Public Policy Materials for the
November 2020 Meeting of the Board of Commissioners

Public Policy Committee……Dana M. Warnez, Chairperson

A. Reports

1. Approval of September 16, 2020 minutes
2. Public Policy Report

B. Court Rules

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

The proposed amendment of MCR 1.109 would require a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109 as part of the e-Filing rule changes.

Status:	01/01/2021 Comment Period Expires.
Referrals:	09/18/2020 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	E. Thomas McCarthy, Jr.

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

The proposed amendment of MCR 6.502 would eliminate the requirement to return successive motions to the filer and would eliminate the prohibition on appeal of a decision made on a motion for relief from judgment. Further, it would require all such motions to be submitted to the assigned judge, and require a trial court to issue an order when it rejects or denies relief.

Status:	01/01/2021 Comment Period Expires.
Referrals:	09/18/2020 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section; Litigation Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section.
Liaison:	Kim Warren Eddie

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

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

Status:	01/01/2021 Comment Period Expires.
Referrals:	09/18/2020 Judicial Ethics Committee; Lawyers & Judges Assistance Program; Judicial Section.
Comments:	Judicial Ethics Committee; Judicial Qualifications Committee; Lawyers & Judges Assistance Committee. Comment provided to the Supreme Court included in materials.
Liaison:	Mark A. Wisniewski

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

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

Status: 01/01/2021 Comment Period Expires.
Referrals: 09/18/2020 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. Comment provided to the Supreme Court included in materials.
Liaison: Takura N. Nyamfukudza

C. Model Criminal Jury Instructions

1. M Crim JI 5.15

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

Status: 12/01/2020 Comment Period Expires
Referrals: 10/18/2020 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Valerie R. Newman

D. Consent Agenda

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

Model Criminal Jury Instructions

1. M Crim JI 17.2a

The Committee proposes amending the Domestic Assault instruction, M Crim JI 17.2a, to add the offense of Aggravated Domestic Assault for which there was no instruction previously.

2. M Crim JI 33.1a

The Committee proposes amending the Animal Fighting instruction, M Crim JI 33.1a, by adding language to comport with an amendment to the applicable statute, MCL 750.49(2)(e).

3. M Crim JI 40.1, 40.2, and 40.3

The Committee proposes new instructions, M Crim JI 40.1, 40.2 and 40.3, for disturbing-the-peace person offenses found in MCL 750.170 (disturbance of lawful meetings), MCL 750.169 (disturbing religious meetings), and MCL 750.167d (disturbing funerals), respectively.

4. M Crim JI 39.7 and 39.7a

The Committee proposes new instructions, M Crim JI 39.7 and 39.7a, for the crimes found in MCL 750.411a(2) of falsely reporting an offense involving explosives and of falsely reporting an offense involving of harmful substances or poisons, respectively.

5. M Crim JI 39.8 and 39.8a

The Committee proposes new instructions, M Crim JI 39.8 and 39.8a, for the crimes found in MCL 750.411a(2)(b): threatening to commit an offense involving explosives (M Crim JI 39.8), or threatening to commit an offense involving of harmful substances or poisons (M Crim JI 39.8a).

Agenda
Public Policy Committee
September 16, 2020 – 9 a.m. to 10 a.m.

Committee Members: Robert J. Buchanan, Judge Shauna L. Dunnings, Kim Warren Eddie, Suzanne C. Larsen, E. Thomas McCarthy, Jr., Thomas G. Sinas, Mark A. Wisniewski
SBM Staff: Janet Welch, Peter Cunningham, Elizabeth Goebel, Carrie Sharlow

A. Opening Statements

B. Reports

1. Approval of July 24, 2020 minutes
The minutes were unanimously approved.

C. Court Rule Amendments

1. ADM File No. 2020-11: Proposed Amendment of MCR 2.108

The proposed amendment of MCR 2.108 would provide a timeframe for a responsive pleading when a motion for more definite statement is denied.
The following entities offered comments on the ADM File No. 2020-11: Civil Procedure & Courts Committee.
The committee voted to unanimously (7) to support the proposed amendment to the MCR 2.108.

2. ADM File No. 2020-14: Amendment of MCR 4.202

The amendment of MCR 4.202(H) makes the rule consistent with the requirements of MCR 4.201(F)(4) by requiring the court clerk to mail defendant notice of entry of a default judgment. The rule was amended previously to require plaintiff to mail a default judgment to the defendant, unlike MCR 4.201(F)(4), which was not amended. Having two different procedures for matters that are both summary proceedings has caused confusion for courts. This amendment returns the language to its previous status and makes MCR 4.201 and MCR 4.202 consistent again.
The following entities offered comments on the ADM File No. 2020-14: Access to Justice Policy Committee and Civil Procedure & Courts Committee.
The committee voted to unanimously (7) to support the amendment to the MCR 4.202.

D. Model Criminal Jury Instructions

M Crim JI 13.19 and 13.19a

The Committee proposes amending instruction M Crim JI 13.19 and adding a new instruction, M Crim JI 13.19a, to address offenses charged under MCL 750.411a, as amended, for making a false report of a crime (M Crim JI 13.19) or a false report of a medical or other emergency (M Crim JI 13.19a). With respect to amendments to M Crim JI 13.19, deleted language from the current instruction is in strikeout and added language is underlined; M Crim JI 13.19a is entirely new.
The Model Criminal Jury Instructions were supported as drafted, as per the consent agenda.

M Crim JI Chapter 15

The Committee on Model Criminal Jury Instructions proposes a revision of Chapter 15 (Traffic Offenses) of the Model Criminal Jury Instructions. Repeated statutory amendments over the past four decades have left the jury instructions for this chapter a hodgepodge and inconsistent in format with other chapters, especially the driving-while-intoxicated portion of Chapter 15. The Committee offers a re-write that organizes the instructions according to the current statutory structure for driving offenses in a more consistent and comprehensive format.
The instructions are divided into four sets in hopes of making them more convenient to compare and review. The first set of instructions are the current instructions, M Crim JI 15.1 through 15.13, involving intoxicated

driving. They are followed by the proposed amended instructions for intoxicated driving, M Crim JI 15.1 through 15.12, including three new instructions: M Crim JI 15.10 (Owner or Person in Control of Vehicle Permitting Operation By Another Person While Intoxicated or Impaired), 15.11 (Person Under 21 Operating With Any Alcohol in System) and 15.12 (Violation With a Person Under the Age of 16 in the Motor Vehicle). The next set of instructions are the current instructions for other driving offenses, M Crim JI 15.14 through 15.25. Those are followed by the proposed revised jury instructions for those offenses, M Crim JI 15.13 through 15.17a.

