**Agenda**
**Public Policy Committee**
**April 12, 2019 – 8:00 am**
**State Bar of Michigan, Room 2**

*For those joining by phone, the conference call number is 1.877.352.9775, passcode 6516204165#.*

*Public Policy Committee*……*Dennis M. Barnes, Chairperson*

**A. Reports**

**1.** Approval January 18, 2019 Minutes
**2.** Approval of March 7, 2019 Minutes
**3.** Public Policy Report

**B. Court Rules**

**1. ADM File No. 2002-37: Proposed Amendment of Rule 1.109 of the Michigan Court Rules**

The proposed amendment of Rule 1.109 of the Michigan Court Rules is an expected progression necessary for design and implementation of the statewide electronic-filing system. This particular amendment will assist in implementing the goals of the project.

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| Status: | 05/01/19 Comment Period Expires |
| Referrals: | 03/04/19 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Business Law Section; Consumer Law Section; Criminal Law Section; Elder Law & Disability Rights Section; Family Law Section; Labor & Employment Section; Litigation Section; Negligence Law Section. |
| Comments: | Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. |
| Liaison: | Hon. Cynthia D. Stephens |

**2. ADM File No. 2002-37: Proposed Administrative Order 2019-XX**

To ensure that those individuals required to electronically file court documents have meaningful access to Michigan courts, the Michigan Supreme Court adopts this order requiring courts that seek permission to mandate that all litigants e-File to first submit an e-Filing Access Plan for approval by the State Court Administrative Office.

Each plan must conform to the model promulgated by the state court administrator and ensure access to at least one computer workstation per county. The plan shall be submitted to and approved by the State Court Administrative Office as a local administrative order under MCR 8.112. The State Court Administrative Office may revoke approval of an e-Filing Access Plan due to litigant grievances.

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| Status: | 05/01/19 Comment Period Expires |
| Referrals: | 03/04/19 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Business Law Section; Consumer Law Section; Criminal Law Section; Elder Law & Disability Rights Section; Family Law Section; Labor & Employment Section; Litigation Section; Negligence Law Section. |
| Comments: | Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. |
| Liaison: | Hon. Shauna L. Dunnings |

**3. ADM File No. 2016-46: Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application**

The Court is considering whether questions regarding mental health should be included on the personal affidavit that is part of the application for the Michigan Bar Examination, and if so, what form those questions should take.

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| Status: | 05/01/19 Comment Period Expires |
| Referrals: | 02/22/19 Character & Fitness Committee; Lawyers & Judges Assistance Committee; Elder Law & Disability Rights Section. |
| Comments: | Character & Fitness Committee; Lawyers & Judges Assistance Committee. Comments provided to the Supreme Court included in materials. |
| Liaison: | Daniel D. Quick |

**4. ADM File No. 2018-25: Proposed Amendment of Rule 7.312 of the Michigan Court Rules**

The proposed amendment of MCR 7.312 would incorporate into the Supreme Court rules the procedure to be followed for cases being argued on the application. These rules have been previously included in orders granting argument on the application. A proposed new subrule (K) would alert parties to the fact that they should argue the merits of the case even for motions being heard on the application.

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| Status: | 06/01/19 Comment Period Expires |
| Referrals: | 02/15/19 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section. |
| Comments: | Criminal Jurisprudence & Practice Committee. |
| Liaison: | Andrew F. Fink, III |

**C. Legislation**

**1. HB 4296** (Filler) Civil procedure; costs and fees; e-filing fee; extend sunset. Amends sec. 1993 of 1961 PA 236 (MCL 600.1993).

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| Status: | 03/21/19 Referred to the Senate Committee on Judiciary & Public Safety |
| Referrals: | 03/08/19 Civil Procedure & Courts; Criminal Jurisprudence & Practice Committee. |
| Comments: | Criminal Jurisprudence & Practice Committee. Testimony provided to the House Committee on Judiciary included in materials. |
| Liaison: | Joseph J. Baumann |

**2. SB 0076** (LaSata) Courts; other; certain crime victims; exempt from jury duty and provide that certain individuals are not practicing law in violation of the revised judicature act. Amends secs. 916 & 1307a of 1961 PA 236 (MCL 600.916 & 600.1307a).

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| Status: | 01/29/19 Referred to the Senate Committee on Judiciary & Public Safety |
| Referrals: | 02/15/19 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section. |
| Comments: | Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section. |
| Note: | SB 0076 is tie-barred with SB 0070, which creates the address confidentiality program referred. This bill is included. |
| Liaison: | E. Thomas McCarthy, Jr. |

**Minutes**
**Public Policy Committee**
**January 18, 2019 – 8:30 am**

Committee Members: Dennis M. Barnes, Hon. Shauna L. Dunnings, Kim Warren Eddie, Andrew F. Fink, III, E. Thomas McCarthy, Jr., Daniel D. Quick, Victoria A. Radke
Commissioner Guest: Jennifer M. Grieco
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

## A. Reports

1. Approval of November 16, 2018 minutes
**The minutes were unanimously approved.**

2. Approval of December 3, 2018 minutes
**The minutes were approved subject to further research in the final vote. Judge Shauna L. Dunnings abstained.**

3. Public Policy Report
**The Governmental Relations staff offered a written report.**

## B. Court Rules

### 1. ADM File No. 2017-27: Proposed Amendment of MCR 6.425

The proposed amendment of MCR 6.425 would make the rule consistent that requests for counsel must be filed within 42 days, as opposed to simply "made" or "completed and returned." It would also remove the requirement for a sentencing judge to articulate substantial and compelling reasons to deviate from the guidelines range, pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).
The Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and Appellate Practice Section offered recommendations.
**The committee voted unanimously (7) to adopt the Criminal Jurisprudence & Practice Committee position which includes the following amendments: Keep the "filed with the court" language proposed by the court; incorporate the prisoner mailbox rule into this rule; explicitly provide the defendant with the opportunity to file the request at sentencing; and delete the "substantial and compelling" from 6.425(E)(1)(e).**

### 2. ADM File No. 2018-04: Proposed Amendments of MCR 7.212 and 7.312

The proposed amendments of MCR 7.212 and 7.312 would require amicus briefs to indicate certain information regarding the preparation of the brief and disclosure of monetary contributions. The proposal would be similar to Supreme Court Rule 37.6.
The Civil Procedure & Courts Committee recommended support the proposed amendments with minor amendments.
**The committee voted unanimously (7) to take no position on the proposed amendment.**

### 3. Proposed Amendment to MCR 5.117 to Allow Limited Scope Representation in Probate Proceedings

The Probate & Estate Planning Section recommended an amendment to Rule 5.117.

**The committee voted unanimously (7) to support the amendment to Rule 5.117 as proposed by the Probate & Estate Planning Section.**

**C. Other**

**1. Non-Fee Generating Cases – Letter from Legal Services Association of Michigan**

The Consumer Law Section, Family Law Section, Labor & Employment Law Section, Negligence Law Section, and Real Property Law Section offered recommendations on LSAM's request.

**The committee voted unanimously (7) that the issue is *Keller* permissible in approving the availability of legal services to society.**

**The committee voted unanimously (7) to support the categories of "non-fee-generating" cases as expressed in the letter from LSAM dated September 12, 2018.**

**D. Model Criminal Jury Instructions**

**1. M Crim JI 3.11**

The Committee proposes amending Paragraph (6) of M Crim JI 3.11, the Composite Instruction that explains the deliberative process to the jury. The amendment attempts to clarify the instruction, to reduce the court's housekeeping obligations to provide the names of different offenses that a jury may be considering, and to make it easier for judges to read. Deletions are in strike-through, and new language is underlined.

**The Criminal Jurisprudence & Practice Committee recommended supporting the instructions as written. The committee adopted this position.**

**2. M Crim JI 3.29, 3.30, and 3.31**

The Committee proposes amending M Crim JI 3.29, 3.30, and 3.31, the jury verdict forms used for multiple counts with and without insanity defenses and lesser offenses, because the current forms fail to provide a general "not guilty" option for each charged count. See *People v Wade*, 283 Mich App 462 (2009). Deletions are in strike-through, and new language is underlined.

**The Criminal Jurisprudence & Practice Committee and Criminal Law Section recommended supporting the instructions with amendments. The committee adopted these positions.**

**3. M Crim JI 7.25**

The Committee proposes a new instruction, M Crim JI 7.25, for use where a defendant interposes a self-defense claim to a felon-in-possession-of-a-firearm charge as permitted under *People v Dupree*, 486 Mich 693 (2010).

**The Criminal Jurisprudence & Practice Committee recommended supporting the instructions as written. The committee adopted this position.**

**4. M Crim 11.38 and 11.38a**

The Committee proposes amending M Crim JI 11.38 and 11.38a, the instructions for felon-in-possession-of-a-firearm charges to comport with the felony-firearm instruction, M Crim JI 11.34, by requiring that the possession of the firearm be "knowing," and to otherwise clarify the instructions. Deletions are in strike-through, and new language is underlined. (As the Use Notes to the instructions are lengthy and are irrelevant to the amendments, they are not published below and the superscript Use Note numbers in the instructions are not included.)

**The Criminal Jurisprudence & Practice Committee recommended supporting with a minor grammatical amendment. The committee adopted this position.**

**5. M Crim JI 14.2a**

The Committee proposes a new instruction, M Crim JI 14.2a, where perjury is charged under MCL 750.423(2) – false declarations made under penalty of perjury (including in electronic media). The instruction is entirely new.

**The Criminal Jurisprudence & Practice Committee and Criminal Law Section recommended supporting the instructions as written. The committee adopted these positions.**

**6. M Crim JI 15.18**

The Committee proposes amending M Crim JI 15.18 and eliminating 15.19, the instructions for charges involving moving violations causing death or serious impairment of a body function under MCL 257.601d. The amendment follows the decision in *People v Czuprynski*, a published Court of Appeals opinion (No. 336883), finding M Crim JI 15.19 in error for failing to require proof that a moving violation was the cause of the serious impairment of a body function. The proposal combines the elements for both instructions in M Crim JI 15.18. Deletions are in strike-through, and new language is underlined.

**The Criminal Jurisprudence & Practice Committee recommended supporting the instructions as written. The committee adopted this position.**

**7. M Crim JI 20.38c**

The Committee proposes amending M Crim JI 20.38c, the instruction for possessing or accessing child sexually abusive activity, to clarify that it applies when the defendant possesses or accesses child sexually abusive material for viewing it himself or herself. Deletions are in strike-through, and new language is underlined.

**The Criminal Jurisprudence & Practice Committee recommended supporting the instructions with amendments. The committee adopted this position.**

**8. M Crim JI 27.1 and 27.5**

The Committee proposes amending M Crim JI 27.1, the jury instruction for embezzlement charged under MCL 750.174, and M Crim JI 27.5, the jury instruction for embezzlement charged under MCL 750.177 or 750.178 to accommodate statutory changes and clarify the instructions. Deletions are in strike-through, and new language is underlined.

**The Criminal Jurisprudence & Practice Committee recommended supporting the instructions as written. The committee adopted this position.**

**9. M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g**

The Committee proposes new instructions for crimes charged under MCL 750.49, pertaining to using animals for fighting or targets (or providing facilities for doing so or breeding such animals, etc.): M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g. These instructions are entirely new.

**The Criminal Jurisprudence & Practice Committee recommended supporting the instructions as written. The committee adopted this position.**

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February 1, 2019

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

**RE: ADM File No. 2017-27 – Proposed Amendment of Rule 6.425 of the Michigan Court Rules**

Dear Clerk Royster:

At its January 18, 2019 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced rule amendment published for comment. In its review, the Board considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and Appellate Practice Section. The Board voted unanimously to support the rule proposal with additional amendments to section (F).

The Board supports the proposed amendment to MCR 6.425(E), which makes the rule consistent with the Court's decision in *People v Lockridge*, 498 Mich 358 (2015).

For subsection (F), the Board supports changing the language to "filed with the court" in subsections (F)(1)-(3) as proposed in the rule published for comment. The Board, however, also supports adding the language suggested by the State Appellate Defender Office (SADO) to ensure that courts give defendants an opportunity to submit the request for counsel at sentencing (which is the current practice in many courts) and to incorporate the prison mailbox rule into the rule. SBM's proposed amendments are shown below in bold and underline:

> (3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be ~~completed and returned to~~ filed with the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. **The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so.**
>
> **(4) A request for counsel must be deemed filed on the date on which it is received by the court, but if a request is received more than 42 days after sentencing, and if the defendant is incarcerated in a prison or jail, the request must be deemed filed on the date of deposit in the outgoing mail at the prison or jail in which the defendant is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid.**
>
> (5) [Renumbered from (4) but otherwise unchanged.]

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President

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February 1, 2019

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

**RE: Proposed Amendment of Rule 5.117 of the Michigan Court Rules Concerning Limited Scope Representation in Probate Court**

Dear Clerk Royster:

The State Bar of Michigan (SBM) recommends that the Michigan Supreme Court amend Rule 5.117 of the Michigan Court Rules to explicitly allow for limited scope representation (LSR) in probate proceedings and civil actions pending in probate court.

Last year, this Court adopted a set of rule amendments first proposed by SBM to explicitly allow for LSR in civil proceedings. These amendments have allowed people who are unable to afford full representation the opportunity to hire legal counsel to represent them for critical portions of their cases.

Although the amendments were intended to apply to all civil proceedings, including probate, SBM's original proposal did not include the necessary changes to MCR 5.117 to make clear that LSR is available in probate court. To remedy this oversight, Professor Christopher Hastings, a member of the SBM workgroup that developed the original LSR rules, drafted amendments to MCR 5.117 and sought feedback from the Probate & Estate Planning Section as well as from individual members with expertise in probate court. The feedback received was overwhelmingly positive, and SBM was able to incorporate into the following proposed amendments many of the suggestions for improvement. The proposal was presented to the Affordable Legal Services Committee, which voted unanimously to support the proposed amendments. At its January 18, 2019 meeting, the Board of Commissioners unanimously supported the following amendments to MCR 5.117 (changes shown in bold and underline):

RULE 5.117 APPEARANCE BY ATTORNEYS

(A) Representation of Fiduciary. An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.

(B) Appearance.

(1) In General. An attorney may **generally** appear by an act indicating that the attorney represents an interested person in the proceeding. **A limited**

**appearance may be made by an attorney for an interested person in a civil action or a proceeding as provided in MCR 2.117(B)(2)(c), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons.** An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person.

(2) Notice of Appearance. If an appearance is made in a manner not involving the filing of a paper served with the court or if the appearance is made by filing a paper which is not served on the interested persons, the attorney must promptly file a written appearance and serve it on the interested persons whose addresses are known and on the fiduciary. The attorney's address and telephone number must be included in the appearance.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the client.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court-ordered conference or trial **if it is within the scope of the appearance**.

(C) Duration of Appearance by Attorney.

(1) In General. Unless otherwise stated in the appearance or ordered by the court, an attorney's appearance applies only in the court in which it is made or to which the action is transferred and only for the proceeding in which it is filed.

(2) Appearance on Behalf of Fiduciary. An appearance on behalf of a fiduciary applies until the proceedings are completed, the client is discharged, or an order terminating the appearance is entered.

(3) Termination of Appearance on Behalf of a Personal Representative. In unsupervised administration, the probate register may enter an order

terminating an appearance on behalf of a personal representative if the personal representative consents in writing to the termination.

(4) Other Appearance. An appearance on behalf of a client other than a fiduciary applies until a final order is entered disposing of all claims by or against the client, or an order terminating the appearance is entered.

**(5) Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons.**

(~~5~~6) Substitution of Attorneys. In the case of a substitution of attorneys, the court in a supervised administration or the probate register in an unsupervised administration may enter an order permitting the substitution without prior notice to the interested persons or fiduciary. If the order is entered, the substituted attorney must give notice of the substitution to all interested persons and the fiduciary.

