn't understand the second question. I apologize.

MS. HAROUTUNIAN: May I?

CHAIRPERSON JOHNSON: Without objection, you may restate.

MS. HAROUTUNIAN: For clarification, here is the question. If a client finds out about a divorce but he has not been served with that divorce, can he go to an attorney and speak to the attorney without having been served?

MR. MARTINA: Oh, absolutely. First we have to remember, just because an ex parte order is effective when entered, it's not enforceable till served, but the bottom line is that if a person finds out that, absolutely, and they can look at an advertisement to take them to that lawyer or they could have maybe gotten a general solicitation by mail

from that lawyer previously, thought, you know, they look competent, they are in the area, I can go to them, or they could have seen them on radio or television or any number of reasons. Absolutely nothing would prevent that whatsoever. The lawyer would be doing nothing wrong.

MS. HAROUTUNIAN: In follow up.

JUDGE CHMURA: If he wants to finish making a statement.

CHAIRPERSON JOHNSON: Sure, and please remember each speaker may only speak once and speak for no more than three minutes.

If you want to follow up on your question, yes, you may do that, Mr. Haroutunian.

MS. HAROUTUNIAN: The follow-up is, from the attorney's point of view, will the lawyer be somehow ethically, have an ethical problem by speaking to a client who has not been served but who knows that a divorce is coming, and my concern is what does that do to the lawyer, because you are now potentially putting that lawyer on the spot, and in my judgment there are enough things in this world where lawyers are put on the spot.

MR. MARTINA: This would not prohibit that at all. If a person --

CHAIRPERSON JOHNSON: Mr. Martina, I am sorry. You can't answer that at this point. Thank you.

Yes, sir.

MR. MCCLORY: Mike McClory from the 3rd circuit. I am a former chair of the Probate Estate Planning Section, so I have enough knowledge to be dangerous about court rules. We dealt with a new probate code. We have a new trust code that takes effect April 1st. I doubt my wisdom in this area, because I don't do anything in it, but I just want to throw out some general things that I think we should consider as we are deliberating this.

The first is I was struck by, you know, not really having a valid example of it, like something that actually occurred as a result of solicitation that did cause this harm.

The other thing that I am, you know, struck by is that this is how we work with both trust code, probate code, other probate legislation, other court rules. If you don't have a consensus from these different groups and you try to get that, we would not usually go forward. What I am saying is that they have chosen, the Family Law Section, for their own tactical reasons when they had this consensus 18

months ago to come to the Bar section to try to get our endorsement to somehow maybe grease the skids.

Now, I have never dealt with something along this nature. Why they haven't and why they still don't, and they are free to do so as far as I know, unless this is one of those administration of justice issues, just submit this to the Supreme Court themselves, just to go ahead and do that and then have the comment process go through. I think what we have to be careful with as an organization, however we decide, and I am just really not quite sure what I am going to do myself, is that why they haven't chosen to do that 18 months ago when they had this consensus.

The other thing that strikes me is the question Ed asked about no other states having done something similar. For instance, when we were adopting Michigan Trust Code, which takes place April 1st, there are 22 states that have different versions of the Uniform Trust Code, which we drew out significant parts. So that shows we are kind of like in a trend line. We are going along in terms of doing that.

I am not saying that there can't be a problem here, but these are all issues from a policy standpoint that we have to consider in terms of doing

that, in terms of letting this go ahead on our own if there is this dispute between the two different sections or whether we are so sure that it's overridingly important to go ahead and give this huge endorsement. That's all I have to stay.

CHAIRPERSON JOHNSON: Thank you, Mr. McClory.

MR. KRIEGER: Madam Chair, Nick Krieger from the 3rd circuit. I have a couple questions. Constitutional issues aside, I think it could be more precisely tailored, but that's neither here nor there. I suppose it is, but my real question is what teeth are there here? I mean, would this just be a general grievable offense, and, if so, isn't it already covered by MRPC 7.3(A)? 7.3(A), of course, is very broad, but if you read the official comments, the Supreme Court has stated that it is to be interpreted, you know, in accordance with Shapero. It needs to be read in a limited fashion so as not to violate Shapero. Well, neither would this maybe, at least the proponents say that it wouldn't.

So I think it might be a duplication of 7.3(A), which, of course, is broader and doesn't just apply to family law cases, but it says that you can't go out and solicit somebody if you are looking for your own pecuniary gain. Well, of course, attorneys

always solicit people for their own pecuniary gain, but maybe it's already covered.