The Model Criminal Jury Instructions were supported as drafted, as per the consent agenda.

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

September 23, 2020

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

RE: ADM File No. 2020-11: Proposed Amendment of Rule 2.108 of the Michigan Court Rules

Dear Clerk Royster:

At its September 16, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (the Board) considered the above-referenced proposed amendment published by the Court for comment. In its review, the Board considered a recommendation from the Civil Procedure and Courts Committee.

After this review, the Board voted unanimously to support the proposed rule amendment, as it clarifies the procedure for a motion for a more definite statement by defining the number of days by which a responsive pleading must be filed when such a motion is denied.

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

Sincerely,

Janet K. Welch
Executive Director

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

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September 23, 2020

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

RE: ADM File No. 2020-14: Amendment of Rule 4.202 of the Michigan Court Rules

Dear Clerk Royster:

At its September 16, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (the Board) considered the above-referenced amendment published by the Court for comment. In its review, the Board considered recommendations from the Civil Procedure and Courts Committee and the Access to Justice Policy Committee.

After this review, the Board voted unanimously to support the rule amendment as it would bring consistency to the court rules and thereby reduce confusion in the courts. The Board supports making the requirements of Rule 4.202(H) consistent with those of Rule 4.202(F)(4) by establishing that the court clerk – not the plaintiff – would be required to mail the defendant notice of entry of a default judgment.

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

Sincerely,

Janet K. Welch
Executive Director

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

SBM STATE BAR OF MICHIGAN

To: Board of Commissioners

From: Governmental Relations Division Staff

Date: November 11, 2020

Re: Governmental Relations Update

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

Legislation

HB 4488 (Individual Licensing & Registration, Use of Criminal Record to Determine Eligibility)
HB 4489 (Revised Judicature Act of 1961, Qualifications for Admission to State Bar)

These bills were repeat introductions from last legislative session: HB 6110 – HB 6113. In 2018, SBM, the State Court Administrative Office (SCAO), and the Board of Law Examiners (BLE) shared the position that HB 6110 should not apply to the legal profession because the licensing of attorneys is the exclusive domain of the Supreme Court through the BLE. Although HB 6110 was amended during the legislative process to include an explicit exemption for the licensing of attorneys, the bill was not signed into law before the end of the legislative session.

HB 4488 and HB 4489 were introduced in April 2019. The Board held an e-vote the week of May 21, 2019 and voted to support HB 4488 with an amendment that the bill does not apply to attorney licensing and voted to support HB 4489 without amendments.

The legislation was referred to the House Committee on Regulatory Reform. The SBM submitted testimony on the legislation, and the bill was subsequently re-referred to the House Committee on Ways & Means. Both bills passed out of the committee – HB 4488 as substitute H-4 and HB 4489 without amendments. The amended HB 4488 specifically mentions the Board of Law Examiners being exempt at Sec. 1. (3)(C).

The legislation passed the House unanimously on September 10 and has since been reviewed and reported by the Senate Committee on Regulatory Reform.

HB 5444 (A Bill to Create the Kinship Caregiver Navigator Program)

HB 5444 would create a Kinship Navigator Program and provide kinship caregivers with the resources and services, including legal services, to care for children who may otherwise be directed towards the foster care system.

The Board supported this legislation with two clarifications, neither of which were adopted by the legislature.

The legislation passed the Senate unanimously on September 16. It was signed by the Governor on October 8 and is now Public Act 178.

HB 5488 (The Code of Criminal Procedure, Certain Permissible Costs)

By extending the sunset provision of certain permissible costs, HB 5488 would allow trial courts to continue to impose costs that are reasonably related to actual costs incurred by courts for operation on criminal defendants who either plead or are determined guilty.

At its July 24, 2020 meeting, the Board voted to support the legislation; however, it stated that it looks forward to a time when the Trial Court Funding Commission's recommendations are fully implemented and temporary fixes such as those set forth in HB 5488 are no longer necessary.

The legislation passed the Senate on September 1 and was signed by the Governor on September 22 as Public Act 151.

SB 20 (The Michigan Penal Code, Jurisdiction)
SB 21 (The Code of Criminal Procedure, Jurisdiction)

The Board supported both bills based on a vote held on July 27, 2018. Both bills have since passed the Senate by a vote of 22 to 16 and have moved onto the House to be reviewed by the Judiciary committee.

SB 865 (Revised Judicature Act of 1961, Cellular Telephones in Courtrooms)

SB 865 would allow the use of cellular telephones and other electronic devices in courtrooms.

The Senate Committee on Judiciary & Public Safety considered SB 865 on July 29, 2020 and September 1, 2020. The SBM submitted written testimony in advance of the July 29 hearing in which it expressed the SBM's opposition to the legislation.

On September 9, 2020, SB 865 moved to the Senate floor for consideration.

SB 895 (Revised Judicature Act of 1961, Procedure for Granting New Trial)

SB 895 would alter the process for parties filing relief from judgment motions. On July 24, 2020, the Board voted to oppose this bill. The Appellate Practice Section appeared before the Senate Committee on Judiciary & Public Safety on October 1, 2020 expressing the Section's and the State Bar's shared opposition to the bill's fee shifting provisions and concerns with SB 895's impact on existing, established appellate processes and court rules.

On October 6, 2020, SB 895 with Substitute (S-3) moved to the Senate floor.

Court Amendments

A public administrative hearing was held via Zoom on September 23, 2020.

ADM File No. 2002-37: Amendments of MCR 1.109, 2.002, 2.302, 2.306, 2.315, 3.101, 3.222, 3.618, and 8.119

These amendments were the latest court rule revisions as part of the design and implementation of the statewide electronic-filing system. On March 24, 2020, the Board unanimously supported the amendments as drafted.

The Court adopted a revised set of amendments will take effect January 1, 2021.

ADM File No. 2015-21: Amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204

These amendments were intended to make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights). They also sought to make the appeal period uniform (21 days) for all child protective cases. On June 12, 2020, the Board unanimously supported the rule changes with an amendment that the current language in Rule 7.204(A) be retained to allow trial courts to extend the 21-day period for filing an appeal upon a finding of good cause.

On September 23, 2020, the Court adopted amendments to MCR 3.971, 3.972, 3.973, and 3.974 to make various clarifying changes to rules the Court adopted in 2019. The Court, consistent with the recommendations of the SBM, did not amend Rule 7.204, thereby retaining the rule's original language that allows trial courts to extend the 21-day period for filing an appeal upon a finding of good cause.

The amendments will take effect January 1, 2021.