(D) Right to Determination of Compensation. An attorney whose services are terminated retains the right to have compensation determined before the proceeding is closed.

Thank you for your consideration. We hope that the Court will publish the proposed change for comment and ultimately approve it as an amendment to the Michigan Court Rules.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer Grieco, President

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February 1, 2019

Ms. Ann Routt, Co-Chair
Legal Services Association of Michigan
420 North 4th Avenue
Ann Arbor, MI 48104

**RE: Response to Legal Services Association of Michigan List of Non-Fee-Generating Cases**

Dear Ms. Routt:

I write in response to the letter dated September 12, 2018 from the Legal Services Association of Michigan (LSAM), requesting that the State Bar of Michigan (SBM) approve an updated list of non-fee-generating cases that private attorneys do not normally accept. This list was last updated in 2010.

To assist the SBM Board of Commissioners (Board) with its review, SBM sought feedback from its relevant sections, and received feedback from the Consumer Law, Family Law, Labor & Employment, Negligence, and Real Property Sections.

At its January 18, 2019 meeting, the Board considered the list of non-fee-generating cases set forth in LSAM's letter, along with the recommendations from the sections and a response letter from LSAM dated January 16, 2019. After this review, the Board voted unanimously to approve the list as proposed by LSAM in its September 12, 2018 letter.

We recognize the vital representation that legal aid providers give to some of our most vulnerable citizens. It is our hope that this list of non-fee-generating cases will allow legal aid providers to more efficiently represent clients – rather than spending time making fruitless referrals – thereby increasing the availability of legal services to society.

Sincerely,

Janet K. Welch
Executive Director

cc: Jennifer Grieco, President

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February 20, 2019

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

**RE: Board of Commissioners Positions on Model Criminal Jury Instructions**

**M Crim JI 3.11**
**M Crim JI 3.29, 3.30, and 3.31**
**M Crim JI 7.25**
**M Crim 11.38 and 11.38a**
**M Crim JI 14.2a**
**M Crim JI 15.18**
**M Crim JI 20.38c**
**M Crim JI 27.1 and 27.5**
**M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g**

Dear Mr. Smith:

At its last meeting, the Board of Commissioners of the State Bar of Michigan considered the above-referenced model criminal jury instructions published for comment. In its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee and Criminal Law Section.

The Board voted to adopt the positions recommended by the Criminal Jurisprudence & Practice Committee and Criminal Law Section.

As such, the Board supports the following proposed instructions as written:

- M Crim JI 3.11
- M Crim JI 7.25
- M Crim JI 14.2a
- M Crim JI 15.18
- M Crim JI 27.1 and 27.5
- M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g

The Board supports M Crim JI 3.29, 3.30, and 3.31 with two amendments: the addition of "Guilty of the Lesser Offense of:" under 3.30 "Count 1"; and the addition of "Not Guilty" on the verdict form of cases where insanity defenses used.

The Board supports M Crim 11.38 and 11.38a with an amendment inserting "previously" after "had" in 11.38(2) and 11.38a(2) to allow for better clarity in the jury instruction.

The Board supports M Crim JI 20.38c with the following amendment:

> (2) First, that the defendant [possessed child sexually abusive material / intentionally **sought and viewed** ~~looked for~~ child sexually abusive material ~~and intentionally caused~~ ~~to view it, or~~ to cause it to be sent to or seen by another person].

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

Sincerely,

Janet K. Welch
Executive Director

cc: Jennifer M. Grieco, President

**State Bar of Michigan**
**Board of Commissioners**
**Minutes**
**March 2019**
**Teleconference Only**

Committee Members: Dennis M. Barnes, Joseph J. Baumann, Kim Warren Eddie, Andrew F. Fink, III, E. Thomas McCarthy, Jr., Daniel D. Quick, Victoria A. Radke, Hon. Cynthia D. Stephens
GCSI Staff: Marcia Hune
SBM Staff: Peter Cunningham, Kathryn Hennessey, Carrie Sharlow

**A. Court Rules**

**1. ADM File No. 2017-28 - Proposed Amendments of MCR 1.109, MCR 8.119, and Administrative Order 1999-41**

The proposed amendments would make certain personal identifying information nonpublic and clarify the process regarding redaction.

The following entities offered comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Family Law Section; and Probate & Estate Planning Section.

**The committee voted unanimously (7) to support the Court's efforts to address this issue, but oppose the current amendment as drafted, and provide to the Court all the comments received from sections and committees for the Court to take into consideration in revising the rules; given the number of concerns raised, the committee recommends that the Court publish the revised version of the rules for comment before adopting them.**

**2. ADM File No. 2018-06: Proposed Amendments of MCR 1.111 and 8.127**

These two proposals, which would promote greater confidence that a qualified foreign language interpreter is proficient in the language and would reduce the possibility that renewals are delayed, were recommended to the Court by the Foreign Language Board of Review.

The following entities offered comments: Access to Justice Policy Committee and Civil Procedure & Courts Committee.

**The committee voted unanimously (8) to support the proposed amendments.**

**3. ADM File No. 2018-13 - Proposed New Rule 3.22X**

This proposal was developed by a workgroup facilitated by SCAO's Friend of the Court division to make more uniform the ADR processes used by Friend of the Court offices.

The following entities offered comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; and Family Law Section.

**The committee voted unanimously (8) to support in principle the adoption of new rule 3.22X but oppose the amendments as drafted in view of the following concerns**:

**(1) Attorneys should have the ability to be present at and participate in any meeting where an order is generated.**
**(2) There are sufficient domestic violence screening, training, and protocols contained in this rule and this will need to be addressed.**
**(3) The confidentiality provisions in this rule need to be consistent with the confidentiality mandates already in existence.**

**(4) The language regarding an automatic order being generated should be stricken from the rule.**

**(5) (D)(1) should be amended as follows:**

**(D)(1) Parties who are, or have been, subject to a personal protection order or other protective order or who are involved in a ~~past or~~ present child abuse and neglect proceeding may not be referred to friend of the court ADR without a hearing to determine whether friend of the court ADR is appropriate. The court may order ADR if a protected party requests it without holding a hearing.**

**(6) The rule should clarify whether (D)(1) is intended to include:**

**A. all persons who have been subject to any protective order**

**B. Persons who have been subject to any protective order involving each other**

**C. Persons who have been subject to a protective order concerning domestic abuse Or abuse or neglect of any child**

**4. ADM File No. 2017-17: Proposed Amendments of MCR 6.001, 6.006, 6.425, 6.427, 6.610, 7.202, and 7.208 and Proposed New MCR 6.430**

The proposed amendments would more explicitly require restitution to be ordered at the time of sentencing as required by statute, and would establish a procedure for modifying restitution amounts. This published version was based on an original submission from the State Appellate Defenders Office, but includes additional revisions and alternative language as well.

The following entities offered comments: Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee.

**The committee voted unanimously (8) to support the rule proposal with the following amendments:**

**(1) To address the issue raised by CJAP of restitution not being known at the time of sentencing, support the Michigan District Judge's proposed rule language for MCR 6.427(11) and 6.425(E).**

**(2) Support the Court of Appeals' recommendations that appeals of orders amending restitution be by leave, rather than by right, and remove reference of trial court's authority over motions to amend restitution, as it is unnecessary for the reasons stated by the Court of Appeals.**

**5. ADM File No. 2018-23: Proposed Amendment of MCR 6.001**

The proposed amendment of MCR 6.001 would allow for discovery in criminal cases heard in district court to the same extent that it is available for criminal cases heard in circuit court. The proposal was submitted by the Michigan District Judges Association. The MDJA noted that although many prosecutors provide discovery, there is no rule mandating it. The MDJA also noted that if the general discovery rule (MCR 6.201) is made applicable to district court criminal cases, subsection (I) could be used to limit its application where full-blown discovery may not be appropriate.

The following entities offered comments: Criminal Jurisprudence & Practice Committee and Criminal Law Section.

**The committee voted unanimously to support the rule proposal in principle, but encourage the court to revise the rule in light of the numerous thoughtful concerns that have been raised in the comments submitted to the Court and note that implementation of electronic discovery may lessen the impact of requiring discovery in misdemeanor cases.**

SBM STATE BAR OF MICHIGAN

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March 26, 2019

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

**RE: ADM File No. 2017-28 - Proposed Amendments of Rules 1.109 and 8.119 of the Michigan Court Rules and Administrative Order 1999-41**

Dear Clerk Royster:

At its March 8, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule and administrative order amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee, Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, Family Law Section, and Probate & Estate Planning Section.

After this review, the Board voted unanimously to support the Court's efforts to protect personal identifying information. The Board opposes the rules in their current form, however, based on concerns raised by State Bar sections and committees in their recommendations to the Board. To assist the Court in improving the proposed rule, enclosed please find our committees' and sections' recommendations. Given the importance of this rule, the Board would appreciate an opportunity to comment on the revised version of the rule before it is adopted.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, State Bar of Michigan

# Public Policy Position
# ADM 2017-28

The Access to Justice Policy Committee is comprised of 26 members appointed by the president of the State Bar of Michigan. The Access to Justice Policy Committee is not the State Bar of Michigan and the position expressed herein is that of the Committee only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's efforts to protect personal identifying information, but oppose the rules in their current form.

The Access to Justice Policy Committee has a public policy decision-making body with 23 members. On January 15, 2019, the Committee adopted its position after a discussion and vote at a scheduled meeting. 18 members voted in favor of the Committee's position on ADM File No. 2017-28, 1 member voted against this position, 1 member abstained, 8 members did not vote.

## Support

**Explanation**

The committee supports in concept the proposed rule changes that put in place practices and procedures to protect litigants' personal identifying information.

**Position Vote:**

Voted For position: 13
Voted against position: 1
Abstained from vote: 1
Did not vote (absent): 8

**Contact Persons:**

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

# Public Policy Position
# ADM File No. 2017-28

The Civil Procedure & Courts Committee is comprised of 29 members appointed by the president of the State Bar of Michigan. The Civil Procedure & Courts Committee is not the State Bar of Michigan and the position expressed herein is that of the Committee only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's efforts to protect personal identifying information, but oppose the rules in their current form.

The Civil Procedure & Courts Committee has a public policy decision-making body with 27 members. On February 28, 2019, the Committee adopted its position after an electronic discussion and vote. 15 members voted in favor of the Committee's position on ADM File No. 2017-28, 4 members voted against this position, 0 members abstained, 8 members did not vote.

## OPPOSE WITH AMENDMENTS

**Explanation**

ADM 2017-28 is a proposed amendment to MCRs 1.109 and 8.119 intended to protect "protected personal identifying information" (PPII) from being accessible in public court files. While the aim of the recommendation is laudatory, the specific suggested changes raise enough questions and impose enough burdens to make the proposal in its current form unsupportable.

**The committee opposes the current proposal with the following suggestions:**

**a. 1.109(D)(9)(b)**

There may be situations where it is wise to restrict some parties' access to PPII, for instance when domestic violence may be alleged. As a result, the rule should allow courts to restrict access to PPII in appropriate situations by including language like the following:

> A court may restrict the access of any party, person, or other legally defined interested person, to protected personal identifying information upon a finding of just cause.

**b. 1.109(D)(9)(c)(d)**

These sections refer to PPII required by law or court rule and the confidential reference list such would be listed on. What does not seem to be covered are instances of PPII that are not required by law or court rule but which are still helpful (e.g., telephone numbers are often exceedingly helpful in contacting parties, especially if any investigation is required, which is likely why they have been required to be included in case captions since the Court Rules were amended in 1985). Should such

helpful information, which would otherwise count as PPII, be required and not be counted as PPII? Should courts be allowed to collect such useful information, even if not required by law or court rule, but keep it confidentially? These and perhaps other options seem to fulfill a reasonable need.

**c. 1.109(D)(9)(f)(iii)**

One might question whether the power to sanction conduct as contempt in the court rule is covered by the authorization in statute at MCL 600.1701. Beyond that, one might question the severity of contempt as a sanction.

**d. 1.109(D)(10)(b)**

For any document of any size filed after January 1, 2021, and for which a copy request is received, for a court to be forced review the entire document and redact all PPII is an unworkable burden. It would be preferable to remove (b) altogether and, as 1.109(D)(9)(f) suggests, affix the onus and liability on the party filing documents with PPII.

**e. 8.119(H)**

The new rule would seem to require any court maintaining a record digitally that can be accessed by a website to have all PPII redacted. [Unrestricted access to court records online probably does not exist in any state court in Michigan right now, but considering that it is available in the Federal Pacer system, such access may be a reality in the near future.] If such access were to become a reality, then for all records so accessed courts would likely need to examine all previously scanned images to determine whether they need to be redacted or redact all PPII prior to imaging the records.

**Position Vote:**
Voted For position: 15
Voted against position: 4
Abstained from vote: 0
Did not vote: 8

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

# Public Policy Position
# ADM File No. 2017-28

The Criminal Jurisprudence & Practice Committee is comprised of 19 members appointed by the president of the State Bar of Michigan. The Criminal Jurisprudence & Practice Committee is not the State Bar of Michigan and the position expressed herein is that of the Committee only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's efforts to protect personal identifying information, but oppose the rules in their current form.

The Criminal Jurisprudence & Practice Committee has a public policy decision-making body with 17 members. On January 25, 2019, the Committee adopted its position after a discussion and vote at a scheduled meeting. 11 members voted in favor of the Committee's position on ADM File No. 2017-28, 0 members voted against this position, 0 members abstained, 6 members did not vote.

**Oppose**

**Explanation**
The committee voted unanimously (11) to oppose the administrative order for reasons stated by the Family Law Section.

**Position Vote:**
Voted For position: 11
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

**Contact Persons:**
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

# Public Policy Position
# ADM File No. 2017-28

The Family Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,476 members. The Family Law Section is not the State Bar of Michigan and the position expressed herein is that of the Family Law Section only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's efforts to protect personal identifying information, but oppose the rules in their current form.

The Family Law Section has a public policy decision-making body with 21 members. On January 5, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 19 members voted in favor of the Section's position on ADM File No. 2017-28, 0 members voted against this position, 0 members abstained, 2 members did not vote.

## Oppose

**Explanation:**
The Family Law Council unanimously opposed this amendment to the rules regarding court records and what can and cannot be included in pleadings filed with the court after discussing the following concerns/questions:

a. Do these pleadings include SCAO forms, such as UCSOs, USSOs, etc.? Is the public document redacted and the FOC copy unredacted? How would that work?

b. There seems to be numerous inconsistencies in the rule as written that need to be addressed, i.e., MCR 1.109(D)(10)(a) indicates that the responsibility to redact is not on the clerk; however, MCR 1.109(D)(10)(c)(i) indicates that the clerk will redact on written request. Subrule (d) seems to be inconsistent with subrule (b). Further, MCR 1.109(D)(9)(e) seems to be a huge loophole in that it provides that the party submitting an exhibit at hearing or trial which contains personal identifying information is not obligated to redact it; rather, the person to whom the information pertains may request redaction. There is no distinction between motion hearings and trials or evidentiary hearings where exhibits are returned to parties by the trial court. If the exhibits are subject to appeal, then submission at the appellate level puts the information in the public realm. If the person to whom the information pertains is a witness on a witness list, how would that person even know he or she needs to request redaction?

c. Should the opposing side be served with the redacted version or the unredacted version or both? If both and e-filing is being used, that seems to defeat the purpose, as the unredacted version would

also be part of the e-filing system.

d. With the effective date of 01/01/2021, how does this rule apply to old files? What obligations do attorneys have to reach out to former clients or request redaction in post-judgment matters?

e. There seems to be needed a requirement for clerks' offices to educate self-represented litigants, i.e., notices or instructions for what should or should not be included in documents filed.