And the last thing is, if it's in the Professional Rules of Conduct or the Court Rules, I don't think it's anything more than a sanctionable offense, and I want to know if I am wrong about that and if someone who does this could be sanctioned by a trial court. I find no parallel provisions to 7219 or 7319 for trial courts, which would allow a trial court to award general sanction for gross violation of the Court Rules or the Michigan Rules of Professional Conduct, whereas the Court of Appeals and the Supreme Court can. So maybe somebody could address that. Thank you.

CHAIRPERSON JOHNSON: Thank you, Mr. Krieger. Woman at the microphone here.

MS. OEMKE: Kathleen Oemke, 44th circuit. I am speaking in favor of the proposal. The idea that domestic violence is predictable is ridiculous. One never knows when anything is going to erupt. The calmest families can have emotional breakdowns and breakdowns in temperament so that people can be put in danger at a moment's notice.

People can find out about their situation in public record if they are looking for it; however, as

we all know, people don't go looking for that information unless they have suspicions regarding that.

I believe that the previous attorneys or the family members that are attorneys that have contact with the person would have an established method of trust and would be able to assist the people in a domestic arena and perhaps prevent further damage. Thank you.

CHAIRPERSON JOHNSON: Thank you, Ms. Oemke. Gentleman here at this microphone.

MR. LINDEN: Jeff Linden, 6th circuit. I am not necessarily in favor or against the concept of protecting the perceived harm. I tend to want to protect the perceived harm from occurring. My concern is in line with Mr. Haroutunian's comment that I don't think this proposal gets us there in the following way: It reads in the second clause, A lawyer may not contact or solicit a party for purposes of establishing a client/lawyer relationship.

In Mr. Haroutunian's example where a family law defendant becomes aware of the case that has not been either served with the case and the 14 days has not expired and seeks to contact a lawyer, as this is written, that lawyer that is contacted, let's say a

voicemail message was left, could not call that person back without violating this proposal. And I don't think that in this circumstance, as written, that the risks to the professional who is not doing the trolling that the people are trying to prohibit stands at risk of having ethical or professional discipline, which I don't believe was intended, and I understand the proponents have argued that that isn't what it says and that's not what's intended, but the language used does appear to be contact, and calling somebody back would be contact for purposes of establishing a special relationship, and if you are not a relative and you don't have prior business with that person, you would violate this proposal, and to that extent I think as written this is overbroad.

CHAIRPERSON JOHNSON: Thank you, Mr. Linden. The woman at the microphone over here.

MS. WASHINGTON: Good afternoon, Erane Washington, 22nd circuit, and I am neither in favor or opposed. I don't know where I am yet, but I do have some concerns with the way it's currently written as well, and this goes to the issue of predicting. I think that it's not in every case you can predict whether there is going to be domestic violence, but there are indicators. Having done

criminal law and some family law, I know that there are indicators and there is a series of standards that are used to determine whether or not someone is going to be a batterer in a domestic situation, and there are indicators with respect to children and whether there is a risk of harm or them being taken out of the city.

So my concern is in addressing that I have the overly broad issue with family law in every family law case this particular statute would apply, and I would ask the committee whether or not they would consider imposing some type of a duty on the family law practitioner who is filing the case to provide an affidavit indicating that there is some type of domestic situation going on. In that event it would be narrowly tailored to situations in which there were domestic violence, and then you impose an ethical duty upon the practitioner to actually take a look at that and see whether there is an indicator.

And then, secondly, my next concern is that in this particular situation where this rule would apply it seems to go further in basically sending to the public that whole rule that the first to file actually ends up with the right to the children and all those other issues. So I think you have to look

at it and deal with the overly broad way that it's written right now.

CHAIRPERSON JOHNSON: Thank you. Gentleman over here.

MR. WEINER: James C. Weiner from the 6th circuit. Two things. One, I listened to this, and I have feelings both ways, but I would like to say that I think this is simple enough, 14 days and up, it's a bright line rule, and it's actually probably very easy even ethically for us to take a look at.

Now, I would like to also propose a friendly amendment to say, A lawyer may not initiate contact or solicit a party. So that gets us around returning phone calls from somebody that's contacted them. That gets us around talking to somebody that they had solicited an attorney.

CHAIRPERSON JOHNSON: Mr. Weiner, will you repeat your friendly amendment, then I will ask the proponent if she is in favor of that.

MR. WEINER: I would like to add the word "initiate" immediately prior to "contact" on the second line.

MS. SADOWSKI: The proponent accepts the friendly amendment.

CHAIRPERSON JOHNSON: Thank you,

Ms. Sadowski.

Is there any further discussion?

MR. MIENK: Roy Mienk from the 55th circuit. I think to me the problem is that, as stated, it's a simple rule, and it was originally targetted at a specific problem of trolling. The rule should actually be specific to the problem. I mean, you can analogize this to all kinds of cases. Some of the worst cases I have seen are real estate property line cases, and the neighbors get notice of it, and then they are fighting.