ADM File No. 2019-27: Amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and Addition of Rule 6.126

These amendments were intended to clarify and simplify the rules regarding procedure in criminal appellate matters. On June 30, 2020, the Board voted to unanimously support the proposed rule changes with an amendment to Rule 7.205 (A)(4)(b) to clarify the time deadline for filing a delayed application for leave to appeal as shown on the left side of the chart below.

On September 23, 2020, the Court adopted amendments to MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and the addition of Rule 6.126. The Court adopted the following change to Rule 7.205(A)(4)(b) as shown on the right side of the chart below.

SBM suggested amendments to 7.205(A)(4)(b)	**Rule 7.205(A)(4)(b) as adopted by the Court**
[Additions shown in **bold** and **underline**, and deletions shown in strikethrough] (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within **the later of 6 months from the entry of the order appealed**, 21 day **after** ~~of the~~ entry of the dismissal order, or **21 days after entry of** an order denying reconsideration of ~~that~~ **the dismissal** order, provided that: [remainder of rule omitted for brevity].	[Addition shown in **bold**]. (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may **also** be filed within 21 days of the entry of the dismissal order or an order denying reconsideration of that order, provided that [remainder of rule omitted for brevity].

The amendments take effect January 1, 2021.

ADM File No. 2019-13: Amendment of MCR 7.118

This amendment would require that counsel be appointed to an indigent prisoner when a prosecutor or victim files an application for leave to appeal a grant of parole. Further, the amendment would provide that an indigent prisoner must be notified of his or her right to counsel.

On March 24, 2020, the Board voted to support the proposed amendment, as it would improve equity within the court system by ensuring that indigent prisoners would be notified of their right to counsel and have counsel appointed when a prosecutor or victim files a leave to appeal a grant of parole.

The State Appellate Defender's Office (SADO), in an April 1, 2020 letter to the Court, proposed a slight amendment to Rule 7.118(D). SADO's amendment clarified that when a circuit court appoints counsel for an indigent prisoner, such appointment should be made through the Michigan Appellate Assigned Counsel System to ensure that standards for eligibility, training, and oversight are met.

On September 23, 2020, the Court adopted the changes to Rule 7.118(D) as suggested by SADO; those changes appear as follows in **bold and underline**.

> (d) If a prosecutor of victim files an application for leave to appeal, the circuit court shall appoint counsel for a**n indigent** prisoner ~~who is indigent~~ **through the Michigan Appellate Assigned Counsel System.**

With the exception of the changes noted immediately above, the Court adopted all other amendments to Rule 7.118 as published for comment.

The amendments will take effect January 1, 2021.

ADM File No. 2019-29: Amendments of MCR 7.212 and 7.312

These amendments were intended to make the appendix rules consistent within the Court of Appeals and the Supreme Court. On June 12, 2020, the Board voted unanimously to support the proposed rule amendments. In its letter the Court, SBM included specific input from the Civil Procedure & Courts Committee for the Court's consideration. That committee's inquiry focused on the following three areas:

- Concern that the proposed Rule 7.212(J)(2)(B) imposed electronic format ad booking requirements on appendices before the Court's pilot program on electronic briefs had concluded.
- Clarification on whether practitioners needs a separate Table of Contents for each volume of appendices or whether one full Table of Contents is sufficient.
- Consideration of whether exclusions as proposed in Rule 7.212(J)(1)(a)-(f), should also apply to briefs in the Supreme Court, rather than being carved out.

On September 23, 2020, the Court adopted amendments to Rules 7.212 and 7.312. The adopted rule changes are as follows:

(1) The Court adopted minor changes to Rule 7.212 (J)(2)(b)(3) to address concerns raised about the administrative burden of requiring practitioners to create separate, electronically filed, table of contents. The adopted language of Rule 7.212(J)(2)(b)(iii) is as follows [additions in **bold**]:

"The table of contents should, **if possible without unduly burdening the filer**, link to the documents contained in the appendix or in that volume of the appendix."

(2) The Court adopted minor amendments to the language of Rule 7.212(J)(3)(c) to clarify when an index to a transcript is required. The newly amended language reads as follows [additions in **bold**]:

. . . "If a complete trial, deposition, or administrative transcript is filed, an index to such transcript must be included **if one was provided by the court reporter**."

The amendments take effect January 1, 2021.

ADM File No. 2019-31: Amendment of MCR 7.216

These amendments would enable the Court of Appeals to impose filing restrictions on a vexatious litigator similar to Rule 7.316. On June 12, 2020, the Board of Commissioners voted unanimously to support the proposed rule amendments with additional amendments to Rule 7.216(C)(1)(a)(not originally contemplated for amendment by ADM File No. 2019-31) to make it consistent with Rule 7.316(C)(1)(a): [additional amendments are shown in bolded underline and deletions are shown in strike-through].

[t]he appeal was taken for purposes of hindrance or delay o~~r without reasonable basis~~ **or is not reasonably well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal or existing law**: ~~for belief that there as a meritorious issue to be determined on appeal~~; or

On September 23, 2020, the Court adopted amendment of Rule 7.216 as originally drafted and did not amend Rule 7.216 (C)(1)(a). The amendment takes effect January 1, 2021.

ADM File No. 2019-26: Amendment of MCR 7.314

This amendment would allow the Court to determine the amount of time for oral argument in an order granting leave for appeal.

On June 12, 2020, the Board voted unanimously to support the rule change, as it would allow the Court the discretion to determine the appropriate time limits for oral arguments.

On September 23, 2020, the Court adopted the amended rules as originally drafted. The amendment takes effect January 1, 2021.

ADM File No. 2020-03: Administrative Order No. 2020-20

This administrative order would provide procedural rules and requirements to ensure that election related litigation is handled by the Court in a timely and efficient manner.

At its June 12, 2020 meeting, the Board voted unanimously to support the administrative order as drafted.

On September 23, 2020, the Court adopted the administrative order as originally drafted. The administrative order takes effect immediately.

Order

Michigan Supreme Court
Lansing, Michigan

September 16, 2020

ADM File No. 2019-48

Proposed Amendment of
Rule 1.109 of the Michigan
Court Rules

_____

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)-(D) [Unchanged.]

(E) Signatures.

(1) [Unchanged.]

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

(a)-(b) [Unchanged.]

(3)-(7) [Unchanged.]

(F)-(G) [Unchanged.]

Staff comment: The proposed amendment of MCR 1.109 would require a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109 as part of the e-Filing rule changes.