There also seemed to be a consensus that including telephone numbers as part of personal identifying information is ridiculous. Witness lists would simply be the names of individuals, which then would dovetail back to subparagraphs (b) and (c) above.

**Contact Person:** Jennifer Johnsen
**Email:** jenjohnsen@westmichigandivorce.com

# Public Policy Position
# ADM File No. 2017-28

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,228members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. The State Bar's position in this matter is to support the Court's efforts to protect personal identifying information, but oppose the rules in their current form.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On February 15, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 18 members voted in favor of the Section's position on ADM File No. 2017-28, 0 members voted against this position, 0 members abstained, 5 members did not vote.

## OPPOSE

**Explanation**
The Section opposes ADM File No. 2017-28 in its current format but recognizes the need for protection of personal identifying information, especially as the court system moves toward universal e-filing.

**Position Vote:**
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

**Contact Person:** David Skidmore
**Email:** dskidmore@wnj.com

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March 12, 2019

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

**RE: ADM File No. 2018-06: Proposed Amendments of Rules 1.111 and 8.127 of the Michigan Court Rules**

Dear Clerk Royster:

At its March 8, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy and Civil Procedure & Courts committees.

After this review, the Board voted unanimously to support the proposed rule amendments, as they would help improve the proficiency of qualified foreign language interpreters.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, State Bar of Michigan

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March 26, 2019

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

**RE: ADM File No. 2018-13 - Proposed New Rule 3.22X of the Michigan Court Rules**

Dear Clerk Royster:

At its March 8, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed new rule published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy and Civil Procedure & Courts committees and the Family Law Section.

After this review, the Board voted unanimously to support in principle expanding the availability of alternative dispute resolution (ADR) processes in Friend of the Court (FOC) proceedings. The Board opposes the rule as drafted, however, based on a number of concerns.

First, the rule should explicitly provide that attorneys may participate in any meeting where an order is generated. While subsection (A)(8) requires FOC ADR plans to "provide that attorneys of record will be allowed to attend all friend of the court ADR processes," in practice, many times attorneys are not welcome at these proceedings. Family law practitioners have reported that some FOC facilitators allow attorneys in the room but instruct them not to talk. Other FOC facilitators do not allow attorneys to be present at all, instructing them to wait in the hallway. This practice is particularly troublesome in conciliation counties where *ex parte* orders for temporary custody, parenting time, and support are generated early in the case, sometimes before the other party is even served with the pleadings. Therefore, the rule should explicitly provide that attorneys may be present and participate in any meeting where an order could be generated.

Second, the rule should require that FOC facilitators use the domestic violence screening protocol and require facilitators to have sufficient training on screening for domestic violence. As proposed, subsections (F)(1)(a), (G)(1)(a), and (H)(1)(a) require the FOC facilitator to conduct a "reasonable inquiry" whether there is a history of domestic violence between the parties. Although the domestic violence screening protocol is one form of reasonable inquiry, the rule allows the facilitator to use other methods as long as they constitute a reasonable inquiry. The rule language is vague and leaves too much discretion to the FOC facilitator with no assurance that the facilitator has received adequate training

to determine, for example, the "inability of one or both parties to negotiate for themselves at ADR" or that a party's "health or safety would be endangered by ADR." Given the subtleties involved with identifying domestic violence and making these types of determinations, the rule should require that FOC facilitators use the SCAO domestic violence screening protocol and require facilitators to receive adequate domestic violence screening training.

Third, as proposed, the rule has different confidentiality provisions for different types of meetings. For example, under subsection (G)(2), communications made during FOC domestic relations mediations are confidential, but under subsections (F)(2)(c) and (H)(2), communications made during information-gathering conferences and joint meetings are not confidential and may be used in court proceedings. To avoid confusion for parties and FOC facilitators, the confidentiality provision should be consistent for all FOC ADR proceedings.

Fourth, the rule should not allow FOC facilitators to generate proposed orders without the consent of both parties. As proposed, ADR facilitators may generate recommended orders following ADR proceedings, including conciliation conferences, and these orders can have major impacts on families and the trajectory of the case. This is particularly troubling because attorney participation has been discouraged at these proceedings, and some of these orders could be generated very early in the proceedings before the parties have had time to fully understand and develop their case. Therefore, the rules should not allow the FOC ADR facilitator to generate proposed orders, unless both parties consent.

Fifth, the language regarding protective orders in subsection (D)(1) should be clarified. As currently drafted, it is unclear whether the rule is intended to include: (a) all persons who have been subject to any protective order; (b) persons who have been subject to any protective order involving each other; or (c) persons who have been subject to a protective order concerning domestic abuse or abuse or neglect of a child.

Finally, subsection (D)(1) should be amended as follows (additions shown in bold underline; deletions shown in bold strikethrough):

> Parties who are**, or have been**, subject to a personal protection order or other protective order or who are involved in a ~~**past or**~~ present child abuse and neglect proceeding may not be referred to friend of the court ADR without a hearing to determine whether friend of the court ADR is appropriate. The court may order ADR if a protected party requests it without holding a hearing.

As proposed, (D)(1) is too narrow because it only applies to situations in which there is currently a protective order and would not apply to situations in which there is a past protective order between the parties. The history of having a protective order is a fairly strong indicator of a history of domestic violence; therefore, the Board recommends that

the rule be expanded to include both present and past protective orders. In addition, (D)(1) is too broad with respect to abuse and neglect proceedings. As currently proposed, the rule would apply to people who had an abuse and neglect proceeding wholly unrelated to domestic violence, making the process more onerous for parents for reasons that are not necessarily related to protecting victims of domestic violence. Therefore, the rule should only apply to present abuse and neglect proceedings.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, State Bar of Michigan

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March 12, 2019

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

**RE: ADM File No. 2017-17 - Proposed Amendments of Rules 6.001, 6.006, 6.425, 6.427, 6.610, 7.202, and 7.208 and Proposed New MCR 6.430 of the Michigan Court Rules**

Dear Clerk Royster:

At its March 8, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy and Criminal Jurisprudence & Practice committees.

After this review, the Board voted to support the proposed rules with the following amendments:

1. To address the issue of restitution not being known at the time of sentencing, the Board supports the rule language proposed by the Michigan District Judges Association for MCR 6.427(11) and 6.425(E).
2. The Board agrees with the Court of Appeals that appeals of orders amending restitution should be by leave, rather than by right.
3. The Board also agrees with the Court of Appeals that the reference to the trial court's authority over motions to amend restitution in MCR 7.208(G) is unnecessary and should be stricken.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, President, State Bar of Michigan

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March 12, 2019

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

**RE: ADM File No. 2018-23: Proposed Amendment of Rule 6.001 of the Michigan Court Rules**

Dear Clerk Royster:

At its March 8, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee, the Criminal Law Section, and the numerous other comments that have been submitted to the Court.

After this review, the Board voted unanimously to support in principle expanding access to discovery in criminal cases pending in district court. The Board, however, encourages the Court to reconsider this proposal in light of the numerous thoughtful comments that have been submitted to the Court by both prosecutors and criminal defense attorneys. While some comments have raised concerns about the increased burden on prosecutors in providing discovery in district court cases, the Board notes that the expanded use of electronic discovery may lessen this burden.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Jennifer M. Grieco, President, State Bar of Michigan

SBM STATE BAR OF MICHIGAN

To: Board of Commissioners

From: Governmental Relations Division Staff

Date: April 4, 2019

Re: Governmental Relations Update

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

**Court Rules**

**ADM File 2016-05: Amendment of MCR 2.513**

The rule amendment requires courts to orally recite preliminary and final jury instructions in addition to providing them in writing. At its November 16, 2018 meeting, the Board of Commissioners voted unanimously to support the rule amendment. After holding a public administrative hearing on March 13, 2019, the Court adopted the amendments as initially published. The rule amendment is effective May 1, 2019.

**ADM File 2016-27: Amendment of Michigan Rule of Professional Conduct 7.2**

This amendment requires a lawyer or law firm that advertises under a phone number, web address, icon, or trade name to identify "at least one lawyer responsible for the content of the advertisement." In April 2016, the State Bar proposed changes to MRPC 7.2. In response, the Court published two alternative amendments; Alternative A was SBM's proposal, and Alternative B was based on the ABA model-rule language. SBM continued to support the RA-approved Alternative A. On May 30, 2018, the Court published an order adopting language from both alternatives.

The rule amendment was supposed to be effective September 1, 2018; however, on September 27, 2018, the Court held the order in abeyance and issued a new order proposing modified language based on the newly-adopted ABA commentary language. The Board voted to support the language the Court previously adopted on May 30, 2018 because the language was clearer and set forth the precise information that lawyers and law firms needed to disclose. On March 27, 2019, the Court adopted the rule language proposed on September 27, adding lawyers and law firms advertising under an icon to the types of advertisements to which this rule applies. In addition, the Court also added a sentence to allow the information to appear on the lawyer's or law firm's home page if not practical on the actual advertisement.

Effective May 1, 2019, MRPC 7.2(d) will read as follows:

> For purposes of media advertising, services of a lawyer or law firm that are advertised under the heading of a phone number, web address, icon, or trade name shall identify the name and contact information of at least one lawyer responsible for the content of the advertisement. The identification shall appear on or in the advertisement itself; or, if that is not practical due to space

limitations, the identification shall be prominently displayed on the home page of the law firm's website and any other website used by the law firm for advertising purposes.

**ADM File 2017-15: Amendment of Canon 7 of the Code of Judicial Conduct**
This amendment to the Code of Judicial Conduct explicitly allows judicial campaign solicitation as permitted by law, eliminates the $100 per lawyer limitation, and removes the disclaimer requirement. The State Bar took no position on this amendment. On March 13, 2019, the Court adopted the amendments as published. The amended Canon is effective May 1, 2019.

**ADM File 2018-07: Amendment of MCR 3.993**
The rule amendment establishes a list of specific orders that can be appealed by right regarding an Indian child subject to a child protective proceeding. The American Indian Law Committee initially proposed this rule amendment to the Representative Assembly at its September 28, 2017 meeting. The RA approved the proposal with only minor modifications with overwhelming support. After publishing the rules for comment, the Michigan Supreme Court held an administrative public hearing, during which Judge Angela Sherigan advocated for the rule amendments on behalf of the Bar. The Court adopted the rules as proposed by the State Bar. The rule amendment is effective May 1, 2019.

**ADM File 2018-21: Adoption of Administrative Order 2019-1**
The administrative order requires courts to establish a standing courthouse security committee. At its November 16, 2018, the Board voted unanimously to support the proposed administrative order. After considering the rule at a public administrative hearing, the Michigan Supreme Court adopted the rule with only non-substantive changes. The administrative order is effective immediately.

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

February 27, 2019

ADM File No. 2002-37

Proposed Amendment of
Rule 1.109 of the Michigan
Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

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

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

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

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

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

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(f) [Unchanged.]

(g) Where electronic filing is mandated, a party may file paper documents with that court and be served with paper documents according to subrule (G)(6)(a)(ii) if the party can demonstrate good cause for an exemption. A party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility, has good cause for an exemption.

(i) A request for an exemption must be filed with the court where the individual's case will be or has been filed. The request must be on a form approved by the State Court Administrative Office and verified under MCR 1.109(D)(3). There is no fee for the request.

(ii) The request must specify the reasons that prevent the individual from filing electronically. The individual may file supporting documents along with the request for the court's consideration.

(iii) A judge must review the request and any supporting documentation and issue an order granting or denying the request within two business days of the date the request was filed.

(iv) The clerk of the court must promptly mail the order to the individual. The clerk must place the request, any supporting documentation, and the order in the case file. If there is no case file, the documents must be maintained in a group file.

(v) An exemption granted under this rule is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system. In that event, the individual waives the exemption and becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption under this rule may file another request for exemption.

(4)-(7) [Unchanged.]

*Staff Comment:* The proposed amendment of Rule 1.109 of the Michigan Court Rules is an expected progression necessary for design and implementation of the statewide electronic-filing system. This particular amendment will assist in implementing the goals of the project.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2019

Clerk

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

**Oppose unless Amended.**

**Explanation:**
The proposed amendment adds a section to the provision governing electronic filing describing when a party may file with paper instead of e-filing. To be exempt from e-filing, a party must demonstrate "good cause." While any party confined by a governmental authority, such as a jail, prison, or medical or mental health facility, is deemed to have demonstrated good cause, the rule does not define other circumstances in which the good cause standard is or is presumed to be met. The rule provides that applicants must file the request on a State Court Administrative Office (SCAO) form, there is no fee for making the request, and the request must be submitted in the court where the case is or will be pending. A judge must review the request and issue an order within 2 business days. The grant of exemption to e-filing is only valid for the specific case in which the request was filed.

The ATJ Policy Committee recommends that SBM oppose the rule amendments, unless key aspects are addressed to help ensure pro se litigants continue to have meaningful access to the courts with the implementation of the statewide e-filing system.

**SCAO Should Implement a More Transparent Process in Developing E-Filing Rules**.

MCR 1.109(D)(7) provides that e-filing is "governed by subrule (G) and the policies and standards of [SCAO]." It is unclear what policies and procedures SCAO is developing and their impact on access to our courts. It is imperative that our courts remain accessible to all with the implementation of e-filing; therefore, the committee recommends that SBM encourage the Court to require SCAO to develop a more transparent process in developing policies and standards affecting e-filing and allow the public an opportunity to provide feedback.

**Good Cause Exemptions Should Be Better Defined.**
The proposed rule fails to adequately define what constitutes good cause to be exempt from e-filing. There are many reasons that pro se litigants may be unable e-file, such as lack of reliable access to electronic device, the internet, or transportation. Therefore, the committee recommends that MCR 1.109(G)(3)(g) be amended as follows:

> Where electronic filing is mandated, a party may file paper documents with that court and be served with paper documents according to subrule (G)(6)(a)(ii) if the party can demonstrate good cause for an exemption.
>
> **(i)** A party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility, has good cause for an exemption.
>
> **(ii)** **A court shall consider the following factors in determining whether a party has demonstrated good cause:**

a. **Lack of reliable access to an electronic device on which party can regularly check email;**
b. **Distance of travel to access a public computer;**
c. **Lack of transportation or other limitations on the ability to travel;**
d. **Safety issues;**
e. **Limited English proficiency;**
f. **Age or disability limitations; and**
g. **Lack of capability to use the e-filing system.**

Clearly defining "good cause" is essential to ensuring that litigants are treated similarly in all courts throughout the state and helping to ensure that our courts remain accessible to all with the implementation of e-filing.

**Filing Deadlines Should Be Stayed Pending Courts Review of E-Filing Exemption Request**
While the rule provides that a judge must issue an order within 2 business days, the rule does not provide that filing deadlines are stayed while the request is pending judicial review. The committee recommends that MCR 1.109 explicitly provide that all filing deadlines are stayed while the court is considering the e-filing exemption request.

**Provision Concerning Waiver of E-Filing Exemption Should be Removed.**
The committee also recommends that the provision providing for a waiver of the e-filing exemption be removed. It is unclear how this waiver would work with limited scope representation. In addition, given that individuals have already demonstrated a good cause reason to be exempted from e-filing, a more affirmative step than accidentally registering with the e-filing system should be required to waiver the exemption. Therefore, the committee recommends that MCR 1.109(G)(3)(g)(v) be amended as follows:

> An exemption granted under this rule is valid only for the court in which it was filed and for the life of the case~~ unless the individual exempted from filing electronically registers with the electronic-filing system. In that event, the individual waives the exemption and becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption under this rule may file another request for exemption~~.