So if you are looking to do all cases, then do all cases, but just to limit it to family law, if you are going to do this for trolling, make it specific for trolling. Define trolling and put it in the resolution, because it's just a general rule which to me anybody that did direct mailing would be in violation of, and so now we have got somebody who does a direct mailing in violation of the rule, and he could be brought up on ethical charges, and I think that's where I see the Ethics Committee is coming, that people that are not targetted by the rule would be in trouble.

CHAIRPERSON JOHNSON: Thank you very much. Any further discussion?

MS. SADOWSKI: Is response from the proponent allowable?

CHAIRPERSON JOHNSON: From the floor, if you want to move to close debate.

MR. WEINER: Point of order, shouldn't we vote on the friendly amendment first before we vote on --

CHAIRPERSON JOHNSON: No.

MR. WEINER: Oh, it's a friendly amendment.

CHAIRPERSON JOHNSON: It was accepted.

You are the proponent. If you wish to make a final statement, you may.

MR. REISER: May I just briefly be heard? If not, I will sit down and we will vote.

CHAIRPERSON JOHNSON: She has not come to the podium yet. I will allow it.

MR. REISER: John Reiser, 22nd circuit. I don't think this is to address trolling. I think this is to address the extra judicial things that go on prior. It's not the receipt of the letter or the sending of the letter. It's what gets done once they get notice and don't hire the lawyer. It's that which is done prior to the defendant coming in to court, alienating the assets.

As an assistant prosecuting attorney in

Ann Arbor, I have the luxury of law enforcement policies which strongly favor arrests in domestic violence cases, which means that the defendant is hauled before the court and the conditions are gone over with that defendant. Why I am supporting this is because over the last three years the Family Law Council has unanimously been in favor of it, and I understand that the Family Law Council is attorneys who represent both plaintiffs and defendants, both the wives and the husbands, and if we are nothing, we are an organization which regulates ourself, and those people who know best about this stuff are saying we got to do this to protect people, to protect families, and that's why I would urge our members to support this. Thank you.

CHAIRPERSON JOHNSON: Thank you very much, Mr. Reiser.

If there is no further discussion, the proponent may make a final statement, and I will call you to the podium, please.

MS. SADOWSKI: As Mr. Reiser stated, this is not an anti-trolling statute. This is a proposal to stop prior notice in order to prevent irreparable injury, loss, other damage resulting from the delay required to effect notice or that notice will

precipitate adverse action before an order is issued. That's what this is about. It is the problem with the notice requirement that would violate an ex parte order, the spirit of an ex parte order already in our statutes.

Our special proceedings section of our Court Rules, the 3.200, is inclusive of all family law matters. Thank you.

CHAIRPERSON JOHNSON: Thank you very much. There is now a motion on the floor, and the debate has been closed with the final proponent. There is a motion and a second on the floor to move the proposal as presented with the one word "initiate" inserted.

Hearing no further discussion, all those in favor of the proposal for attorney solicitation as proposed with the insertion please signify by saying aye.

All those opposed say no.

Any abstentions?

VOICE: Division.

CHAIRPERSON JOHNSON: At this point I have heard a call for division. There is no debate. I would ask -- I am going to repeat the request again, and I am going to ask you to stand. Will the clerk and the vice chairperson please count the votes.

Those in favor of the proposal for the attorney solicitation with the one word "initiate" inserted, please stand now.

(Votes being counted.)

CHAIRPERSON JOHNSON: Thank you. Those members may be seated. All those opposed please stand now.

(Votes being counted.)

CHAIRPERSON JOHNSON: Thank you. You may all be seated. The tellers have counted. The votes were 68 aye, 43 no. The motion carries. Thank you to all who participated in this, the Family Law Section, the Civil Procedure Committee. We appreciate very much your involvement in this issue.

The next and final item on our calendar is number 17, which is an informational update from the Special Issues Committee considering the revised Uniform Arbitration Act, and at this time I would like to call to the podium the chairperson of the Special Issues Committee, Ms. Krista Licata Haroutunian for her report of the Special Issues Committee.

MS. HAROUTUNIAN: Good afternoon. My name is Krista Licata Haroutunian. I am chair of the Special Issues Committee. I am from the 6th circuit.

I wanted to, number one, thank the officers,

Order

Michigan Supreme Court
Lansing, Michigan

December 2, 2011

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

ADM File No. 2010-22

Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct (Regarding Solicitation of Potential Family Law Clients by Attorneys)

On order of the Court, this is to advise that the Court is considering 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 will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

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.

[The present language is amended with new language indicated in underlining and deleted language overstricken.]