The 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, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-48. 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 16, 2020

Clerk

Public Policy Position
ADM File No. 2019-48

Support with Amendment

Explanation

The committee voted unanimously to support correcting the rule to clarify that a document filed by a party represented by an attorney must be signed by an attorney of record; however, the committee proposes that the rule be simplified by returning to the previous language of MCR 2.114(C)(1), as follows:

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

Position Vote:

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

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

Public Policy Position
ADM File No. 2019-48

Support

Explanation

The committee supported the proposed addition to Rule 1.109 because it brings consistency to the court rules by reinserting language that was inadvertently stricken when the e-filing rules were adopted.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 3

Contact Persons:

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

Order

Michigan Supreme Court
Lansing, Michigan

September 16, 2020

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

ADM File No. 2019-35

Proposed Amendment of
Rule 6.502 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.502 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 6.502 Motion for Relief from Judgment

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. ~~The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.~~

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion ~~that asserts that one of~~

~~these exceptions is applicable~~ to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime. For motions filed under both (G)(1) and (G)(2), the court shall enter an appropriate order disposing of the motion.

(3) [Unchanged.]

Staff comment: The proposed amendment of MCR 6.502 would eliminate the requirement to return successive motions to the filer and would eliminate the prohibition on appeal of a decision made on a motion for relief from judgment. Further, it would require all such motions to be submitted to the assigned judge, and require a trial court to issue an order when it rejects or denies relief.

The 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, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-35. 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 16, 2020

Clerk

Public Policy Position
ADM File No. 2019-35

Support

Explanation
The committee voted to support the amendment to Rule 6.502.

The committee supports the proposed amendment of Rule 6.502 because it: 1) eliminates the prohibition on appealing decisions made on a motion for relief of judgment, 2) requires all such motions be submitted to the assigned judge, and 3) requires a trial court to issue an order when it rejects or denies relief.

The committee supports the proposed rule change because it provides clarity to all parties when a motion is denied. Specifically, the amended rule requires that a trial court issue an order if it rejects or denies relief. The amended rule represents an improvement over current practice whereby a court may simply return pleadings to the filer without explanation and the filer has no recourse to correct any improprieties.

Position Vote:
Voted for position: 22
Voted against position: 0
Abstained from vote: 1
Did not vote (due to absence): 5

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

Public Policy Position
ADM File No. 2019-35

Support

Explanation
The committee voted to support the proposed amendments to Rule 6.502. Even if the rule could theoretically increase litigation resulting from courts denying defendants' successive motions, the committee supports the amendment because it expands and improves a litigant's ability to appear before the court and such access should not be unduly limited.

Position Vote:
Voted For position: 19
Voted against position: 1
Abstained from vote: 0
Did not vote (absent): 3

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

Public Policy Position
ADM File No. 2019-35

Support with Recommended Amendments

Explanation
With a majority vote of 22 out of 24 voting members (there was 1 "no" vote and one member did not vote), the Council fully supports the proposed amendments, which we believe would help ensure fairness and justice by placing judges, not clerks, in the position of determining whether a successive motion for relief from judgment meets one of the exceptions listed in the rule.

We also have two suggestions regarding the rule's current language. First, in subparagraph (G)(1), we suggest the following revision to eliminate a redundancy:

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

Second, we propose clarifying in subparagraph (G)(2) that a retroactive change in law or discovery of new evidence provides grounds to file a second or subsequent motion for relief from judgment so long as the retroactive change in law or discovery of new evidence occurred after the first motion for relief from judgment was filed, as opposed to when the motion was actually decided. See APS Position Letter dated 11-9-20.

Position Vote:
Voted for position: 22
Voted against position: 1
Abstained from vote: 0
Did not vote: 1

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

SBM STATE BAR OF MICHIGAN

p (517) 346-6300
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306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

www.michbar.org

APPELLATE PRACTICE SECTION

November 9, 2020

State Bar of Michigan
Board of Commissioners
306 Townsend St
Lansing, MI 48933-2012

Re: Appellate Practice Section Comments on ADM 2019-35

Dear Commissioners:

The State Bar of Michigan Board of Commissioners has invited comments on ADM File No. 2019-35 from the Council for the Appellate Practice Section.

With a majority vote of 22 out of 24 voting members (there was 1 "no" vote and one member did not vote), the Council fully supports the proposed amendments, which we believe would help ensure fairness and justice by placing judges, not clerks, in the position of determining whether a successive motion for relief from judgment meets one of the exceptions listed in the rule.

We also have two suggestions regarding the rule's current language. First, in subparagraph (G)(1), we suggest the following revision to eliminate a redundancy:

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

Second, we propose clarifying in subparagraph (G)(2) that a retroactive change in law or discovery of new evidence provides grounds to file a second or subsequent motion for relief from judgment so long as the retroactive change in law or discovery of new evidence occurred after the first motion for relief from judgment was filed, as opposed to when the motion was actually decided:

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

We thank you for this opportunity to comment.

Very truly yours,

Anne Argiroff
Chair, APS

Order

Michigan Supreme Court
Lansing, Michigan

September 16, 2020

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

ADM File No. 2020-16

Proposed Amendment of
Rule 9.261 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.261 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 9.261 Confidentiality; Disclosure

(A)-(I) [Unchanged.]

(J) Notwithstanding the prohibition against disclosure in this rule, upon request the commission shall disclose all information in its possession concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the State Bar Judicial Qualifications Committee, or to any other officially authorized state or federal judicial qualifications committee.

(K) Notwithstanding the prohibition against disclosure in this rule, either upon request or on its own motion, the commission shall disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the State Bar Lawyers & Judges Assistance Program.

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

The 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, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-16. 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 16, 2020

Clerk

Public Policy Position
ADM File No. 2020-16

Support

Explanation

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

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

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

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

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

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

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

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

Report on Public Policy Position

Name of Section: Judicial Ethics Committee
Contact Person: Judge Terry Clark
e-Mail or phone: d70-6@saginawcounty.com; 989-790-5371
Administrative File No. 2020-16 – Proposed Amendment of Rule 9.261 of the Michigan Court Rules
Date Position was Adopted: November 9, 2020
Process used to take the ideological position: Position adopted after an electronic discussion and vote.
Number of members in the decision-making body: 11
Number who voted in favor and opposed the position:

- Voted against position:
- Voted for position: 10
- Abstained from vote:
- Did not vote: 1

Position:

☒ Support
☐ Support with recommended amendments
☐ Oppose
☐ Oppose with recommended amendments
☐ Other, please specify: _____

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

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

This issue continues with requests from the Lawyers and Judges Assistance Program who assist the legal community in a variety of ways, including but not limited to, alcohol and substance use

disorders. Information from the Judicial Tenure Commission would further assist the Lawyers and Judges Assistance Program to provide the appropriate services to the member they are assisting when knowing additional facts that brought them to their attention.