**Position Vote:**
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

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

# Public Policy Position
# ADM File No. 2002-37 – MCR 1.109

**Support with amendments proposed by the Access to Justice Policy Committee**

**Explanation**
The committee voted 12 to 1 to support the following Access to Justice Policy Committee's proposed amendments to the court rule proposal:

**Good Cause Exemptions Should Be Better Defined.**
The proposed rule fails to adequately define what constitutes good cause to be exempt from e-filing. There are many reasons that pro se litigants may be unable e-file, such as lack of reliable access to electronic device, the internet, or transportation. Therefore, the committee recommends that MCR 1.109(G)(3)(g) be amended as follows:

> Where electronic filing is mandated, a party may file paper documents with that court and be served with paper documents according to subrule (G)(6)(a)(ii) if the party can demonstrate good cause for an exemption.
>
> **(i)** A party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility, has good cause for an exemption.
>
> **(ii)** **A court shall consider the following factors in determining whether a party has demonstrated good cause:**
>
> **a.** **Lack of reliable access to an electronic device on which party can regularly check email;**
> **b.** **Distance of travel to access a public computer;**
> **c.** **Lack of transportation or other limitations on the ability to travel;**
> **d.** **Safety issues;**
> **e.** **Limited English proficiency;**
> **f.** **Age or disability limitations; and**
> **g.** **Lack of capability to use the e-filing system.**

Clearly defining "good cause" is essential to ensuring that litigants are treated similarly in all courts throughout the state and helping to ensure that our courts remain accessible to all with the implementation of e-filing.

**Filing Deadlines Should Be Stayed Pending Courts Review of E-Filing Exemption Request**
While the rule provides that a judge must issue an order within 2 business days, the rule does not provide that filing deadlines are stayed while the request is pending judicial review. The committee recommends that MCR 1.109 explicitly provide that all filing deadlines are stayed while the court is considering the e-filing exemption request.

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The committee also recommends that the provision providing for a waiver of the e-filing exemption be removed. It is unclear how this waiver would work with limited scope representation. In addition, given that individuals have already demonstrated a good cause reason to be exempted from e-filing, a more affirmative step than accidentally registering with the e-filing system should be required to waive the exemption. Therefore, the committee recommends that MCR 1.109(G)(3)(g)(v) be amended as follows:

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**Position Vote:**
Voted For position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 3

**Contact Persons:**
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

MICHIGAN COURTS NEWS RELEASE
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FOR IMMEDIATE RELEASE

# Supreme Court Makes Proposals to Help Trial Courts Improve Access

*Seeking public comment on plan to ensure court access for self-represented litigants*

LANSING, MI, February 27, 2019 – With a goal of ensuring access to the courts for self-represented litigants, the Michigan Supreme Court has published for public comment proposed measures to help trial courts implement and mandate e-filing use statewide. If approved, a uniform exemption process would be implemented, and trial courts that seek to mandate e-filing for all filers must submit a plan to the State Court Administrative Office for approval that describes how the court will provide assistance to self-represented litigants.

"Making e-filing mandatory in Michigan trial courts is the best way to ensure that all residents have uniform access to local court services and resources," said Chief Justice Pro Tem David F. Viviano, who oversees the Supreme Court's e-filing process. "At the same time, self-represented litigants who might not have access to a computer must have the ability to file pleadings and receive notices from the court. Our goal is to improve access to all while increasing efficiency and saving money."

The order also would require that there be at least one computer workstation per county for self-represented litigants and that the court conform to the standards set forth by the State Court Administrative Office. Those standards include:

- The court must perform a calculation using a calculator tool to determine how many e-filing workstations it must make available.
- The court must list all workstations (with a preference for onsite locations) that self-represented litigants may use.
- The court must list the manner of assistance to be provided in using the court's equipment.
- The court will include material on how to provide assistance to self-represented litigants in training its staff.
- The court will make its access plan available on its website, and will regularly review and update the plan.
- The court will create a grievance process.

The largest pilot courts (Oakland, Wayne, and Macomb) provide on-site (or close by) assistance in the form of dedicated computers, scanners, and court staff (or with the assistance of local legal assistance staff) to help filers process their filings. Smaller courts can provide assistance on an ad hoc basis.

Public input will be received through a public hearing May so that a final order can be in place by September. The proposed changes to court rules and related Administrative Order are available here. Comments can be sent to: ADMcomment@courts.mi.gov

Visit https://courts.michigan.gov/E-Filing for more information.

–MSC –

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

February 27, 2019

ADM File No. 2002-37

Proposed Administrative Order to Require E-Filing Access Plans

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

AO No. 2019-XX — Trial Court Requirements for Providing Meaningful Access to the Court for Mandated Electronic Filers

To ensure that those individuals required to electronically file court documents have meaningful access to Michigan courts, the Michigan Supreme Court adopts this order requiring courts that seek permission to mandate that all litigants e-File to first submit an e-Filing Access Plan for approval by the State Court Administrative Office.

Each plan must conform to the model promulgated by the state court administrator and ensure access to at least one computer workstation per county. The plan shall be submitted to and approved by the State Court Administrative Office as a local administrative order under MCR 8.112. The State Court Administrative Office may revoke approval of an e-Filing Access Plan due to litigant grievances.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2019

Clerk

State Court Administrative Office
Model Local Administrative Order XX – e-Filing Access Plan

[LOCAL COURT LETTERHEAD]

Administrative Order [year] – [number]

**E-FILING ACCESS PLAN**

This e-Filing access plan is intended to ensure meaningful access to court services for litigants who are unable to remotely file court documents electronically when a court seeks to mandate electronic filing for all filers. The purpose of this plan is to ensure that a court can show it will provide sufficient assistance to litigants. This plan is based on the premise that the majority of filers that need assistance with access to electronic filing are self-represented litigants. This plan does not address the needs of litigants deemed exempt from e-filing.

---

**IT IS ORDERED:**

**Section I. Needs Assessment**

**A. Self-Represented Litigant Data**
The court will provide self-represented litigants service and access to e-Filing computer workstations to electronically file documents in the court. The court has used the e-Filing Workstation Calculator available at [link] to estimate the number of workstations necessary to support the number of self-represented litigants who may come to the courthouse to file. The court's completed calculator is attached as Addendum 1.

**B. Government Agencies**
The court has identified that the following government agencies routinely file documents with the court: [*List government agencies such as law enforcement, Michigan Department of Health and Human Services, Michigan Department of Corrections, etc.*]. The court has consulted with each government agency listed above and established that it is capable of e-filing court documents. Additionally, the court has consulted with law enforcement agencies specifically regarding e-filing citations.

- The following law enforcement agency(ies) are exempt from e-filing citations [*Name the specific law enforcement agency(ies) that are exempt from e-filing. If no law enforcement agencies are exempt, delete this section.*]:
  -

**Section II. e-Filing Assistance Resources**

**A. Access to Computer Workstations**
No less than [I***nsert number or workstations identified by calculator available at this [link]. If the calculator returns an estimate of zero computer workstations, the court must identify computer workstations that self-represented litigants may be referred to below and may delete this sentence.***] computer workstations will be available to litigants for the purposes of e-filing

court documents. Where possible, computer workstations will be located in the courthouse. Computer workstations are available in the following locations. [***List and describe all available computer workstations that self-represented litigants may use to electronically file court documents, including courthouse workstations specifically for that purpose, court clerk workstations that can be made available as necessary, self-help centers in the courthouse or county, and entities with which the court has a memorandum of understanding, such as libraries, universities, senior centers, community centers, etc. If entities with which the court has a memorandum of understanding are included, a copy of the executed memorandum of understanding must be attached. At least one computer workstation per county must be identified. Multi-county jurisdictions must have more than one computer workstation per jurisdiction. The court may include other resources not listed here.***].

1.
2.
3.
4.

Computer workstations will meet or exceed the capabilities of the configurations recommended on the MiFILE webpage available at http://www.mifile.info/mifile-pricing/.

**B. Access to Assistance in e-Filing Documents**

The court will assist individuals who need help electronically filing documents in the following ways.

- Assistance with using the court's electronic equipment such as computers, scanners, and printers includes: [***List and describe the written materials, tutorial videos, clerk assistance, etc. that the court provides to assist litigants with using or troubleshooting the technology necessary to e-file.***].
  - 
  - 
  - 

- Assistance for completing e-Filing tasks includes: [***List and describe the written materials, tutorial videos, clerk assistance, etc. available to assist self-represented litigants in using the MiFILE program interface.***].
  - ImageSoft Inc. MiFILE Customer Care at 855-959-8868.
  - THIS IS A PLACEHOLDER FOR MiFILE TRAINING VIDEO LOCATION
  - Electronic mail address Support@TrueFiling.com
  - 
  - 

## Section III. Training

The court is committed to training its court staff to provide meaningful access to the court. When the court provides training, it will include a component on ensuring self-represented litigants have access to e-Filing resources. The court will work with the State Court Administrative Office (SCAO) and Michigan Judicial Institute to ensure that all employees are trained on e-Filing access policy and process.

## Section IV. Public Notification and Evaluation of e-Filing Access Plan

### A. e-Filing Access Plan Approval and Notification

This e-Filing Access Plan has been approved by the State Court Administrative Office. The court will post its e-Filing Access Plan on its public website (if available) or public notification area within the courthouse and will make copies of the plan available upon request.

### B. Evaluation and Review of the e-Filing Access Plan

One year after the effective date of this local administrative order and every three years thereafter, the court will assess whether its e-Filing Access Plan needs to be updated. Review of the following areas may indicate a need to update the e-Filing Access Plan:

- Number of litigants requesting access to computer workstations
- Number of litigants requesting assistance using computer workstations
- Number of litigants requesting procedural assistance electronically filing documents in the court
- Changes in the entities with which the court has a Memorandum of Understanding for the purposes of e-Filing
- Changes in the Memorandum of Understanding for the entity with which the court has a relationship to assist with e-filing
- Feedback from litigants
- Feedback from court staff
- Changes to the e-Filing initiative statewide or locally
- Problems that have arisen since implementation of the above plan

### C. Grievance Process

The court is committed to addressing grievances regarding access to electronic filing assistance promptly and thoroughly.

Specific issues regarding e-Filing access must be submitted to the chief judge, court administrator, and State Court Administrative Office by completing form SCAO XX. The court will respond in writing to your grievance using SCAO XXb within five business days.

Effective Date:

Date: _____ Chief Judge Signature: _____

**Public Policy Position**
**ADM File No. 2002-37**

**Oppose Unless Amended.**

**Explanation:**
This Administrative Order would require courts, prior to mandating e-filing, to submit an "e-Filing Access Plan" to the State Court Administrative Office (SCAO) for approval in an effort "[t]o ensure that those individuals required to electronically file court documents have meaningful access to Michigan courts."

The committee recommends that SBM oppose this Administrative Order unless the following concerns are addressed.

1. **Courts Mandating E-Filing Should Be Required to Have At Least One Court Computer Workstation at the Courthouse and All Workstations Have Assistance Available.**

Under Section 2A, courts are required to have a certain number of computer workstations available to the public for purposes of e-filing. While the order requires these workstations to be located in the courthouse "where possible," the order also allows courts to enter into a Memorandum of Understanding (MOU) with a third party to house computer workstations. This means that e-filing workstations could be located offsite in libraries, universities, senior centers, or community centers, and it is unclear what, if any, assistance will be available at these locations. Therefore, the order should require that courts have at least one computer workstation available at the courthouse where a clerk or other employee is able to assist litigants with e-filing. This should also be a court computer workstation to ensure that the court clerk or employee can access or use the computer. In addition, the order should require entities in which the court enters into MOUs to have employees trained and available to assist litigants with e-filing.

2. **Litigants Should Be Allowed Access to Their E-Mail Inside Courthouses Mandating E-Filing.**

Many times, litigants need access to email to effectively e-file. Many courts, however, do not allow litigants to enter with their cell phones and do not allow e-mail access on public computers. The order should require that courts ensure that all litigants have meaningful access to email by both allowing litigants to bring cell phones into the courtroom and to access their emails on computer workstations.

3. **Courts Should Be Required to Provide In-Person E-filing Assistance.**

In Section 2(B), the proposed order requires that courts provide individuals with e-filing assistance. This could include written materials, such as tutorials. In order to ensure that individuals have meaningful access to e-filing, in-person clerk assistance is essential. Instead of listing "clerk assistance"

as one of several possible means of assistance, all courts should be required to provide in-person clerk assistance.

4. **The Order Should Explicitly Provide Certain Assistance Does Not Constitute Legal Advice.**

At the beginning of Section 2(B), the proposed order should define the type of assistance that does not constitute legal advice, as follows:

> The court will provide assistance to individuals that need help. The following tasks are not legal advice and permissible activities for court personnel:
> - Identifying case codes
> - Identifying information in documents, such as case number
> - Helping an individual identify which documents are to be uploaded
> - If filing is incomplete, telling them what forms are missing and where to find them.
> - Answering questions that does not require legal advice.
> - [LORRAY – could you insert MLH's actual language?]

The court will provide assistance to individuals who need help. The following tasks are NOT considered legal advice, and are permissible activities for court personnel:

- Helping an individual determine which case code applies to their filing
- Helping an individual find information in their documents, such as a case number
- Telling an individual which documents are to be uploaded in which boxes
- If someone's filing is incomplete, telling them what forms are missing and where they can find them
- Answers to other questions not requiring legal advice

5. **Courts Should Be Required to Post Their E-Filing Access Plan on Both Their Public Website and Within the Courthouse.**

As currently proposed, the order requires courts to post their e-Filing Access Plan on either their public website or inside the courthouse. To maximize availability of the plan, courts should be required to post it on both their website and inside the courthouse, be available on workstation computers, and have copies available upon request.

6. **Courts Should Be Required to Assess Their E-Filing Access Plan Every Year**

After the first year, the order only requires courts to review their e-Filing Access Plan every three years. Because the order allows courts to enter into MOUs with third parties, accessibility issues need to be closely monitored; therefore, the committee recommends that plans be reviewed every year.

7. **Grievance Process Should Be Revised to Ensure Individuals Can Provide Meaningful Feedback.**

Section IV(C) sets forth a "Grievance Process" for e-filing access issues. The term "grievance" has a negative connotation. This may be problematic because, at times, the issue raised may directly involve the level of assistance provided by the clerk's office, and the clerk may not be motivated to assist the individual in filing a "grievance" against the clerk's office. The committee recommends that this process be referred to in a more neutral tone, such as "feedback process."

In addition, the feedback process, including the steps individuals must take to submit feedback, should be posted in the courthouse and be available on computer workstations. The clerk's office should have a feedback form that the individual may fill out. An individual can submit feedback on the court feedback form or in writing. The individual should not be required to submit the feedback to the chief judge, court administrator, and SCAO, rather the feedback should be submitted to the clerk's office and the clerk's office can distribute the feedback to everyone else.

**Position Vote:**
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

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

# Public Policy Position
# ADM File No. 2002-37 - Administrative Order 2019-XX

**Support the Concept**

**Explanation**

The committee voted 11 to 2 to support the concept of trial court requirements for mandating electronic filing; however, the committee opposes the adoption of the administrative order as presented until there clarity regarding the minimum standards.

The committee was concerned with cost. The self-represented litigants calculator may require multiple workstations for large courts and counties, but this calculator is not available. The provision of an ADA-acceptable workstation will require both space and the purchase of hardware as well as staff time, but the information necessary to determine true cost is not yet available.

The committee agrees that e-filing access in the form of workstations is needed, but believes more specifics are required.