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for 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). However, in any matter that involves a family law case in a Michigan trial court, a

lawyer shall not initiate contact or solicit a party to establish a client-lawyer relationship until the initiating documents have been served upon that party or 14 days have passed since the date the document was filed, whichever action occurs first. This limitation does not apply if the party and lawyer have a pre-existing family or client-lawyer relationship. For purposes of this rule, "family law case" includes the following case-type code designations from MCR 8.117: DC, DM, DO, DP, DS, DZ, NA, PJ, PH, PP, or VP.

(b) A lawyer shall not solicit professional employment from a 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 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.

Staff Comment: This proposal was submitted by the State Bar of Michigan Representative Assembly. The proposed amendment is designed so that it would limit situations in which an attorney soliciting new clients would inform a defendant or respondent that an action has been filed against him or her before the defendant or respondent is served with the papers. The bar argues that allowing attorneys to notify defendants before service leads to greater risk of domestic violence against the filing party or other illegal actions (such as absconding with children or removing assets from a joint bank or other financial account) that may occur before service can be completed.

The staff comment is not an authoritative construction by the Court.

A copy of the order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-22. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

HATHAWAY, J. When commenting on the proposed amendment to the rule, please address whether the proposed amendment is consistent with *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988), or raises any other constitutional concerns.

I, Corbin R. Davis, 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.

December 2, 2011

Corbin R. Davis

Clerk

SBM STATE BAR OF MICHIGAN

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

FAMILY LAW SECTION

December 5, 2011

Mr. Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: AM 2010-22 & MRPC 7.3:
Controlling Family Law Attorney "Trolling"

Dear Mr. Davis:

The Family Law Council, representing the Family Law Section of the State Bar of Michigan, unanimously voted 19-0 to support AM 2010-22 at its December 3, 2011 meeting. The proposed Court Rule Amendment is carefully tailored to restrict an attorney's targeted solicitation of a party to a divorce case for the lesser of fourteen (14) days or service of process on the other party.

The Family Law Section has been a strong proponent of controlling the increasingly widespread practice of attorneys soliciting the representation of prospective clients prior to a party having been served with a copy of a Complaint, Injunctions against Transfer of Assets, Temporary Custody Orders, Personal Protection Orders or other initial pleadings in a Divorce case.

This practice is commonly referred to as "trolling" for Divorce clients. It typically involves an attorney inspecting the case filings in a County and immediately soliciting the representation of a client by mail or otherwise. These are "targeted" solicitations because they are directed to persons who have actually been named as defendants or parties in a family law case.

Because *ex parte* relief, injunctions, temporary restraining Orders, Personal Protection Orders may still be in process, a party in receipt of a targeted solicitation prior to being served with the pleadings and Orders in a family law case, is not yet subject to the jurisdiction of the court, and advance notice furnishes the opportunity to transfer assets, change beneficiary designations, remove the children from their custodial environment, or otherwise avoid and evade Court process prior to being served with the Complaint, Injunctions, Restraining Orders, Personal Protection Orders or other pleadings.

This is a matter of grave concern to the Family Law Section because "tipping off" a Defendant in a family law case to a divorce or family law case filing before a party can be served with the Complaint, or a Personal Protection Order, or an Ex Parte Order substantially increases the risk of physical or economic harm to the Plaintiff or the children involved in a *high conflict* divorce. Michigan law is clear that prior to issuance of an injunction, or an *ex parte* order, or an order restraining the transfer of assets, the trial Court must make a specific determination, based upon well pled facts, that *irreparable harm* in the form of physical or economic injury is imminent.

Our Michigan statutes and common law authorize PPOs, injunctions, temporary Custody Orders, asset restraining Orders, and other injunctive relief which may clearly be frustrated when the a party receives advance notice through a targeted solicitation from an unknown attorney prior to service of a Complaint, or service of an injunction, restraining Order, personal protection order or other ex parte Order from a trial court. Until an injunction or restraining Order is served upon a Defendant there is **nothing:** (1) prohibiting a party from seizing children and passports and fleeing the County; (2) from emptying out bank accounts, and fleeing the jurisdiction; (3) from changing beneficiary insurance designations, transferring money or assets into the hands of third parties; (4) from assaulting, wounding, molesting or beating the other party.

Justice Hathaway has requested that *Shapero* issues be addressed in any commentary to AM 2010-22. Constitutional restrictions upon commercial free speech are a relevant consideration in this discussion.

SHAPERO v KENTUCKY BAR ASSOCIATION

The case of *Shapero v Kentucky Bar Association*, 496 U.S. 466 (1988) is neither a bar nor an impediment to controlling lawyer *trolling* in family law cases. *Shapero* involved a foreclosure proceeding, not a family law case. Injunctions, ex parte orders, restraining orders, and personal protections orders are neither regular nor routine in foreclosure cases. These were not considerations in the *Shapero* case.