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

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

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

Copy and paste the text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report. Text may be provided by hyperlink. https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2020-16_2020-09-16_FormattedOrder_PropAmendtOfMCR9.261.pdf

If recommending State Bar action on this issue, complete the following: Requesting support of the adoption of the proposed MCR 9.120.

List any arguments against the position: Not Applicable.

Public Policy Position
ADM File No. 2020-16

Support

Explanation
The committee provided detailed comments in the attached letter.

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

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

Bogas & Koncius

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

October 26, 2020

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

Dear Members of the Board of Commissioners:

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

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

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

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

31700 Telegraph Road, Suite 160 ◆ Bingham Farms, Michigan 48025
phone (248) 502-5000 ◆ fax (248) 502-5001
kbogaslaw.com

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

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

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

Sincerely,

Daniel T. Stepek
Co-Chairperson

Kathleen L. Bogas
Co-Chairperson

KLB:caw

Public Policy Position
ADM File No. 2020-16

Support

Explanation
The committee provided detailed comments in the attached letter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State of Michigan

LYNN A. HELLAND, ESQ.
EXECUTIVE DIRECTOR
& GENERAL COUNSEL

GLENN J. PAGE, ESQ.
DEPUTY EXECUTIVE DIRECTOR

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Judicial Tenure Commission

November 5, 2020

Via Email

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

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

Dear Ms. Boomer:

The Judicial Tenure Commission thanks the Supreme Court for the opportunity to submit comments concerning the proposed amendments to MCR 9.261.

The Commission believes that the proposed amendments are welcome changes to the rule that governs the confidentiality of our files. There is no reason the State Bar Judicial Qualifications Committee should not have as much access to our files as it has to the files of the Attorney Grievance Commission. More important, the public interest will be served if those deciding whether to appoint a judge to a position of significant trust are informed by relevant information in our possession.

Similarly, the Commission sees no reason for the State Bar Lawyers & Judges Assistance Program to have less access to our files than it has to Attorney Grievance Commission files, when it is trying to help a judge in need. To the extent our records can aid a judge's effort to benefit from LJAP assistance, we welcome the latitude the amendment would provide to enable us to do that.

Please let me know if you would like any additional information.

Very truly yours,

Hon. Monte J. Burmeister
Chairperson
For the Commission

MJB/
cc: All Commission Members
Lynn A. Helland, Esq.

Order

Michigan Supreme Court
Lansing, Michigan

September 16, 2020

ADM File No. 2019-06

Amendment of Rule 6.302 of the Michigan Court Rules

_____

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

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

On order of the Court, this is to advise that the following amendment of Rule 6.302 of the Michigan Court Rules is adopted, effectively immediately, and that a public comment period has also begun. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment. 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.

[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) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) [Unchanged.]

(2) the maximum possible prison sentence for the offense<u>, including, if applicable, whether the law permits or requires consecutive sentences,</u> and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3)-(5) [Unchanged.]

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the

record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

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

The 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 January 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. 2019-06. 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 16, 2020

Clerk

Public Policy Position
ADM File No. 2019-06

Support

Explanation
The committee unanimously supports the amendment to Rule 6.302.

The committee supports the rule amendment because it mirrors the Court's ruling in *People v Warren*, 505 Mich 196 (2020), mandating that defendants are informed of 1) the maximum possible prison sentence that they could receive, and 2) the possibility that a court could impose consecutive, instead of concurrent, sentences. Court rules should be consistent with case precedent.

Position Vote:
Voted for position: 23
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 5

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

Public Policy Position
ADM File No. 2019-06

Support

Explanation
The committee supports the amendment to Rule 6.302.

The committee supports the rule amendment because it would make the court rule reflective of the Court's ruling in *People v. Warren*. 505 Mich 196(2020). In compliance with *Warren*, the amended rule requires a court to inform a defendant of the maximum possible prison sentence that could be imposed and that any such sentences may be consecutive.

The majority of the committee supported the proposed rule change because it makes the court rule consistent with precedent. Furthermore, all the proposed rule requires is that *if* a court has knowledge of the possibility of consecutive sentences at the time a defendant pleas, the court must advise the defendant of that possibility; therefore, while the amended rule may not solve "all the problems" with guilty pleas under Rule 6.302, it does nothing objectionable and brings the rule in greater accord with the *Warren* ruling.

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

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

From: Warren, Michael
To: ADMcomment
Subject: ADM File No. 2019-06
Date: Friday, September 25, 2020 3:12:27 PM

Dear Justices,

Philosophically I am in complete agreement that a criminal defendant who tenders a plea in connection with several new charges should be advised of the possibility of consecutive sentencing within the case. (How could I not, the rule being laid down in *People v Warren*?).

However, I write in connection with perhaps an unintended consequence for the current revision of MCR 6.302. As you know, many defendants have several cases across the State and perhaps the nation. The most obvious example that is pertinent to the rule change is when a defendant is on parole and commits another offense. After the defendant is sentenced in the new case, sometimes the Michigan Department of Corrections will remand the defendant back to prison in light of the new case as a violation of parole. The new case is then consecutive to parole on the old case. Another example may be a defendant who is on probation under the Holmes Youthful Training Act status and is avoiding an otherwise mandatory 2 year felony firearm sentence, and a subsequent criminal conviction could result in a violation of probation revocation of HYTA and a consecutive sentence on the old HYTA case. Likewise, a defendant who is on bond on another case can also face consecutive sentencing.

If the intention of the amended language is to ensure that a defendant knows "whether the law permits or requires consecutive sentences" **in the case at hand**, it might be best to add such qualifying language.

Unfortunately, at the time of a plea, judges and lawyers often have incomplete information. There are countless times when a judge takes a plea thinking the defendant was not on probation, parole, bond, etc. and that information is simply incorrect. For what it is worth, not clarifying the language could easily result in a small cottage industry of plea withdrawals of defendants who face consecutive sentences related to other cases without the knowledge of the lawyers or judge at the time of the plea.

Thank you in advance for your thoughtful consideration of this matter.

Very truly yours,

Michael Warren
Oakland County Circuit Court

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2020. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

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

[NEW] M Crim JI 5.15 Interpreter

This court seeks a fair trial for everyone, regardless of the language they speak or how well it is spoken. An interpreter will be assisting the court during these proceedings. Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter, too. Therefore, you may not give greater or lesser weight to a person's interpreted testimony based on your conclusions, if any, regarding the extent to which that person speaks English.