**Position Vote:**

Voted For position: 12
Voted against position: 2
Abstained from vote: 0
Did not vote: 3

**Contact Persons:**

Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

MICHIGAN COURTS NEWS RELEASE
*John Nevin, Communications Director*
Ph: 517-373-0129 Twitter: @MISupremeCourt FB: facebook.com/misupremecourt

FOR IMMEDIATE RELEASE

# Supreme Court Makes Proposals to Help Trial Courts Improve Access

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The order also would require that there be at least one computer workstation per county for self-represented litigants and that the court conform to the standards set forth by the State Court Administrative Office. Those standards include:

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–MSC –

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

January 23, 2019

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. 2016-46

Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application

_____

On order of the Court, this is to advise that the Court is considering whether questions regarding mental health should be included on the personal affidavit that is part of the application for the Michigan Bar Examination, and if so, what form those questions should take. Before making a final decision on this question, this notice is given to afford interested persons the opportunity to comment generally on the issue or to suggest specific language for the Court's consideration. The Court welcomes the views of all. This matter will be considered at a public hearing following the close of the public comment period. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

The Court's solicitation for public comment in this matter does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of any particular action.

## The Issue

Pursuant to MCL 600.934, "[a] person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character, is 18 years of age or older, has the required general education, learning in the law, and fitness and ability to enable him or her to practice law in the courts of record of this state, and that he or she intends in good faith to practice or teach law in this state." The Board of Law Examiners establishes the policies and procedures for admission to the State Bar of Michigan. In addition to passage of the Michigan Bar Examination, an applicant must be recommended for admission on the basis of the applicant's background, which process is conducted by the State Bar of Michigan through its Character and Fitness investigation procedure.

As part of the bar application process, an applicant must submit an affidavit that provides information about the applicant's life prior to taking the bar examination, including information about the applicant's mental health and treatment history. Question 54a asks:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.

Further, question 54b states:

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

In addition, the BLE recently added some clarifying language as a preamble to these questions as follows:

> Pursuant to MCL 600.934(1), "A person is qualified for admission to the bar of this state who proves to the satisfaction of the board of law examiners that he or she is a person of good moral character, is 18 years of age or older, has the required general education, learning in the law, and fitness and ability to enable him or her to practice law in the courts of record of this state…" The Michigan Board of Law Examiners (Board), as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance abuse issue which impairs or could impair an applicant's ability to meet the essential eligibility requirements to practice law. The Board does not seek medical records as part of this initial application. If it is later determined that medical records are required to assist in any admission decisions, they will be subsequently requested. This information is treated confidentially under State Bar Rule 15(7) and Board of Law Examiners Rule 2.
>
> The Board supports applicants seeking mental health and/or substance abuse treatment, and views effective treatment by a licensed professional as enhancing an applicant's ability to meet the essential eligibility requirements.
>
> In answering the questions below, you do not need to provide information that is reasonably characterized as situational counseling. Examples of

> situational counseling include stress counseling, grief counseling, and domestic relations counseling.

The Court is considering whether these questions should continue to be included on the affidavit, and if so, whether they should be revised.

This issue has been considered in the context of the Americans with Disabilities Act, 42 USC 12101 *et seq*., by the United States Department of Justice Civil Rights Division. In response to a complaint filed on behalf of a bar applicant in Louisiana (which contracted with the National Conference of Bar Examiners to conduct a preliminary investigation and produce a report for each applicant), the DOJ conducted an investigation into the bar application process in that state, focusing on several specific instances in which some individuals with certain diagnoses (but without evidence of conduct that required continued monitoring) were required to agree to terms of conditional admission for five years.[1] The DOJ concluded that Louisiana should modify its application to focus on an applicant's conduct, not diagnoses or treatment for such diagnoses [DOJ report].

As a result of the DOJ report, the NCBE revised its standard questions related to mental health to focus on the applicant's conduct. The NCBE form, used by nearly half of the states, now inquires:

> 25. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?
>
> 26(A). Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a mental emotional, or nervous condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?
>
> 26(B). If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

[1] Conditional admission typically requires appointment of an attorney practice monitor, mandatory consultation with the mental health care provider at least every three months, mandatory health status updates from the mental health care provider, agreement to participate in and pay for consultations with an independent medical professional, and full access to the applicant's medical records.

Further, some states that do not use the NCBE form have revised their questions to focus on conduct as opposed to diagnoses. And some states have eliminated the questions about mental health altogether, including Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee.[2] The court seeks input on whether Michigan should continue to ask about an applicant's mental health history, or ask different questions related to this topic.

Please submit any written materials to the Office of the Administrative Counsel by May 1, 2019, and reference ADM File No. 2016-46. This issue also will be considered at a public hearing, which notice will be posted and circulated at least four weeks before the hearing. You may submit comments or materials electronically to ADMcomment@courts.mi.gov or by regular mail at 925 W. Ottawa St., Lansing, Michigan, 48915.

BERNSTEIN, J. (*concurring*). I strongly support this Court's invitation for public comment on this issue. Whether questions inquiring into an applicant's mental health should be included on the application for the Michigan Bar Examination is a significant question that not only affects law school graduates aspiring to enter the legal profession, but also one that asks us to fundamentally examine the consideration and accommodations our state is providing to those with disabilities.[3] I hope that public comment will, at a minimum, address and clarify the following questions:

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[2] In some cases, the state eliminated the specific mental health question and replaced it with a more general inquiry, such as "Is there any other information, incident(s), or occurrence(s) which … may have a bearing, either directly or indirectly, positively or negatively, upon your ability to practice law actively and continuously?" (Arizona) and "Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?" (Alaska).

[3] Federal courts have consistently held that Title II of the Americans with Disabilities Act, 42 USC 12131 *et seq*., applies to state bar associations and that bar applicants with a history of mental health diagnosis or treatment are "qualified individual[s] with a disability" under 42 USC 12132. See, e.g., *ACLU of Ind v Ind State Bd of Law Examiners*, unpublished opinion of the United States District Court for the Southern District of Indiana, issued September 20, 2011 (Case No. 1:09-cv-842-TWP-MJD), pp 9-10; *Ellen S v Fla Bd of Bar Examiners*, 859 F Supp 1489, 1491-1493 (SD Fla, 1994). Further, federal regulations prohibit eligibility criteria "that screen out or tend to screen out an individual with a disability . . . unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered," 28 CFR 35.130(b)(8) (2018), and prohibit "policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others," 28 CFR 35, Appendix B.

(1) How, if at all, is inquiring into the state of an applicant's mental health an effective or appropriate way of assessing an applicant's "good moral character"? See MCL 600.934(1).

(2) How, if at all, is inquiring into an applicant's mental health status an effective way of assessing an applicant's "fitness and ability" to practice law? See MCL 600.934(1).

> To provide greater context for this question, in its investigation into the Louisiana bar application, the United States Department of Justice (DOJ) cited substantial research indicating that "a history of mental health diagnosis or treatment does not provide an accurate basis for predicting" future professional misconduct. United States Department of Justice, *The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (ADA)*, DJ No. 204-32M-60, 204-32-88, 204-32-89 (*DOJ Investigation*), p 5, available at <https://www.ada.gov/louisiana-bar-lof.pdf> (accessed January 15, 2019) [https://perma.cc/5WAP-UK6F].[4] Similarly, in *In re Petition & Questionnaire for Admission to the RI Bar (Rhode Island)*, 683 A2d 1333, 1336 (RI, 1996), the Rhode Island Supreme Court, after receiving extensive public input, found: "Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace," and that "there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or by any other regulatory

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[4] The *DOJ Investigation* cited various authorities to substantiate this point. E.g., *DOJ Investigation* at 23, quoting American Bar Association Commission on Mental and Physical Disability Law, *Recommendation to the House of Delegates*, 22 Mental & Physical Disability L Rep 266, 267 (1998) (" 'Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to act with integrity, competence, or honor.' "); *DOJ Investigation* at 23, quoting Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L Rev 93, 141 (2001) (" '[T]here is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney[.]' "); *DOJ Investigation* at 23, quoting Bauer, 49 UCLA L Rev at 141-142 n 153 ("observing that the only small retrospective study of attorneys 'provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys' ").

body in comparison with those who have not had such treatment."[5] In our consideration of this issue, evidence that bears on the connection, or lack thereof, between a person's mental health status and his or her ability to practice law would be invaluable.

(3) What standards or guidelines are used in: (a) evaluating an applicant's initial answers to the mental health questions on the bar application, (b) regulating any subsequent investigation into an applicant's mental health history, and (c) determining whether an applicant's mental health history should preclude his or her acceptance into the bar?

(4) Does asking mental health questions actually deter prospective applicants, such as law students, from seeking rehabilitative counseling and treatment, or detract from the effectiveness of such professional help?

In its aforementioned investigation, the DOJ cited evidence that confidentiality is a critical element of the treatment relationship and that fears of disclosure could discourage individuals from seeking professional help. *DOJ Investigation* at 23.[6] In *Rhode Island*, the court noted that, in the substance abuse

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[5] See also *Clark v Va Bd of Bar Examiners*, 880 F Supp 430, 436, 446 (ED Va, 1995) (finding that expert testimony failed to show either "a correlation between mental health questions and an inability to practice law," or that obtaining evidence of mental health counseling or treatment is effective in guarding against a threat to public safety).

[6] The *DOJ Investigation* cited various authorities to substantiate this point. E.g., *Jaffee v Redmond*, 518 US 1, 10-11 & n 10 (1996) (recognizing a federal psychotherapist-patient privilege based on the view that confidentiality of psychotherapy sessions is crucial to their success and serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem); United States Department of Health & Human Services, *Mental Health: A Report of the Surgeon General*, p 441 (1999) (observing that "evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship"); American Psychiatric Association, *Resource Document on Recommended Guidelines Concerning Disclosure and Confidentiality* (1999), p 1, available at < https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents> (accessed January 15, 2019) (finding that disclosure policies "inhibit individuals who are in need of treatment from seeking help"); Association of American Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J Legal Educ 35, 54-55 (1994) (finding that a much higher percentage of law students would seek treatment for substance abuse problems or refer others to treatment if they were assured

context, a significant portion of surveyed law students indicated that "if they suffered from a substance-abuse problem, they would seek assistance . . . if they were assured that bar officials would not have access to the information." *Rhode Island*, 683 A2d at 1336, citing Association of American Law Schools, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J Legal Educ 35, 55 (1994). This response led the court to conclude that mental health questions could unwittingly dissuade a person in need of treatment from seeking assistance. *Id*. I welcome input on whether requiring disclosure of one's mental health status actually discourages individuals from seeking helpful treatment, or possibly reduces the effectiveness of any treatment sought.

(5) What purpose is served by asking mental health questions that is not already served by other questions asked on the bar application?

In addition to an applicant's mental health status, the bar application probes into many other areas of a person's life, including his or her criminal history, employment background, academic record, professional licensures, financial history, involvement in civil litigation, and residential past. In many of these areas, an applicant is required to disclose instances of misconduct, disciplinary action, termination, or other adverse actions taken against the applicant. Are these questions and answers sufficient to assess an applicant's fitness and ability to practice law? Said differently, what do mental health questions add to the bar application that is not already covered in this already intensive inquiry?

(6) Multiple states have entirely eliminated mental health questions from their bar applications (Alaska, Arizona, California, Illinois, Maine, Massachusetts, New Mexico, Pennsylvania, and Tennessee). What effect, if any, has eliminating these questions had on the effective functioning of the legal systems in these states? In other words, have the legal systems in these states been negatively affected in any way by eliminating such questions?

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that bar officials would not have access to that information); *Bauer*, p 150 (describing how disability-related questions can discourage applicants from obtaining treatment and undermine its effectiveness).

(7) Does answering affirmatively to the mental health questions impose any additional burdens on an applicant, or cause delays in the processing of an applicant's application? Do these burdens or delays occur even if the applicant is ultimately admitted to the bar?[7]

[7] Here, I note that several courts have found that mental health questions impose additional and discriminatory burdens on applicants with disabilities. See, e.g., *Clark*, 880 F Supp at 442 ("Unlike other applicants, those with mental disabilities are required to subject themselves to further inquiry and scrutiny. The Court finds that this additional burden discriminates against those with mental disabilities."); *Ellen*, 859 F Supp at 1494 (finding that Florida's mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability"); *Med Society of NJ v Jacobs*, unpublished opinion of the United States District Court of New Jersey, issued October 5, 1993 (Case No. 93-3670-WGB) (concluding that mental health questions imposed extra burdens on qualified persons with disabilities in violation of the ADA); *In re Applications of Underwood and Plano*, unpublished opinion of the Maine Supreme Judicial Court, issued December 7, 1993 (Case No. BAR-93-21) (finding that requiring applicants to answer mental health questions discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities).

**From:** Eric Pointer
**To:** ADMcomment
**Subject:** Question Regarding Mental Health
**Date:** Thursday, January 24, 2019 12:13:41 PM

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I think the question should be removed. I believe it violates the HIPPA law.

| | |
|---|---|
| **From:** | Arthur C. Spalding |
| **To:** | ADMcomment |
| **Subject:** | Mental health |
| **Date:** | Saturday, January 26, 2019 2:24:44 PM |
| **Attachments:** | imageec5551.PNG<br>imageaa61f8.PNG<br>image8df2d2.PNG |

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As a practicing attorney, I have significantly responsibilities to my clients that can be impacted by my actions and more particularly by my inactions. Substance abuse is a leading cause of attorney inaction. I have served as a member of a hearing panel for the Attorney Grievance Board for a couple of decades and have been involved in a number of matters that have come to our attention. The panel on which I serve is currently involved in a matter involving a respondent who suffers from mental illness which has caused inattention to client matters. It is unfortunate that someone needs to be disciplined because of mental illness because the removal of a right to practice law even for 90 days can destroy the opportunity to practice law in the future. There is no easy solution but removing the review of an applicant's mental health background, or their substance abuse background will not improve the public's right to be protected. Those with mental illness and substance abuse history should have an opportunity to practice law, but the public is entitled to have greater scrutiny of those persons both before and after receiving a license to practice law. Unfortunately, I am unaware of any program to monitor an attorney once licensed. Be creative and figure out a way to deal with this problem.

Arthur C. Spalding
Attorney & Counselor

rhoades mckee
attorneys

Tel: 616.233.5111
Fax: 616.233.5269
Email: acs@grlaw.com

55 Campau Avenue NW, Suite 300

Grand Rapids, Michigan  49503
rhoadesmckee.com

**From:** Sarah Eisenberg
**To:** ADMcomment
**Subject:** Public Comment Regarding 2016-46: Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application
**Date:** Saturday, January 26, 2019 3:46:08 PM

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To Whom it May Concern;

I would like to submit my professional opinion regarding Questions relating to Mental Health on the Bar Examination Application. I am a master's clinical social worker (LMSW) educated at the University of Michigan and licensed in the State of Michigan. I have been practicing in outpatient counseling and mental health for over ten years. I have extensive expertise and experience in mental health and it's impacts on wellbeing and behavior of individuals.

The current language is inherently stigmatizing of mental health challenges and conditions, as well as the seeking of appropriate services and treatment for these conditions. The proposed revised language does a great deal to reduce this stigmatization, but by focusing on conduct it is essentially duplicative of the other character and fitness questions. There is no need to duplicate the conduct language in the context of a mental or emotional health issue unless these conditions are somehow seen as inherently problematic or indicative of immutable deficiencies regardless of successful treatment or conduct. From a scientific standpoint, that is simply not true.

As Justice Bernstein notes in his concurrence, scientific data clearly show that participation in mental health treatment is associated with reduced risk of problematic behavior relative to the general population who have not sought mental health services. This is particularly true for the few mental health conditions that are considered chronic such as neurobiological disorders and personality disorders. It is also worth noting that most mental health conditions are transient and related to situational factors, just like most health conditions more broadly, and are therefore not useful in predicting future functioning or behavior.

In my own professional experience, I have had clients (usually attorneys and other higher-level professionals who are subject to scrutiny by their employers and professional associations) refuse to use their medical insurance coverage when seeking treatment to prevent any records of their even seeking mental health treatment from being accessible to these parties.