Shapero challenged a **total ban** on targeted, direct mail solicitation by attorneys. Contrast this with AM 2010-22, which restricts attorney solicitation to the **first to occur** of either service of process of the Complaint and other pleadings, or fourteen (14) days. This temporary waiting period is the **opposite** of a total ban on attorney solicitation. This temporary ban could be a minimal as a day or two, depending upon service upon the Defendant, and not longer than a maximum period of fourteen (14) days.

Moreover, *Shapero, id* at 476, reaffirmed the power of the State to regulate abuses, which might require attorneys to file their proposed solicitation letter with the state:

> *"The state can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency."*

However, the *Shapero* suggestion of "filing a letter with the State" ignores the stark reality that providing prior advance notice to a party who may be served with an Injunction or Restraining may invite the very conduct sought to be restrained by Court Order. Approving the generic content of a targeted solicitation to a prospective defendant utterly fails to address to issues of prior notice to a party about to be served with a Complaint for Divorce and *ex parte* restraining orders, injunctions, or a personal protection order.

FLORIDA BAR v WENT FOR IT

The United States Supreme Court specifically **upheld** a 30 day "blackout period" prohibiting the solicitation victims of accidents in *Florida Bar v Went For It*, 515 U.S. 618 (1995). The Supreme Court noted that "pure commercial advertising" has "...always reserved a lesser degree of protection under the First Amendment", *id.* at 635.

The Supreme Court concluded:

"We believe that the Bar's 30 day restriction on targeted direct mail solicitation of accident victims and their relatives withstands scrutiny under the three pronged Central Hudson test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and preventing the erosion of confidence in the profession that such repeated invasions have engendered."

The *Florida Bar v Went For It* case is good law today.

Significantly, AM 2010-22 is **even less restrictive** than the Florida rule: (1) It only applies only to family law cases; (2) the longest period of restriction is fourteen (14) days — less than half the thirty (30) days in Florida; (3) the restriction disappears if the other party is served with process, which may only involve a day or two delay; (4) AM 2010-22 is carefully and precisely constructed to impose minimal limitation upon direct or targeted lawyer solicitation, and does not deal with the content of the solicitation. .

RESTRICTIONS ON COMMERCIAL FREE SPEECH ARE SUBJECT TO A FOUR PRONG FREE SPEECH TEST

The *Shapero* case has frequently been suggested as standing for the proposition that it is "unconstitutional" to impair the free speech/commercial advertising rights of attorneys. A careful reading of *Shapero* makes clear it did **not** stand for this proposition. Subsequently, *Florida Bar v Went For It* confirmed the right of the State to impose a 30 ban on direct, targeted solicitation to accident victims.

When dealing with regulation of commercial free speech, which the *Florida Bar* case held was subject to "lesser" standards of protection. Moreover, and even prior to *Shapero*, the United States Supreme Court had enunciated the four prong test to regulate

commercial speech in *Central Hudson Gas & Electric v Public Service Commission*, 447 U.S. 557 (1980) which **can** be regulated if (1) If the advertising is not accurate it can be suppressed. (2) If the Government has a *substantial interest* in the restrictions, speech can be restricted. (3) A showing that the restriction is something more than "ineffective" or "remote support" for the asserted purpose. (4) If the restriction could be the subject of a more limited restriction, it may be subject to challenge.

Subsequent to the *Central Hudson Gas* case, the United States Supreme Court relaxed this test, and held in *Board of Trustees v Fox*, 492 U.S. 469 (1980) ruled that there must only be a "reasonable fit" between the goals and the restriction.

Clearly there is a "reasonable fit" between the goal of preventing advance notice of a filing of a complaint, restraining orders, personal protections orders, and other injunctions in a family law case and prohibiting the targeted solicitation. What valid public policy goal can possibly be asserted in arguing that persons who are the subject of Court Orders are entitled to "advance notice" prior to their being effective?

What about "suppressing all family law files"? This is not a reasonable solution because: (1) it is overbroad, (2) it would make it more difficult for attorneys to exercise their commercial free speech rights, (3) would interfere with the rights of the public to access court files and records; and (4) it would impose a significant additional cost upon counties, courts, and clerks who are already resource strained. Is there any conceivable lesser period of time for the restriction to be meaningful or effective? Hardly. It is common place in divorce cases, particularly in the larger population areas, for **ex parte** orders to take several days to enter. It may take even longer for them to be returned to counsel for service of process. Moreover, the advent of "e-filing" in many counties makes it impossible for counsel to personally deliver the proposed orders and injunctions to the assigned judge.