The interpreter is not associated with any party, and [his / her] only function is to provide unbiased assistance in helping [the defendant / a witness] to communicate effectively in court during the trial and to understand the proceedings.

[The interpreter will not be asked questions or give answers, but will only interpret them. (He / she) may speak in the first person using words such as "I," "me," or "mine," but that is only to ensure that the court record accurately reflects what was said by (the defendant / a witness).]*

Do not allow the fact that the court is using an interpreter to help [the defendant / a witness] to influence how you decide the facts or the case in any way.

[Some of you may know the non-English language being used. If you have a question as to the accuracy of the English translation of a witness's testimony, you may bring this matter to my attention by raising your hand. You should not ask your

question or make any comment about the translation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains in your mind, I emphasize that you must rely only upon the official English translation as provided by the official court interpreter and disregard any other contrary interpretation.]*

Use Note

*These paragraphs are only necessary if the interpreter is used for a witness (including the defendant).

Public Policy Position
M Crim JI 5.15

Support with Amendments

Explanation
The committee voted to support proposed M Crim JI 5.15 as drafted with two amendments as presented below:

(1) The first proposed amendment is to the fourth paragraph as follows:

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

(2) The second proposed amendment is to the last sentence of the fifth paragraph:

> If, however, after such efforts a discrepancy remains in your mind, ~~I emphasize that~~ you ~~must~~ **should** rely only upon the ~~official~~ English translation as provided by the ~~official~~ court interpreter ~~and disregard any other contrary interpretation~~.

The committee recommends these two amendments for the following reasons:

- The committee agreed that the instructions needed additional language to guard against implicit bias when an interpreter is used. The language addition in paragraph 4 would help ensure that juries do not discriminate against witnesses who speak a foreign language.

- The committee agreed that the instructions should ensure that the interpreter's translation is not given too heavy of a weight in cases where there is a juror who understands the foreign language.

- The committee agreed that the language in the fifth paragraph of the proposed instruction is too heavy-handed in so far as it mandates that jurors rely upon an official translation; furthermore, it does not grant jurors the discretion to evaluate discrepancies in the translation.

- The committee sought to counter the M Crim JI 5.15's implication that a translator's work is made "official" by the court.

Position Vote:
Voted for position: 25
Voted against position: 0
Abstained from vote: 1
Did not vote (due to absence): 2

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

Public Policy Position
M Crim JI 5.15

Support

Explanation
The committee voted unanimously to support the model criminal jury instructions regarding foreign language interpreters as drafted.

The committee questioned whether this rule would also cover a sign-language interpretation, and suggests that drafters should consider clarifying the rule to so include.

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

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

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2020. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes amending the Domestic Assault instruction, M Crim JI 17.2a, to add the offense of Aggravated Domestic Assault for which there was no instruction previously.

[AMENDED] M Crim JI 17.2a Domestic Assault / Aggravated Domestic Assault

(1) [The defendant is charged with / you may also consider the less serious crime of[1]] [domestic assault / aggravated domestic assault[1]]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [assaulted / assaulted and battered][~~1~~2] [*name complainant*].

A battery is the forceful, violent, or offensive touching of a person or something closely connected with him or her.[~~2~~3]

The touching must have been intended by the defendant, that is, not accidental, and it must have been against [*name complainant*]'s will.

An assault is an attempt to commit a battery or an act that would cause a reasonable person to fear or apprehend an immediate battery. The defendant must have intended either to commit a battery or to make [*name complainant*] reasonably fear an immediate battery.[~~3~~4] [An

assault cannot happen by accident.] At the time of an assault, the defendant must have had the ability to commit a battery, or must have appeared to have the ability, or must have thought [he / she] had the ability.

(3) Second, that at the time [*name complainant*]: [*Select one or more of the following:*]

(a) was the defendant's spouse

(b) was the defendant's former spouse

(c) had a child in common with the defendant

(d) was a resident or former resident of the same household as the defendant

(e) was a person with whom the defendant had or previously had a dating relationship. A "dating relationship" means frequent, intimate association primarily characterized by the expectation of affectional involvement. It does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context.

[(4) Third, that the assault caused a serious or aggravated injury. A serious or aggravated injury is a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body.[1]]

Use Note

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

2. Use either or both as warranted by the evidence.

3. If the victim's consent or nature of the touching is at issue, use of M Crim JI 17.14, Definition of Force and Violence, or M Crim JI 17.15, Definition of Touching, is recommended.

4. All assaults are specific intent crimes. *People v Joeseype Johnson*, 407 Mich 196, 284 NW2d 718 (1979).

Public Policy Position
M Crim JI 17.2a

Support with Amendments

Explanation

The committee voted unanimously to support the model criminal jury instructions with two amendments to footnote inclusion as described below:

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

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

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

Position Vote:

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

Contact Persons:

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

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2020. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes amending the Animal Fighting instruction, M Crim JI 33.1a, by adding language to comport with an amendment to the applicable statute, MCL 750.49(2)(e).

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

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

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

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

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

(4) First, that the defendant permitted the use of [a building / a shed / a room / a yard / grounds / premises] that belonged to [him / her] or that

was under [his / her] control for the purpose of using [a / an] [*identify kind of animal*] [for fighting / for baiting / as a target to be shot at as a test of skill in marksmanship].

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

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

Public Policy Position
M Crim JI 33.1a

Support

Explanation
The committee voted unanimously to support the proposed model criminal jury instructions 33.1a as drafted.

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

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

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposals by January 1, 2021. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes new instructions, M Crim JI 39.7 and 39.7a, for the crimes found in MCL 750.411a(2) of falsely reporting an offense involving explosives and of falsely reporting an offense involving of harmful substances or poisons, respectively.