In conclusion, I urge you to eliminate any language in the Bar Examination Application relating to mental health conditions or treatment. There is simply no evidence that such questions will be helpful in determining the character and fitness of applicants. Furthermore, there is clear evidence that such questions have a chilling effect on the appropriate use of mental health care services by individuals who would greatly benefit from them.

Respectfully,

Sarah K Eisenberg, LMSW

Clinical Therapist
Open Door Counseling Center
www.opendoorcounselingcenter.com

cell 734-846-7443
SarahKEisenbergLMSW@gmail.com

**From:** Curtis Haney
**To:** ADMcomment
**Subject:** ADM File No. 2016-46
**Date:** Wednesday, February 13, 2019 3:01:32 PM

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Your Honor,

No, should any applicant be compelled to answer any questions about their mental/substance abuse history. This is clearly a violation of the ADA because both are deemed medical conditions as a fact of law. People that have Mental health and/or substance abuse are protected just like any other condition that interferes with life's major functions. The same rules that jurisdiction over employment law should apply here. The bar should only be able to check public records, talk to references, credit history and check employment history. Nothing else should an applicant be forced to compel.

As for the affidavit,

"Do you suffer now from any condition/disability that interferes with the ability to practice law in the State of Michigan?"

Yes/No.

"Do you have a need for reasonable accommodation to practice law in Michigan?"

"If so, what is needed?"

Respectfully,

Curtis Haney, a Disabled Veteran (70%)

# Public Policy Position
# ADM File No. 2016-46

**Replace Affidavit of Personal History (APH) Questions 54a and 54b with the National Conference of Board Examiner's Questions 29 and 31 (expanding the time to 10 years from 5 years).**

**Explanation**

The Character & Fitness Committee recommends replacement of Affidavit of Personal History (APH) Questions 54a and 54b with the National Conference of Board Examiner's Questions 29 and 31 (expanding the time to 10 years from 5 years), and that the State Bar of Michigan form a Task Force of interested stakeholders on law student and lawyer wellness, including representatives of the Michigan Supreme Court, the Board of Law Examiners, law schools, the Lawyers and Judges Assistance Program, the Attorney Grievance Commission, the Attorney Discipline Board, the Judicial Tenure Commission, BigLaw, local bar associations, professional liability carriers, and other relevant stakeholders to work towards the goal of helping law students and lawyers achieve and maintain well-being and end the stigma around seeking help to do so.

The recommendations of the Committee were unanimous. The Committee believes strongly that mental health concerns should be addressed within the profession in a manner that engenders cooperation and fosters an environment of support so persons seeking to become part of the legal profession and those already a part of the legal profession feel they have the necessary support and resources to achieve and maintain wellness.

The recommended amendment to the APH Questions is provided below:

Suggested NEW question 54a (NCBE question 29):

> Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner? Y/N
>
> Explanation:
>
> Relevant dates:

Suggested NEW question 54b (NCBE question 31, amended to look back 10 years rather than 5 years):

> Within the past ten years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure? Y/N

Name/address/phone number of entity before which the issue was raised:

Nature of the proceeding:

Relevant date(s):

Disposition, if any:

Explanation:

APH Questions 54a and 54b are provided below:

Question 54a

Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.

Question 54b

Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

**Position Vote:**
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

**Contact Persons:**
Robert Ebersole rbebersole@gmail.com
Danon Goodrum-Garland dgarland@michbar.org
Diane Van Aken dvanaken@michbar.org

RE: Supplemental Explanation of Character and Fitness Committee's Recommendations on ADM 2016-46

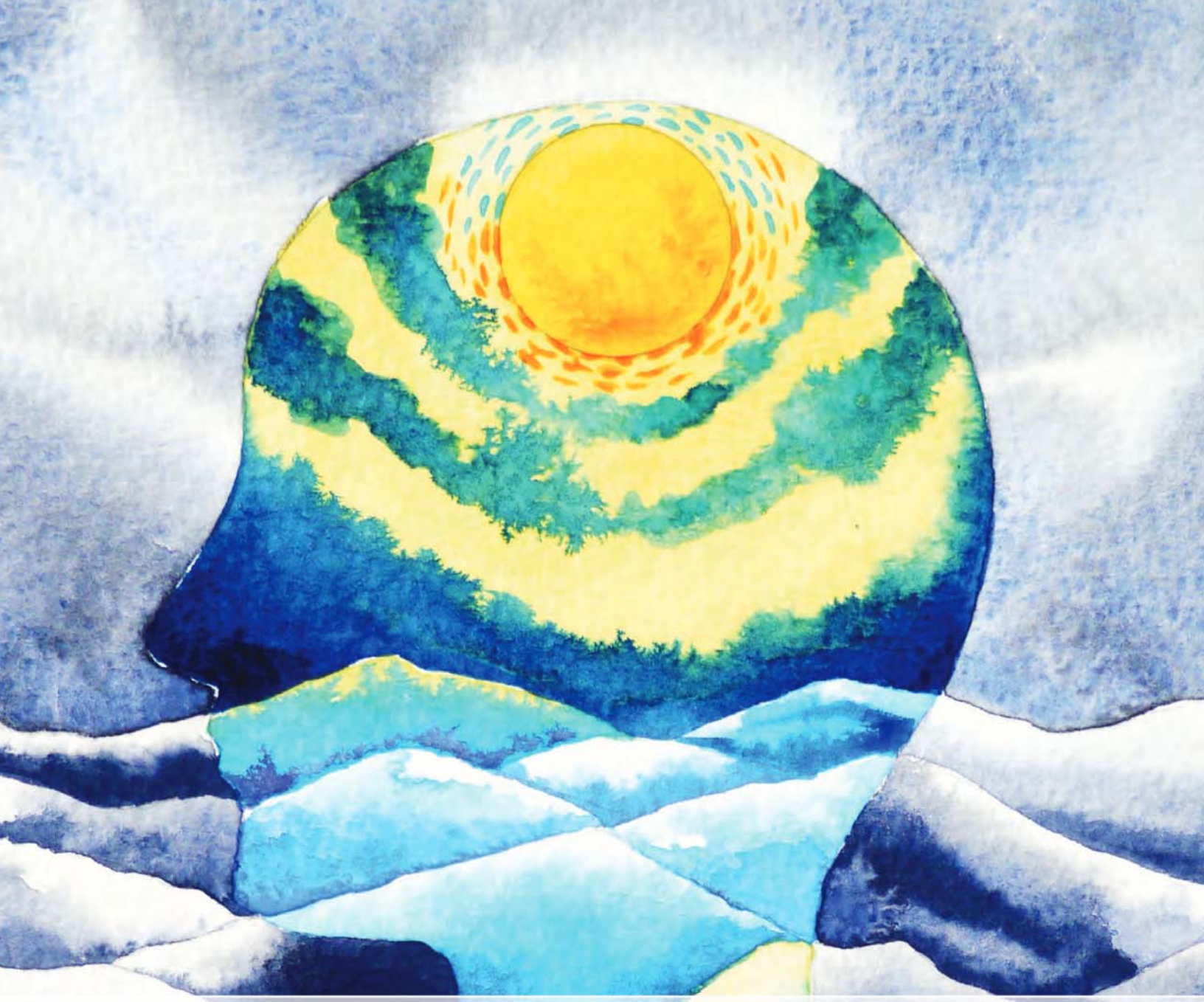
Subject: Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application

It is undisputed that wellness concerns adversely impact law students who are future Michigan lawyers. The "good moral character" standard must be met by all persons seeking to be admitted to the State Bar of Michigan, which serves as the gatekeeper to help ensure only qualified applicants are admitted. The Board of Law Examiners as part of its responsibility to protect the public from unqualified persons entering the legal profession assesses whether an applicant manifests any wellness concerns, including mental health or substance use, which impair or could impair an applicant's ability to meet the essential eligibility requirements to practice law. As a self-regulating profession, it is vital that wellness concerns be addressed in a manner that encourages and supports persons seeking to enter our profession while serving the public protection function required of our profession. Just as it equally important that the self-regulating function of our profession continue to effectively address wellness concerns of our membership through our disciplinary system and assistance programs. In short, we need to directly address wellness concerns before persons enter our profession as well as after persons become part of our profession

As such, avoiding the subject of wellness concerns as it relates to mental health on the Affidavit of Personal History (APH), as has been done in a few other jurisdictions, falls well short of addressing the professional obligation of ensuring applicants are qualified to practice law. Relying on responses to other APH questions not designed to elicit this information is inadequate at best. The intensive character and fitness process is a necessary and vital part of our application process. There could be a good argument made that many of the subjects covered on the APH are daunting and could have an adverse impact on how potential applicants deal with them, e.g., financial and criminal history matters. To be effective, the character and fitness process requires consideration of private and highly sensitive matters.

However, it is important that the process not be viewed and interpreted in a manner that is unnecessarily intrusive and burdensome, and that it not impede applicants proactively seeking to address wellness concerns. So, we have suggested that APH Questions 54a and 54b be replaced with the NCBE Questions 29 and 31 (amended to 10 years rather than 5 year period) to make it even clearer to applicants that past, problematic conduct reflective of ongoing mental health concerns is the focus of the questions rather than diagnoses or treatments received for diagnosed conditions.

Moreover, the Committee believes that additional work is needed to educate law students and our membership about the importance of wellness and seeking assistance, and how to sustain a culture of well-being within the legal profession. The well-reasoned and studied recommendations made by The National Task Force on Lawyer Well-Being should be embraced to enable Michigan to address wellness concerns of law students and its membership. (See attached summary article by James C. Coyle). The first step in the process is gathering the stakeholders, which is consistent with the other part of the Committee's recommendation: that the State Bar form a Task Force of interested stakeholders on law student and lawyer wellness, including representatives of the Michigan Supreme Court, the Board of Law Examiners, law schools, the Lawyers and Judges Assistance Program, the Attorney Grievance Commission, the Attorney Discipline Board, the Judicial Tenure Commission, BigLaw, local bar associations, professional liability carriers, and other relevant stakeholders to work towards the goal of helping law students and lawyers achieve and maintain well-being and end the stigma around seeking help to do so.



# The Report of the National Task Force on Lawyer Well-Being

## and the Role of the Bar Admissions Community in the Lawyer Well-Being Movement

BY James C. Coyle

Several studies in recent years have demonstrated that too many lawyers and law students experience chronic stress and high rates of depression and substance abuse. As a result of two of these studies, the National Task Force on Lawyer Well-Being was formed. The work of the Task Force culminated in an extensive report published in August 2017, which sets forth an ambitious road map to improve the health of law students, lawyers, and judges, calling on all stakeholders to create a movement to improve well-being in the legal profession. The report provides recommendations for all stakeholders, including specific recommendations for the bar admissions community and the role it can take to support lawyer well-being.

## Recent Studies Reveal That Lawyer Well-Being Is at Risk

Three prominent studies have revealed significant problems with well-being among law students and lawyers. The 2014 Survey of Law Student Well-Being, administered to law students in 15 diverse law schools in the United States, showed that significant percentages of those students were dealing with mental health issues, including alcohol and other substance use issues. This survey also showed that law students are reluctant to seek the help that they need due to the misperception that it may cause them difficulties with bar admission or may be a potential threat to job or academic status. Likewise, many law students are concerned with the social stigma associated with seeking help. The survey revealed that 17% of the students experienced some level of depression, 14% experienced severe anxiety, 23% had mild or moderate anxiety, and 6% reported serious suicidal thoughts in the past year. As to alcohol use, one-quarter fell into the category of being at risk of alcoholism, for which further screening was recommended.[1]

In 2016, the ABA Commission on Lawyer Assistance Programs (CoLAP) and the Hazelden Betty Ford Foundation published their study of mental health concerns and substance use disorders among lawyers. The nationwide study of nearly 13,000 practicing lawyers found that between 21% and 36% qualify as problem drinkers (i.e., demonstrating drinking patterns that are hazardous, harmful, and possibly indicative of alcohol dependence), and approximately 28%, 19%, and 23% of lawyers struggle with some level of depression, anxiety, and stress, respectively.[2]

A study conducted in November 2017 by Harvard Law School student government found that out of 886 Harvard law students, 24% reported anxiety, 25% reported depression, a staggering 20.5% were at heightened suicide risk, and 66% reported new mental health challenges in law school.[3] Following the study, Harvard Law School student government leadership called on other law schools to survey their own student bodies each year and release the collected survey data. They also specifically advocated for Harvard to release the full set of survey data and to actively engage in finding solutions to student mental health challenges and reversing this mental health crisis.[4]

> The [2014 Survey of Law Student Well-Being] revealed that 17% of the students experienced some level of depression, 14% experienced severe anxiety, 23% had mild or moderate anxiety, and 6% reported serious suicidal thoughts in the past year. As to alcohol use, one-quarter fell into the category of being at risk of alcoholism.

> The [CoLAP/ Hazelden study] . . . found that between 21% and 36% qualify as problem drinkers . . . and approximately 28%, 19%, and 23% of lawyers struggle with some level of depression, anxiety, and stress, respectively.

> A study conducted . . . by Harvard Law School student government found that out of 886 Harvard law students, 24% reported anxiety, 25% reported depression, a staggering 20.5% were at heightened suicide risk, and 66% reported new mental health challenges in law school.

The results from each of these studies signal an elevated risk in the legal community for mental health

and substance use disorders that is tightly intertwined with an alcohol-based social culture. While the studies also reflect that the majority of lawyers and law students do not have a mental health or substance use disorder, this does not mean that they are thriving. Many lawyers experience a "profound ambivalence" about their work,[5] and different sectors of the profession vary in their levels of satisfaction and well-being.[6] A recent study concluded that the practice of law is the loneliest kind of work for members of all professional occupations, stating that the single most impactful behavior leaders can undertake to counteract loneliness is to create opportunities for building shared meaning with colleagues.[7]

Of greatest concern were the statistics involving younger lawyers. The ABA CoLAP/Hazelden study found that lawyers in the first 10 years of practice have the highest incidence of problematic drinking.

## The National Task Force on Lawyer Well-Being Is Formed

As a result of the 2014 Survey of Law Student Well-Being and the 2016 ABA CoLAP/Hazelden study, three organizations founded the National Task Force on Lawyer Well-Being. These organizations were the ABA CoLAP, the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL).