Significantly, AM 2010-22 does **not** preclude either the attorney or the public from examining and inspecting public files and records; it does **not** prohibit the direct solicitation of the prospective client. It does not prevent the soliciting attorney from drafting the solicitation letter and putting postage on it — it only delays the mailing! ADM 2010-22 does impose an absolute minimal period of time prior an attorney being able to forward the direct, targeted solicitation. This "waiting period" of fourteen (14) days will be even shorter if the attorney for the Plaintiff files a Proof of Service, further reducing the impact of the restriction.

TEMPORARY RESTRICTIONS ON TARGETED SOLICITATIONS ARE COMMON THROUGHOUT THE UNITED STATES.

A recent case from the 2nd Circuit Court of Appeals has exhaustively analyzed the constitutionality of 30 day "moratoriums" applicable to personal injury or wrongful death cases in the State of New York; *Alexander v Cahill*, 598 F. 3rd. 79 (2010) **affirmed** the 30 day moratorium on targeted solicitations of accident victims.

In the course of its analysis, the Court of Appeals noted, *id* at p. 98, the following states that have banned direct, targeted solicitation in personal injury or wrongful death cases: (1) Ariz. Rules of Prof'l Conduct R. 7.3(b)(3) (prohibiting "written, recorded or electronic communication or by in-person, telephone or real-time electronic" solicitation where "the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence"); (2) Conn. Rules of Prof'l Conduct R. 7.3(b)(5) (imposing a forty-day moratorium on "written or electronic communication concern[ing] an action for personal injury or wrongful death"); (3) Ga. Rules of Prof'l Conduct R. 7.3(a)(3) (imposing a thirty-day moratorium on "written communication concern[ing] an action for personal injury or wrongful death"); (4) La. Rules of Prof'l Conduct R. 7.3(b)(iii)(C) (imposing a thirty-day moratorium on communication "concern[ing] an action for personal injury or wrongful death"); (5) Mo. Rules of Prof'l Conduct 7.3(c)(4) (prohibiting written solicitation, including by e-mail, "concern[ing] an action for personal injury or wrongful death ... if the accident or disaster occurred less than 30 days prior to the solicitation"); (6) Tenn. Rules of Prof'l Conduct R. 7.3(b)(3) (prohibiting solicitation of "professional employment from a potential client by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact" if "the communication concerns an action for personal injury, worker's compensation, wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed ... unless the accident or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication.

CONGRESS HAS MIRRORED STATE RESTRICTIONS ON ATTORNEY SOLICITATION IN AIRLINE CASES.

A paramount example of Federal concern over the rights of parties to be free from improper solicitation by attorneys or their representatives has occurred in airline cases. It is illegal under Federal Law to solicit victims or the families of victims of airline crashes for a period of time after a crash. The Aviation Disaster Federal Assistance Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (codified at 49 U.S.C. 1136 (2006). This Act was amended in 2000 and the moratorium extended to 45 days. No challenge has ever been brought to this Statute.

CONCLUSION

Not all divorces are *high conflict* divorces. Not all divorces involve assault, battery, mayhem, murder, misappropriation of assets, kidnapping of children out of the Country, or pillaging of a marital estate. However, our Statutes specifically provide for orderly processes designed to prevent irreparable harm to parties and children.

These processes involve ex parte relief, injunctions, restraining orders, temporary custody orders, and personal protection orders. The public policy of the State of Michigan is subverted by *family law trollers* who provide advance notice to litigants, prior to their being served with legal process. The public policy of the State of Michigan is sabotaged when a party to a divorce case is able to act with impunity because of advance knowledge of a pending injunction or restraining order.

When this issue first came to the Family Law Council nearly four (4) years ago, Circuit Judge John Hammond, Berrien County, forcefully and passionately argued that "one dead body is too many". If a single irreparable injury is prevented by approval of ADM 2010-22, then this goal will have been accomplished. The family law section, and the Michigan Supreme Court, should not have to wait for "one dead body" prior to taking action on this critical issue.

Sincerely,

CONNIE THACKER
Chair Person
Family Law Council
Family Law Section - State Bar of Michigan

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 9, 2021

Re: SB 408 – Relief from Judgement Process

Background
SB 408 would amend the Revised Judicature Act to allow a party to seek relief from a circuit court judgment entered in a civil action based on a jury verdict on certain grounds, including newly discovered evidence, or fraud or misconduct of an adverse party. An opposing party would be able to file an appeal of right to the Michigan Court of Appeals within 42 days before the date the circuit court had ordered a new trial to start. Additionally, the bill would require the Court of Appeals to take appropriate steps towards ensuring a timely processing of an appeal of right. The bill would not apply to review of verdicts in actions alleging personal injury or medical malpractice.