[NEW] M Crim JI 39.7 False Report of Explosive Offenses

(1) The defendant is charged with making a false report that a crime involving explosives had occurred. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [communicated / caused (another person / *identify person who made report*) to communicate] with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, [the defendant / the other person / *identify person who made report*)] reported that [dynamite, nitroglycerine, fulminate in bulk in dry condition, or any other explosive substance that explodes by concussion or friction had been ordered, sent, taken, transported, conveyed, or carried concealed as freight or baggage, on a passenger boat, railroad car, motor vehicle, or other vehicle used to carry passengers or articles of commerce[1] / a person sent, took, or carried, or attempted to order, send, take, or carry dynamite, nitroglycerine or any other explosive substance that explodes by concussion or

friction, concealed in any manner, either as freight or baggage, on a passenger boat, railroad car, motor vehicle, or other vehicle used to carry passengers[2] / an explosive substance or any other dangerous thing had been sent with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[3] / a person constructed a device that appeared to be a bomb or an explosive or incendiary device[4] / an explosive material was handled or being handled by an intoxicated person[5] / an explosive substance had been placed in or near any real or personal property with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[6] / a person possessed an explosive substance or device in a public place with intent to frighten or intimidate[7] / a person carried or possessed an explosive or combustible substance with intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property, without the permission of the property owner or governmental agent, if it is public property[8] / a person manufactured, bought, sold, furnished, or possessed a Molotov cocktail or any similar device with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[9] / a person manufactured, bought, sold, furnished, or possessed a device designed to explode or that would explode upon impact or with the application of heat or a flame or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[10] / a person manufactured, sold, kept, or offered for sale any unbranded or unmarked or falsely branded or falsely marked high explosive[11] / a death resulted from placing gun powder or any other explosive substance in, on, under, against, or near a building[12]].

(4) Third, that the report was false.

(5) Fourth, that when the defendant [made the report / caused the report to be made], [he / she] knew it was false.

Use Note

1. MCL 750.201
2. MCL 750.327
3. MCL 750.204
4. MCL 750.204a
5. MCL 750.204c
6. MCL 750.207

7. MCL 750.209a
8. MCL 750.210
9. MCL 750.211a(1)(a)
10. MCL 750.211a(1)(b)
11. MCL 750.212
12. MCL 750.328

[NEW] M Crim JI 39.7a False Report of Poisoning or Harmful Substances Offenses

(1) The defendant is charged with making a false report [of poisoning / concerning harmful substances]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [communicated / caused (another person / *identify person who made report*) to communicate] with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, [the defendant / the other person / *identify person who made report*)] reported that [a person manufactured, delivered, possessed, transported, placed, used, or released (a harmful biological substance or a harmful biological device / a harmful chemical substance or a harmful chemical device / a harmful radioactive material or a harmful radioactive device / a harmful electronic or electromagnetic device)[1] / a person manufactured, delivered, possessed, transported, placed, used, or released (a chemical irritant or a chemical irritant device / a smoke device / an imitation harmful substance or device)[2] / a person made another individual believe that (he / she) had been exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, or harmful electronic or electromagnetic device[3] / a person placed an offensive or injurious substance or compound[*] in or near to any real or personal property intending to wrongfully injure or coerce another person, or to injure the property or business of another person, or to interfere with another person's use, management, conduct, or control of his or her business or property[4] / a person (placed pins, needles, razor blades, glass, or other harmful objects in any food with intent to harm the consumer of the food / placed a harmful substance in any food with intent to harm the consumer of the food / knowingly furnished food containing a harmful object or substance to another person)[5] / a person willfully (mingled a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product / placed a poison or harmful substance in a spring, well, reservoir, or public water supply), knowing or having reason to know that it may be consumed or used by a person and result in injury[6] / a person had dishonestly told another individual that a poison or harmful substance had been or would be placed in a food, drink, nonprescription medicine, pharmaceutical product, spring, well, reservoir, or public water supply, knowing that the information was false and that it would likely be disseminated to the public[7]].

[Provide definitions by selecting from paragraphs (a) through (i):] [8]

(a) A "harmful biological device" means a device designed or intended to release a harmful biological substance.

(b) A "harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.

(c) A "harmful chemical device" means a device that is designed or intended to release a harmful chemical substance.

(d) A "harmful chemical substance" means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.

(e) A "harmful radioactive material" means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.

(f) A "harmful electronic or electromagnetic device" means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.

(g) "Harmful radioactive device" means a device that is designed or intended to release a harmful radioactive material.

(h) A "chemical irritant" means a solid, liquid, or gas that, through its chemical or physical properties, alone or in combination with one or more other substances, can be used to produce an irritant effect in humans, animals, or plants.

(i) A "chemical irritant device" means a device designed or intended to release a chemical irritant.

(4) Third, that the report was false.

(5) Fourth, that when the defendant [made the report / caused the report to be made], [he / she] knew it was false.

Use Note
1. MCL 750.200i
2. MCL 750.200j
3. MCL 750.200*l*
4. MCL 750.209
5. MCL 750.397a
6. MCL 750.436(1)(a)
7. MCL 750.436(1)(b)
8. MCL 750.200h

* There is no statutory definition for an offensive or injurious substance or compound.

Public Policy Position
M Crim JI 39.7 and 39.7a

Support

Explanation
The Committee voted unanimously to support Model Criminal Jury Instruction 39.7 and 39.7a. The committee supports the changes because they improve the model jury instruction's organization by grouping together a range of crimes that could be the subject of false reports.

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

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

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposals by January 1, 2021. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes new instructions, M Crim JI 39.8 and 39.8a, for the crimes found in MCL 750.411a(2)(b): threatening to commit an offense involving explosives (M Crim JI 39.8), or threatening to commit an offense involving of harmful substances or poisons (M Crim JI 39.8a).

[NEW] M Crim JI 39.8 Threat to Commit an Offense Involving Explosives

(1) The defendant is charged with making a threat to commit a crime involving explosives. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [communicated / caused (another person / *identify person who made report*) to communicate] with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, [the defendant / the other person / *identify person who made report*)] threatened to [order, send, take, transport, convey, or carry concealed as freight or baggage dynamite, nitroglycerine, fulminate in bulk in dry condition, or any other explosive substance that explodes by concussion or friction on a passenger boat, railroad car, motor vehicle, or other vehicle used to carry passengers or articles of commerce[1] / send, take or carry, or attempt to order, send, take or carry dynamite,

nitroglycerine or any other explosive substance that explodes by concussion or friction, concealed in any manner, either as freight or baggage, on a passenger boat, railroad car, motor vehicle, or other vehicle used to carry passengers [2] / send an explosive substance or any other dangerous thing with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[3] / construct a device that appeared to be a bomb or an explosive or incendiary device[4] / to handle an explosive material while intoxicated[5] / place an explosive substance in or near any real or personal property with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[6] / possess an explosive substance or device in a public place with intent to frighten or intimidate[7] / carry or possess an explosive or combustible substance with intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property[8] / manufacture, buy, sell, furnish, or possess a Molotov cocktail or any similar device with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[9] / manufacture, buy, sell, furnish, or possess a device designed to explode or that would explode upon impact or with the application of heat or a flame, or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property[10] / manufacture, sell, keep, or offer for sale any unbranded or unmarked or falsely branded or marked high explosive[11] / kill a person by placing gun powder or any other explosive substance on, under, against, in, or near a building[12]].