When word spread, other entities within and outside the ABA quickly joined. Current membership on the Task Force in addition to the three founding organizations includes representatives from the following organizations: the ABA Standing Committee on Professionalism, the ABA Center for Professional Responsibility, the ABA Young Lawyers Division, the ABA Law Practice Division Attorney Well-Being Committee, the National Client Protection Organization, the National Conference of Chief Justices, the National Conference of Bar Examiners, and the National Continuing Legal and Judicial Education Regulators. Additionally, one of the authors of the 2014 Survey of Law Student Well-Being and two of the authors of the 2016 ABA CoLAP/Hazelden study are also on the Task Force.[8]

## The Task Force Report: A Call for Action

The Task Force went into overdrive, and in August 2017 issued a report titled The Path to Lawyer Well-Being: Practical Recommendations for Positive Change. The report sets out three reasons to take action in addressing the lack of well-being in the profession:

1. Organizational effectiveness (it's good for business).
2. Ethical integrity (it's good for clients and professionalism).
3. Humanitarianism (it's the right thing to do for our colleagues and friends).[9]

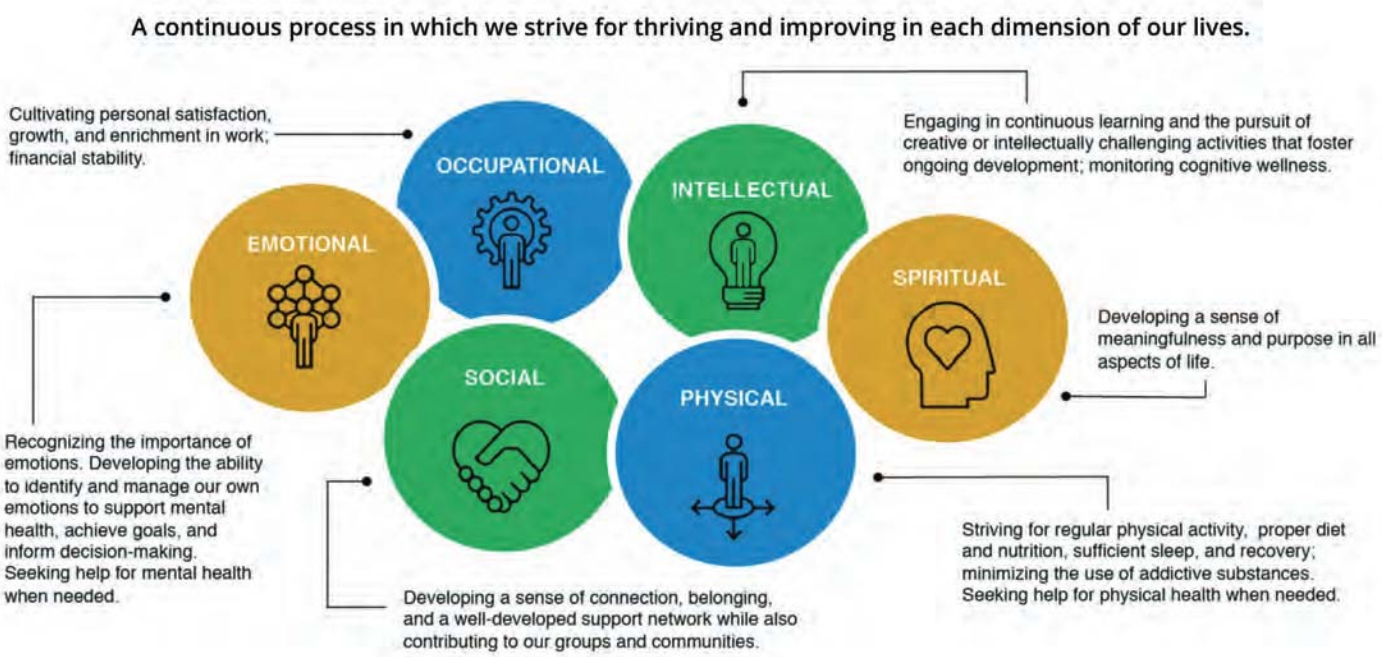
The report provides a definition of lawyer well-being, defined more broadly than the simple absence of impairment. The report instead defines lawyer well-being as "a continuous process in which we strive for thriving and improving in each dimension of our lives,"—intellectual, spiritual, physical, social, emotional, and occupational. The graphic on page 11 details the criteria for thriving in each of these six life dimensions. The report exhorts all stakeholders—including judges, regulators, legal employers, law schools, bar associations, professional liability carriers, and lawyer assistance programs—to work toward the goal of helping lawyers achieve and maintain well-being.[10]

The report also lays out the five essential components of the process of building a sustainable culture of well-being:

1. Identify the stakeholders to engage.
2. End the stigma around seeking help.
3. Emphasize that well-being is integral to competence.
4. Expand education and outreach.
5. Change the tone of the profession one step at a time.[11]

The report provides 44 detailed recommendations—recommendations for all stakeholders in the legal community as well as recommendations for the specific stakeholders previously mentioned. It provides resources and information for acting on specific recommendations in the report.

## Defining Lawyer Well-Being




Finally, the report recommends that the Chief Justice of each jurisdiction create a Commission on Lawyer Well-Being and appoint a representative from each stakeholder group to the commission. It provides a State Action Plan and Checklist for moving forward with the Task Force's recommendations, suggesting the following steps:

1. Gather all the stakeholders.
2. Review the National Task Force report.
3. Do an inventory of recommendations.
4. Create priorities.
5. Develop an action plan.[12]

The report acknowledges that changing a culture that has been ingrained over decades or centuries will not be a quick or easy endeavor but emphasizes that the profession must act. The legal profession is at a crossroads. As stated in the cover letter sent to stakeholders with the report, "To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now."[13]

## A Strong and Positive Response to the Task Force Report

In August 2017, the Conference of Chief Justices adopted Resolution 6, Recommending Consideration of the Report of the National Task Force on Lawyer Well-Being, fully supporting the concept of lawyer well-being as a critical component of lawyer competence.[14] The Resolution reinforced the critical role of the highest Court in each jurisdiction in overseeing the legal profession and recognized that each such Court must take an active role in developing effective mechanisms to regulate the profession, which includes convening the relevant stakeholders in each jurisdiction to improve lawyer well-being. Thus, the Conference of Chief Justices recommended that each jurisdiction closely consider the recommendations contained in the Task Force report.

As of the date this article was written, 15 jurisdictions have actively responded to the report's recommendations and are now in the

process of establishing their own task forces or are in the exploratory phase. The jurisdictions taking an active role so far include Colorado,[15] Connecticut,[16] Florida,[17] Georgia,[18] Illinois,[19] Massachusetts,[20] Minnesota,[21] Nebraska,[22] New Mexico,[23] Texas,[24] Utah,[25] Vermont,[26] Virginia,[27] West Virginia,[28] and Wisconsin.[29] In addition, Rhode Island has expressed an interest in going forward with a task force.[30]

ABA President Hilarie Bass has made lawyer well-being a priority of her administration. In September 2017, at her request, the ABA Board of Governors created the ABA Presidential Working Group to Advance Well-Being in the Legal Profession.[31] This group, made up of members representing law firm management, professional liability carriers, and lawyer assistance and wellness professionals, will work to develop policies that law firms can use to help their lawyers with substance abuse and mental health problems, as well as policies to promote well-being in law firms.

In February 2018, the ABA House of Delegates issued Resolution 105, urging all courts (federal, state, local, territorial, and tribal), bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities employing lawyers to consider the recommendations set forth in the Task Force report.[32] In addition, President Bass sponsored a National Workshop on the Advancement of Attorney Well-Being in the Law Firm Setting, which took place on April 25, 2018, in Washington, D.C. This interactive workshop gathered members of major law firms, professional liability insurance carriers, and lawyer assistance programs to create practical and workable law firm policies to reinforce lawyer well-being as a core component of ethics and professionalism.

Finally, NCBE President Judy Gundersen has agreed to be the NCBE liaison on the National Task Force. The Task Force is interested in working with NCBE to provide opportunities for the bar admissions community to discuss its role in improving law student and lawyer well-being, and to continue to provide creative education and guidance to the jurisdictions on this matter.

## Where Does the Bar Admissions Community Fit in the Lawyer Well-Being Movement?

Bar admission representatives have a unique perspective and vital role in helping to change the culture of the legal profession and increase lawyer well-being. The Task Force report specifically suggests that in the creation of a Commission on Lawyer Well-Being, each Chief Justice appoint a bar admission or bar examiner representative to that jurisdiction's commission.[33]

### The Task Force Report's Recommendations for the Admissions Process

Among the Task Force report's recommendations for the regulator stakeholder group is to adjust the admissions process to support law student well-being so that regulations governing admission to the practice of law facilitate the treatment and rehabilitation of students with impairments. This includes

1. re-evaluating bar application inquiries about mental health history so that any such questions focus on conduct or behavior (rather than on diagnosis or treatment history, which may deter applicants in need of help from seeking it);[34]

2. adopting essential eligibility admission requirements that affirmatively state the abilities needed to become a licensed lawyer, thereby providing a framework for determining whether or not an individual, including one with a mental or physical impairment, has the required abilities, with or without reasonable accommodations;[35]

3. adopting a conditional admission rule with specific requirements and conditions to avoid deterring law students and lawyers from seeking help for substance use and mental health disorders due to overly rigid admission requirements;[36] and

4. publishing data reflecting low rates of denied admissions due to conduct involving mental health disorders and substance abuse (a fact that is known from informal Task Force member discussions with regulators but for which no data are currently published), thereby alleviating law students' fears that seeking help for such disorders will block them from admission.[37]

## Participating in the Well-Being Discussion

But bar admission representatives should not limit their role in the lawyer well-being movement to the Task Force report's four recommendations. Rather, they must recognize their ability to take on an even greater role in the overall discussion on well-being in the legal profession. This greater role may include any of the following.

**Finding solutions to address law student misperceptions regarding the admissions process and the use of professional mental health services.** Bar admission representatives are in a position to debunk the misperception that was highlighted in the 2014 Survey of Law Student Well-Being: that a person's chances for admission into the practice of law are decreased if that person seeks professional help for a substance use or mental health disorder while in law school. This may involve better and earlier written and verbal communications with law students regarding the admissions process, including communicating the views of the jurisdiction's Court and Board of Law Examiners on seeking professional help for mental health issues, to emphasize that it is best to address mental health issues while in law school.

**Evaluating ways to partner with law schools on well-being issues.** This may include providing the schools with anonymized data on what substance use and mental health concerns are evidenced in the application and hearing processes, as well as in conditional admission programs. Such data may prompt law schools to educate both faculty and students on proactive and help-seeking measures to address substance use and mental health concerns and to devote greater resources to promoting well-being.

**Partnering with lawyer assistance programs and other lawyer regulators to educate law students about the admissions process.** Offering regular presentations at law schools with these other professionals is an effective way to promote early screening, evaluation, and counseling for substance abuse and mental health problems and to talk candidly about impairment and well-being, while also reinforcing the strict confidentiality that lawyer assistance programs must maintain.

**Reinforcing the message that law student well-being improves law student competence, and thus the chances for admission into the practice of law.** Law students should understand that their well-being while in law school improves not only their chances for admission but also their chances for a longer and more fulfilling legal career.

**Fostering collegiality and respectful engagement, including increasing diversity and inclusion in the legal profession.** The Task Force report, supported by extensive, reputable research, directly connects collegiality and respect to well-being. The report cites several studies showing that civility appears to be declining in the legal profession, and that women and young lawyers are more frequent targets of incivility and harassment. The bar admissions community must continue to model professionalism and civility and devise strategies to promote widespread observance of these standards.[38] This includes prioritizing diversity and inclusion in daily activities. As stated by the Task Force:

> Research reflects that organizational diversity and inclusion initiatives are associated with employee well-being, including, for example, general mental and physical health, perceived stress level, job satisfaction, organizational commitment, trust, work engagement, perceptions of organizational fairness, and intentions to remain on the job. A significant contributor to well-being is a sense of organizational belongingness, which has been defined as feeling personally accepted, respected, included, and supported by others. A weak sense of belonging is strongly associated with depressive symptoms. Unfortunately, however, a lack of diversity and inclusion is an entrenched problem in the legal profession. The issue is pronounced for women and minorities in larger law firms.[39]

Bar admission representatives can play an especially influential role in advocating for initiatives involving diversity and inclusion, including bar exam grants for qualified applicants, pipeline programming for low-income high school and college students, studies and reports on

the state of diversity in the admissions process, and formal mentoring programs.

## Conclusion

The bar admissions community is a critical stakeholder in the movement toward greater well-being in the legal profession. But collective action is not enough. The Task Force report encourages each person in every stakeholder group to come on board individually and take an active role in the well-being movement. Assuming an active individual role can take the form of serving as a role model by making a personal commitment to well-being, personally striving to reduce the stigma associated with mental health and substance use disorders, encouraging help-seeking behaviors in others, and changing workplace culture to support employee well-being.[40] The Task Force encourages everyone to join the movement toward greater health and well-being in the legal profession. The time for change is now.

## Notes

1. Jerome M. Organ, David B. Jaffe, and Kathryn M. Bender, "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns," 66 J. Legal Educ. 116 (2016). See also Jerome M. Organ, David B. Jaffe, and Kathryn M. Bender, "Helping Law Students Get the Help They Need: An Analysis of Data Regarding Law Students' Reluctance to Seek Help in Policy Recommendations for a Variety of Stakeholders," 84(4) The Bar Examiner 9 (Dec. 2015).

2. Patrick R. Krill, Ryan Johnson, and Linda Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," 10 J. Addiction Med. 46 (2016). See also Linda Albert and Patrick Krill, "Wellness and the Legal Profession: Implications of the 2016 Landmark Study on the Prevalence of Substance Use and Mental Health Concerns Among U.S. Attorneys," 85(1) The Bar Examiner 50 (Mar. 2016).

3. Amanda Chan, Amanda Lee, and Adam Savitt, "Wellness at the Law School: Promises to Keep and Miles to Go Before We Sleep," Harv. Crimson, Mar. 28, 2018; Jamie Halper, "Law Student Leadership Plans Mental Health Initiatives," Harv. Crimson, Oct. 19, 2017.

4. Id.

5. See David L. Chambers, "Overstating the Satisfaction of Lawyers," 39 Law & Soc. Inquiry 1 (2013).

6. Jerome M. Organ, "What Do We Know About the Satisfaction/ Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being," 8 U. St. Thomas L. J. 225 (2011); Larry S. Krieger and Karen M. Sheldon, "What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers," 83 Geo. Wash. L. Rev. 554 (2015).

7. The results of a study of 1,600 full-time employees published in the Harvard Business Review in spring 2018 and conducted by BetterUp, a San Francisco workplace consulting firm, found that 61% of lawyers fell above average on the UCLA Loneliness Scale. This was the highest level of loneliness reported among all professional occupations. Debra Cassens Weiss, "Lawyers Rank Highest on 'Loneliness Scale,' Study Finds," ABA J., April 3, 2018; Danielle Paquette, "American Workers Are Already Lonely. Here Come the Robots," Wash. Post, March 30, 2018; Shawn Achor, Gabriella Rosen Kellerman, Andrew Reece, and Alexi Robichaux, "America's Loneliest Workers, According to Research," Harv. Bus. Rev., Mar. 18, 2018.

8. Past and current members include: Bree Buchanan, co-chair (Director, Texas Lawyers Assistance Program; President, ABA CoLAP); James C. Coyle, co-chair (Attorney Regulation Counsel, Colorado Supreme Court); Anne Brafford (Aspire Legal, ABA Law Practice Division's Attorney Well-Being Committee); Josh Camson (Camson Rigby, LLC, ABA Standing Committee on Professionalism); Lindsey Draper (Special Advisor to the ABA Standing Committee on Client Protection); Charles Gruber, Esq. (Solo Practice, APRL representative); Judith Gundersen (President and CEO, National Conference of Bar Examiners); Terry Harrell (Executive Director, Indiana Judges and Lawyers Assistance Program; Past-President, ABA CoLAP); David Jaffe (Associate Dean of Students, American University Washington College of Law, co-author of the nationwide law student survey); Tracy Kepler (Director, ABA Center for Professional Responsibility); Patrick Krill (Krill Strategies, co-author of the nationwide lawyer study); Chief Justice Donald W. Lemons (Supreme Court of Virginia); Douglas Leonard (Chair, Pennsylvania Disciplinary Board); Sarah Myers (Clinical Director, Colorado Lawyer Assistance Program); Chris Newbold, co-chair (Executive Vice President, ALPS Corp., a direct writer of lawyers' malpractice insurance); Shannon Nordstrom (Nordstrom Law Office); Jayne Reardon (Executive Director, Illinois Supreme Court Commission on Professionalism; ABA Standing Committee on Professionalism); Hon. David A. Shaheed (ABA CoLAP and judicial representative); Lynda Shely (The Shely Firm, PC, APRL representative); William Slease, co-chair (Chief Disciplinary Counsel, Disciplinary Board of the New Mexico Supreme Court); Kathleen Uston (Assistant Bar Counsel, Virginia State Bar); and Courtney Wylie (Drinker Biddle & Reath LLP). Liaisons: Linda Albert (The Psychology Center, co-author of the nationwide lawyer study); Donald Campbell (Collins, Einhorn, Farrell & Ulanoff, P.C., APRL President); and Erica Moeser (former president, National Conference of Bar Examiners). Staff Attorney: Jonathan P. White (Professional Development Counsel, Office of Attorney Regulation Counsel, Colorado Supreme Court).