***Keller* Considerations**
The Civil Procedure & Courts Committee found the procedural aspects of SB 408 to be *Keller*-permissible because they affect the functioning of the courts (court procedures) and the availability of legal services (appeals of right) to a certain subset of cases. Committee members, however, questioned the *Keller*-permissibility of challenging the Legislature's substantive right to define cases that may be appealed by right because, contrary to the Negligence Law Section's position, the Michigan Court Rules do contemplate the Legislature defining cases that may be appealed by right. MCR 7.203(A)(2) provides that the Legislature does have authority to define appeals by right, by defining the Court of Appeals' jurisdiction of an appeal of right to include "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established **by law** or by court rule." (Emphasis added.) Therefore, both the Court and the Legislature have authority to define cases that may be appealed by right and some Committee members believed that questioning the substantive authority of the Legislature to define appeals by right would be outside the bounds of *Keller*.

***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 satisfies the requirements of *Keller* and may be considered on its merit to the extent that the position does not challenge the Legislature's substantive right to challenge cases that may be appealed by right.

Senate Bill 0408 (2021) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2021-SB-0408

Sponsors
Roger Victory (district 30)
Jim Runestad
(click name to see bills sponsored by that person)

Categories
Civil procedure: other;

Civil procedure: other; new trial; revise procedure for granting. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 309a.

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2021-2022 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

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: 5-12-21)
This document analyzes: SB0408

SUMMARY OF BILL REPORTED FROM COMMITTEE (Date Completed: 5-17-21)
This document analyzes: SB0408

History
(House actions in lowercase, Senate actions in UPPERCASE)
NOTE: a page number of 1 indicates that the page number is soon to come.

Date ▲	Journal	Action
05/04/21	SJ 38 Pg. 590	INTRODUCED BY SENATOR ROGER VICTORY
05/04/21	SJ 38 Pg. 590	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY
05/18/21	SJ 44 Pg. 758	REPORTED FAVORABLY WITHOUT AMENDMENT
05/18/21	SJ 44 Pg. 758	COMMITTEE RECOMMENDED IMMEDIATE EFFECT
05/18/21	SJ 44 Pg. 758	REFERRED TO COMMITTEE OF THE WHOLE
05/27/21	SJ 49 Pg. 845	REPORTED BY COMMITTEE OF THE WHOLE FAVORABLY WITHOUT AMENDMENT(S)
05/27/21	SJ 49 Pg. 845	PLACED ON ORDER OF THIRD READING
05/27/21	SJ 49 Pg. 841	RULES SUSPENDED
05/27/21	SJ 49 Pg. 841	PLACED ON IMMEDIATE PASSAGE
05/27/21	SJ 49 Pg. 845	PASSED ROLL CALL # 235 YEAS 25 NAYS 11 EXCUSED 0 NOT VOTING 0
05/27/21	HJ 49 Pg. 966	received on 05/27/2021
05/27/21	HJ 49 Pg. 971	read a first time
05/27/21	HJ 49 Pg. 971	referred to Committee on Judiciary

SENATE BILL NO. 408

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"

(MCL 600.101 to 600.9947) by adding section 309a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 309a. (1) The legislature finds both of the following:

(a) The right to trial by jury, as preserved by the state constitution of 1963, is sacrosanct and the decisions of juries should not be lightly discarded.

(b) It is the public policy of this state that litigants be afforded the highest possible degree of certainty that jury verdicts will be respected and enforced.

(c) This section is intended to be remedial.

(2) This section applies only if a party seeks relief from a circuit court judgment entered in a civil action based on a jury verdict on any of the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence.

(c) Fraud, misrepresentation, or other misconduct of an adverse party.

(d) That the judgment is void.

(e) Another reason that the party believes justifies relief from the operation of the judgment.

(3) If a circuit court order grants relief to a party as described under subsection (2), an opposing party may file an appeal of right from that order to the court of appeals. Action in the circuit court must be stayed while the matter is on appeal. An opposing party may file an appeal of right under this subsection not later

than 42 days before the date the circuit court has ordered a new trial to start.

(4) In an appeal of right to the court of appeals under subsection (3), the court shall take appropriate steps toward ensuring, consistent with the appellate court rules, a timely processing of the appeal.

(5) This section does not apply to an action to which section 6098 applies.