Use Note

1. MCL 750.201
2. MCL 750.327
3. MCL 750.204
4. MCL 750.204a
5. MCL 750.204c
6. MCL 750.207
7. MCL 750.209a
8. MCL 750.210
9. MCL 750.211a(1)(a)

10. MCL 750.211a(1)(b)
11. MCL 750.212
12. MCL 750.328

[NEW] M Crim JI 39.8a Threatening to Poison or Commit a Harmful Substance Offense

(1) The defendant is charged with threatening to commit a crime involving poison or harmful substances. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [communicated / caused (another person / *identify person who made report*) to communicate] with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, [the defendant / the other person / *identify person who made report*)] threatened to [manufacture, deliver, possess, transport, place, use, or release (a harmful biological substance or a harmful biological device / a harmful chemical substance or a harmful chemical device / a harmful radioactive material or a harmful radioactive device / a harmful electronic or electromagnetic device)[1] / manufacture, deliver, possess, transport, place, use, or release (a chemical irritant or a chemical irritant device / a smoke device / an imitation harmful substance or device)[2] / cause another individual to believe that (he / she) had been exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, or harmful electronic or electromagnetic device when it was untrue that the individual had been exposed to such a substance or device[3] / place an offensive or injurious substance or compound[*] in or near to any real or personal property intending to wrongfully injure or coerce another person, or to injure the property or business of another person, or to interfere with another person's use, management, conduct, or control of his or her business or property[4] / (place pins, needles, razor blades, glass, or other harmful objects in any food with intent to harm the consumer of the food / place a harmful substance in any food with intent to harm the consumer of the food / knowingly furnish food containing a harmful object or substance to another person)[5] / (mingle a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product / place a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that it may be consumed or used by a person and result in injury)[6] / dishonestly tell another individual that a poison or harmful substance had been or would be placed in a food, drink, nonprescription medicine, pharmaceutical product, spring, well, reservoir, or public water supply,

knowing that the information was false and that it would likely be disseminated to the public[7]].

[*Provide a definition by selecting from paragraphs (a) through (i)*:][8]

(a) A "harmful biological device" means a device designed or intended to release a harmful biological substance.

(b) A "harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.

(c) A "harmful chemical device" means a device that is designed or intended to release a harmful chemical substance.

(d) A "harmful chemical substance" means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.

(e) A "harmful radioactive material" means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.

(f) A "harmful electronic or electromagnetic device" means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.

(g) "Harmful radioactive device" means a device that is designed or intended to release a harmful radioactive material.

(h) A "chemical irritant" means a solid, liquid, or gas that, through its chemical or physical properties, alone or in combination with one or more other substances, can be used to produce an irritant effect in humans, animals, or plants.

(i) A “chemical irritant device” means a device designed or intended to release a chemical irritant.

Use Note

1. MCL 750.200i
2. MCL 750.200j
3. MCL 750.200*l*
4. MCL 750.209
5. MCL 750.397a
6. MCL 750.436(1)(a)
7. MCL 750.436(1)(b)
8. MCL 750.200h

* There is no statutory definition for an offensive or injurious substance or compound.

Public Policy Position
M Crim JI 39.8 and 39.8a

Oppose as Drafted

Explanation
The committee voted to oppose the model criminal jury instructions as drafted because the model rules did not include (a) constitutionally derived true threat language, and (b) a proviso that a defendant need not follow through on a threat.

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

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

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposals by December 1, 2020. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes new instructions, M Crim JI 40.1, 40.2 and 40.3, for disturbing-the-peace person offenses found in MCL 750.170 (disturbance of lawful meetings), MCL 750.169 (disturbing religious meetings), and MCL 750.167d (disturbing funerals), respectively.

[NEW] M Crim JI 40.1 Disturbing the Peace

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

(2) First, that the defendant was [in a (tavern / grocery / store / business place / manufacturing establishment / street, lane, alley, or highway / public building) / at (a park / an election / a public meeting where people were lawfully assembled)].

(3) Second, that the defendant intentionally engaged in conduct that threatened public safety, threatened violence to other persons, disrupted the peace and quiet of other persons present, or interfered with the ability of other persons to perform legal actions or duties.[1] The defendant must have intentionally engaged in conduct that went beyond stating [his / her] position or opinion or expression of ideas.[2]

Use Note

1. *People v Mash*, 45 Mich App 459 (1973); *People v Weinberg*, 6 Mich App 345 (1967).
2. *People v Vandenberg*, 307 Mich App 57 (2014).

[NEW] M Crim JI 40.2 Disturbing Religious Meetings

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

(2) First, that a religious meeting was held or was going to be held on private property at [*describe location*].

(3) Second, that the defendant knew that people were meeting or were going to meet to pursue the exercise of religion at that location.

[*Select appropriate alternative(s)*:]

(4) Third, that the defendant entered or attempted to enter the property with the intent to disrupt the meeting.

(5) Third, that the defendant remained or attempted to remain on the property after being instructed to leave with the intent to disrupt the meeting.

(6) Third, that the defendant obstructed or attempted to obstruct the entrance to or exit from the property with the intent to prevent or disrupt the meeting.

[NEW] M Crim JI 40.3 Disturbing Others at a Funeral

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

(2) First, that [a funeral, memorial service, or viewing of a deceased person / a funeral procession or burial] was taking place [in / at] [*describe location*].

(3) Second, that the defendant was within 500 feet of that [building / location].

[*Select appropriate alternative(s)*:]

(4) Third, that the defendant intentionally made a statement or gesture, or engaged in conduct that would make a reasonable person attending that funeral, memorial service or viewing, procession, or burial feel intimidated, threatened or harassed.

(5) Third, that the defendant made a statement or gesture or engaged in conduct intending to incite or result in a breach of the peace, and that [his / her] statement, gesture, or conduct caused a breach of the peace among those attending the funeral, memorial service or viewing, procession, or burial.

> The peace is breached when public safety is threatened, when violence is threatened, when the peace and quiet of other persons present is disrupted, or when there is interference with the ability of other persons to perform legal actions or duties.

(6) Third, that the defendant made a statement or gesture, or engaged in conduct intending to disrupt that funeral, memorial service or viewing, procession, or burial and did disrupt that funeral, memorial service or viewing, procession, or burial.

Public Policy Position
M Crim JI 40.1, 40.2, and 40.3

Support

Explanation

The committee voted unanimously to support the proposed model criminal jury instructions regarding disturbing-the-peace offenses. The committee supports the proposed model instructions because they mirror statutory language and utilize a common law definition of what is "disturbing."

Position Vote:

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

Contact Persons:

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