Senate Fiscal Agency
P.O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 408 (as reported without amendment)
Sponsor: Senator Roger Victory
Committee: Judiciary and Public Safety

CONTENT

The bill would amend the Revised Judicature Act to do the following:

-- Allow a party to seek relief from a circuit court judgment entered in a civil action based on a jury verdict on certain grounds, including newly discovered evidence, or fraud or misconduct of an adverse party.
-- Allow an opposing party to file an appeal of right to the Michigan Court of Appeals if a circuit court order granted relief.
-- Require an opposing party to file an appeal of right within 42 days before the date the circuit court had ordered a new trial to start.
-- Require the Court of Appeals to take appropriate steps towards ensuring a timely processing of an appeal of right.
-- Specify that the bill would not apply to review of verdicts in actions alleging personal injury or medical malpractice.

Proposed MCL 600.309a

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill could have a negative fiscal impact on the State and local circuit courts.

The bill would add an additional appellate procedure to circuit court civil litigation in which a jury trial renders a verdict. According to the 2019 Court Caseload Report issued by the State Court Administrative Office, there were 215 civil jury verdicts in circuit courts statewide for that calendar year (39 of these were medical malpractice jury verdicts, which would be exempted in the bill's language). As such, the bill could allow for roughly 200 additional post-judgment requests for relief from jury verdicts annually. It is unknown what type of process would be used to grant or deny a request for relief from a civil judgment in circuit court but, assuming it would be through post-judgment motion, this could add additional court costs to circuit courts statewide.

It also should be noted that for circuit court civil matters, the Michigan Court Rules (MCR) allow for motions for new trials and provide an existing framework and set of procedures to accommodate those motions. For civil trials, MCR 2.611 permits any party to move for a new trial, or to amend a judgment, within 21 days after the entry of a judgment under a variety of circumstances, including new evidence, jury misconduct, error of law or fact, and other reasons. A sitting judge also may order a new trial on his or her own initiative if he or she feels it is warranted.

Date Completed: 5-17-21

Fiscal Analyst: Michael Siracuse

Public Policy Position
SB 408

Oppose

Explanation
While MCR 7.203(A)(2) indicates that the Legislature has authority to define appeals by right, the procedural aspects of the legislation violate the Court's Article VI authority.

The legislation fails to address as fundamental problem in need of fixing. First, parties whose jury verdicts are reversed by the circuit judge already have adequate safeguards available, including application for leave to appeal or an emergency interlocutory appeal to help ensure that there is no deprivation of justice. To the extent that the legislation is addressing a real problem, the problem is not significant, given that so few jury trials take place in Michigan state courts, we do not have data on the number of jury trials reverse by the circuit judge, and we do not have data on the number of those case that are denied leave to appeal or other appropriate remedies by the Court of Appeals.

Further, the legislation distinguishes appeal rights among cases without providing a rationale for this distinction.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 14

***Keller* Explanation:**
The legislation affects the functioning of the courts and the availability of legal services (appeals by right) to a certain subset of cases.

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

Public Policy Position
SB 408

Oppose

Explanation

As Chairperson of the Negligence Law Section for the SBM, I am writing on behalf of the Section to voice our opposition to SB 408 introduced by Senator Roger Victory. SB 408 allows a party to seek relief from a circuit court judgment entered in a civil action based on a jury verdict, provides for an immediate appeal as of right from the order granting relief from judgment, and also mandating a stay of proceedings during the appellate process.

Currently, Michigan Court Rule 2.612C sets forth the grounds a party must show to obtain relief from a judgment in a civil action. The grounds for setting aside a circuit court judgment in SB 408 are essentially identical to those contained in MCR 2.612(C).

Our opposition to SB 408 is not due to a disagreement with the policies of the bill. Indeed, there is a good argument that when a jury verdict is set aside, the opposing party should have the right to seek an immediate appeal and have the new trial put on hold until the appellate system sorts out whether the jury verdict should have been set aside in the first place.

Instead, our opposition is based on the fact that adoption of SB 408 would create a conflict with the Michigan Court Rules. Under the Court Rules, if a jury verdict is set aside under MCR 2.612(C), the opposing party has to seek permission to appeal and the Court of Appeals has discretion to hear the appeal or deny the appeal. The Court Rules also do not provide for an automatic stay while the application seeking permission to appeal is pending.

If SB 408 is passed into law, a litigant involved in a case where the jury verdict has been set aside would be confronted with a statute that says an appeal as of right can be filed and a court rule that says an appeal as of right cannot be filed. The litigant would also have a statute that says the trial proceedings are stayed and a court rule that says the new trial can go forward immediately. While the traditional rule is that the Court Rules trump a statute on matters of procedure, it will take litigants, the trial court and the Court of Appeals years to firmly decide whether SB 408 prevails over the Court Rules.

This will create uncertainty and an inefficient use of resources for the judiciary and the litigants. For this reason, the Section is unable to support SB 408.

Position Vote:

Voted for position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 0

Contact Person: Thomas R. Behm
Email: trbehm@gmnp.com