9. The Path to Lawyer Well-Being: Practical Recommendations for Positive Change (2017), pp. 8–9, available at www.lawyerwellbeing.net.

10. Id. at pp. 9–10.

11. Id. at pp. 10–11.

12. Id. at App. A., "State Action Plan & Checklist, Chief Justice (or Designee) 'To Do List.'"

13. Id., cover letter page 1.

14. Conf. of Chief Justices Resol. 6 (Recommending Consideration of the Report of the National Task Force on Lawyer Well-Being) (Aug. 9, 2017).

15. Colorado: The Colorado Supreme Court Lawyer Well-Being Task Force will be led by Justice Monica Márquez. Its first meeting will take place in the summer of 2018. Stakeholders will include leaders from law firms, the state's two law schools, the bench, and specialty/local bar associations. Wyoming State Bar Executive Director Sharon Wilkinson and Bar Counsel Mark Gifford, along with University of Wyoming College of Law Dean Klint Alexander, will participate on the Colorado task force in order to evaluate and discuss a possible action plan for Wyoming.

16. Connecticut: The Connecticut Bar Association has established a lawyer well-being task force. The task force will use the report of the National Task Force on Lawyer Well-Being as a "blueprint for moving lawyer well-being forward." The Connecticut task force held its first meeting in April 2018. See Conn. Bar Ass'n, Lawyer Well-Being Task Force, 4/9/2018, http://www.ctbar.org/m/event_details.asp?id=1086879.

17. Florida: The Florida Bar created a special commission to address the issue of lawyer well-being. Florida Supreme Court Chief Justice Jorge Labarga wrote in The Florida Bar News in May 2018 that "[l]awyers who are afraid to get help will not get help. They will suffer alone until their health gives way, causing problems that could have been avoided for their clients and themselves. No more. The entire profession shares this problem and must find solutions. The attitudes of the past that allowed this problem to continue must change." He lauded the efforts of the Florida Bar to combat stigma associated with getting help. C.J. Jorge Labarga, "When Lawyers Need Help, Let's Make Sure They Don't Fear Getting It," The Fla. Bar News, May 1, 2018.

18. Georgia: The State Bar of Georgia has an Attorney Wellness Task Force looking at a range of issues. This group focuses on healthy lifestyles and mental health issues lawyers confront. See Georgia Lawyers Living Well, https://www.gabar.org/wellness/.

19. Illinois: The Illinois Task Force on Lawyer Well-Being first met in February 2018. It is considering a number of innovations including an app and a program for lawyers in career transitions. Erika Kubik, "LAP Forms Illinois Task Force on Lawyer Well-Being," 2Civility, Ill. Sup. Ct. Comm'n on Professionalism blog, Mar. 16, 2018.

20. Massachusetts: Massachusetts convened a group of interested parties to study the National Task Force report and recommendations. The first meeting of this group occurred on March 16, 2018. See, e.g., email from Constance Vecchione, Bar Counsel, Massachusetts Board of Bar Overseers, to the author (Mar. 15, 2018) (on file with author).

21. Minnesota: Minnesota has no formal commission but has already several recommendations in place and is currently studying others: (1) Minnesota allows CLE credit for well-being topics; (2) Minnesota has adopted essential eligibility requirements; (3) Minnesota has a conditional admission program; (4) the Minnesota Board of Law Examiners is evaluating bar application inquiries concerning an applicant's mental health; (5) Minnesota is reviewing whether to publish data revealing the rate of denied admissions due to mental health disorders; (6) Minnesota is reviewing proactive management-based initiatives as part of strategic planning; and (7) the state is studying modification of procedural rules to allow one-way sharing of information from regulators to the lawyer assistance program. See Susan Humiston, "Lawyer Well-Being and Lawyer Regulation," Bench & Bar of Minn. (Dec. 2017).

22. Nebraska: Chief Justice Michael Heavican of the Nebraska Supreme Court reported to the author on April 30, 2018, that Nebraska is in the initial stages of planning for a state task force on lawyer well-being. See also email from Mark Weber, Nebraska Supreme Court Counsel for Discipline, to the author (Jan. 2, 2018) (on file with author). In addition, Nebraska adopted essential eligibility requirements. The Nebraska Lawyer devoted an entire issue to lawyer well-being in 2017.

23. New Mexico: New Mexico has a Proactive Attorney Regulation Committee (PARC) chaired by William Slease, Chief Disciplinary Counsel. Mr. Slease intends to have the PARC study and take steps to implement the Report of the National Task Force on Lawyer Well-Being. New Mexico also has a Professionalism Commission. Mr. Slease plans to work with the New Mexico Judges and Lawyers Assistance Program Director, Pamela Moore, and the State Bar General Counsel, to engage this commission on the national task force's recommendations. See, e.g., email from William Slease, Chief Disciplinary Counsel, Disciplinary Board of the New Mexico Supreme Court, to the author (Jan. 2, 2018) (on file with author).

24. Texas: The Texas Roundtable on Well-Being in the Legal Profession was formed through the Texas State Bar with the support of the Texas Supreme Court. This roundtable is currently (as of May 2018) identifying stakeholders and will study the Task Force report. It will assess what recommendations can be implemented in Texas and what other activities would be useful for promoting lawyer well-being. Its first meeting was on June 7, 2018. See, e.g., email from Bree Buchanan, Director, Texas Lawyers Assistance Program, and co-chair, National Task Force on Lawyer Well-Being, to Jonathan White, staff attorney, National Task Force on Lawyer Well-Being (April 26, 2018) (on file with author).

25. Utah: Chief Justice Matthew Durrant from the Utah Supreme Court informed the author on May 1, 2018, that Utah will convene a task force to review the Task Force report, inventory recommendations, and develop a state

action plan. Justice Paige Petersen will chair this task force.

26. Vermont: The Vermont Supreme Court established the Vermont Commission on the Well-Being of the Legal Profession. The Commission's Charge and Designation provides that it will create an "action plan" by December 31, 2018, with proposals for the Vermont Supreme Court and its committees to consider concerning lawyer, judge, and law student well-being. The Charge and Designation states: "The Vermont Supreme Court fully supports the concept of lawyer, judge, and law student well-being as a critical component of lawyer and judicial competence and access to justice for Vermonters . . . ." See, e.g., Vt. Sup. Ct., Charge & Designation, Vt. Comm'n on the Well-Being of the Legal Prof. (Jan. 2, 2018). Further, the Vermont Bar Journal's spring 2018 issue featured a column by Vermont Bar Association President Daniel Maguire on lawyer well-being, as well as an article by Therese Corsones, Executive Director of the Vermont Bar Association, on the Vermont Commission on the Well-Being of the Legal Profession. Michael Kennedy, Vermont Bar Counsel, has also discussed the issue of lawyer well-being in blog posts. See, e.g., Michael Kennedy, Five for Friday #108, Ethical Grounds, The Unofficial Blog of Vermont's Bar Counsel, Mar. 2, 2018, https://vtbarcounsel.wordpress.com/2018/03/02/five-for-friday-108/.

27. Virginia: Virginia established the Committee on Lawyer Well-Being in late 2017. Justice William Mims of the Virginia Supreme Court chairs the Committee. Several discrete subcommittees are studying well-being as it pertains to various sectors of the legal profession in the Commonwealth. These include law firms, law schools, the judiciary, and public sector employers. See, e.g., email from Kathleen Uston, Assistant Bar Counsel, Virginia State Bar, to Jonathan White, staff attorney, National Task Force on Lawyer Well-Being (April 27, 2018) (on file with author).

28. West Virginia: On March 21, 2018, Chief Justice Margaret Workman issued an order establishing the West Virginia Task Force on Lawyer Well-Being. The order identified stakeholders, including regulators, judges, lawyers, and Chris Newbold, Executive Vice President of ALPS Corp., a direct writer of lawyers' malpractice insurance. The Task Force's first meeting occurred on May 11, 2018, and it will make recommendations to the West Virginia Supreme Court of Appeals by December 31, 2018. See Lacie Pierson, "WV Supreme Court Establishes Task Force for Lawyer Well-Being," Charleston Gazette-Mail, Mar. 22, 2018.

29. Wisconsin: As of April 2018, the State Bar of Wisconsin is moving forward with the creation of a task force to study the recommendations of the national task force report. See, e.g., email from Mary Spranger, WisLAP Manager, to Bree Buchanan, Director, Texas Lawyers Assistance Program, and co-chair, National Task Force on Lawyer Well-Being (Mar. 30, 2018) (on file with author).

30. See, e.g., email from Dave Curtin, Chief Disciplinary Counsel, Disciplinary Board of the Supreme Court of Rhode Island, to Jonathan White, staff attorney, National Task Force on Lawyer Well-Being (April 30, 2018) (on file with author). The author apologizes to the members of any jurisdiction that is also in the process of forming a task force but whose identity was not known as of May 1, 2018.

31. Am. Bar Ass'n Comm'n on L. Assistance Programs, Working Group to Advance Well-Being in the Legal Profession, https://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession.html (last visited Apr. 27, 2018).

32. Am. Bar Ass'n Resol. 105 (Feb. 2018), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.authcheckdam.pdf.

33. See The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, supra note 9, App. A., "State Action Plan & Checklist, Chief Justice (or Designee) 'To Do List'" and "State Action Plan & Checklist, Checklist for Gathering the Stakeholders."

34. See id. at Recommendation 21.1.

35. See id. at Recommendation 21.2.

36. See id. at Recommendation 21.3.

37. See id. at Recommendation 21.4.

38. See also Brittany Kauffman, Inst. for the Advancement of the Am. L. Sys., Change the Culture, Change the System (2015) (arguing that reforming the civil justice system requires, among other things, a return to greater collegiality among lawyers).

39. See The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, supra note 9, pp. 15–16.

40. There are many resources available for employers to consult in changing workplace culture to support employee well-being. These include the Tristan Jepson Memorial Foundation's Guidelines for promoting well-being in the legal profession, available at http://www.tjmf.org.au/the-guidelines/ as well as Anne Brafford's Positive Professionals: Creating High-Performing Profitable Firms Through the Science of Engagement (Am. Bar Ass'n L. Practice Div. 2017).

James C. Coyle was Attorney Regulation Counsel for the Colorado Supreme Court from March 2013 until his retirement at the end of June 2018. Coyle had been with the Office of Attorney Regulation Counsel since 1990, serving in various roles, which included oversight of attorney admissions. Coyle was co-chair of the National Task Force on Lawyer Well-Being from its inception and until his retirement.

# Public Policy Position
# ADM File No. 2016-46

## Remove Questions 54a and 54b and Replace with NCBE Questions

**Explanation**

LJAP recommends that Questions 54a and 54b be retired in favor of the more conduct-oriented NCBE questions. LJAP also recommends that a new process for Character & Fitness hearings be established for cases where an applicant's conduct may be related to a mental health diagnosis. Inclusion of mental health professionals who can properly interpret the medical record, advise panel members, and guide further inquiry, is recommended. Finally, LJAP recommends that C&F panel members be required to complete structured education aimed at providing a basic understanding of mental health and substance use disorders.

Further details are presented in the attached memorandum.

**Position Vote:**

Voted for position to replace questions: 8
Voted to remove questions entirely: 5
Abstained from vote: 2
Did not vote: 3

**Contact Person:** Emily Conway
**Email:** econway@mclpc.com

Response to Order from the Michigan Supreme Court
ADM File No. 2016-46
Special Administrative Inquiry
Regarding Questions Relating to
Mental Health on the Michigan
Bar Examination Application

March 24, 2019

Prepared by Tish Vincent, LMSW, Esq, Program Director of the Lawyers & Judges Assistance Program

*NOTE: Ms. Vincent was a member of the audit team in 2015 that completed a Performance Enhancement Review for the State of Louisiana Judges and Lawyers Assistance Program to assist them in coming into compliance with the elements of the settlement agreement between the United States of America and the Louisiana Supreme Court.*

## *Introduction*

Research findings from the 2014 Survey of Law Student Well-Being indicate that "a significant percentage of . . . students were dealing with mental health issues, including alcohol and other substance use issues . . .*Law students are reluctant to seek the help they need due to the misperception that it may cause them difficulties with bar admission* or may be a potential threat to job or academic status."[1]

Recent research results show that law students and lawyers have higher rates of substance use disorders, depression, anxiety, and stress even relative to other highly educated professionals.[2] It is of concern that during law school, where students are learning the law, and learning to think like lawyers, they may also be learning to deny any mental health concerns, avoid mental health professionals who could help them, and attempt to cultivate an image of being well instead of developing the competency of protecting their well-being in a stressful culture.

It is unsurprising, therefore, that Questions 54a and 54b on the application for the Michigan Bar Examination are the source of anxious questions every time LJAP presents to law students. In our experience, that anxiety motivates students with a latent or diagnosed mental health condition in one of two ways:

1. Some concerned law students request assessment by LJAP in order to demonstrate to the Board of Law Examiners that they are addressing a condition that may be of concern. Where appropriate, sometimes these students enter into monitoring agreements.

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[1] Coyle, J.C., *The Report of the National Task Force on Lawyer Well-Being and the Role of the Bar Admissions Community in the Lawyer Well-Being Movement.* The Bar Examiner. Summer 2018. p 9.

[2] Krill, P, Johnson, R, & Albert, L. *The Prevalence of Substance Use and Other Mental Health Concerns Among Attorneys.* American Society of Addiction Medicine. Feb, 2016; Organ, J., Jaffe, D., Bender, K. *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns.* Journal of Legal Education, Volume 66, Number 1 (Autumn 2016).

2. Other law students avoid LJAP and other mental health professionals, concerned that any interaction with mental health professionals will subject their applications to heightened scrutiny during the Character & Fitness process.

To comment properly to the Court's Administrative Order it is necessary to discuss two questions.

First, does the information gained in an applicant's answer to these questions properly balance the responsibility of the State Bar of Michigan to determine an applicant is fit to practice law with the applicant's right to keep information about a disability private?

Second, once the applicant has answered these questions honestly about a mental health diagnosis and treatment history does the Character & Fitness hearing process handle any protected health information in a respectful, thoughtful, and deferential manner?

## *Questions 54a and 54b on the Application for the Michigan Bar Examination: Balancing SBM's responsibility to determine fitness and applicants' privacy rights.*

In considering Questions 54a and 54b, LJAP is guided by concepts articulated in a settlement agreement between the United States Department of Justice and the Louisiana Supreme Court.

The Bazelon Center for Mental Health Law, on behalf of a number of applicants for admission to the Louisiana State Bar who had mental health conditions, filed an administrative complaint with the Department of Justice, Civil Rights Division. The DOJ determined that Louisiana officials were subjecting applicants to unlawful inquiries concerning their mental health conditions and treatment. In 2014 the DOJ and the Louisiana Supreme Court reached a settlement agreement. In the agreement, Louisiana Bar Admissions personnel pledged to

> [r]efrain from inquiring into mental health diagnosis or treatment, unless (1) an applicant ***voluntarily discloses this information to explain conduct or behavior that may otherwise warrant denial of admission*** . . . [or] . . . (2) the Committee learns from a third-party source that the applicant raised a mental health diagnosis or treatment as ***an explanation for conduct or behavior that may otherwise warrant denial of admission***.[3]

In LJAP's view, placing these conditions on inquiry into mental health diagnosis and treatment strikes an appropriate balance between competing rights and interests, by placing the focus on the applicant's past *conduct* rather than on the applicant's medical and treatment history.

Question 54a is as follows

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a ***mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life***? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or

[3] Settlement Agreement Between the United States of America and the Louisiana Supreme Court Under the Americans with Disabilities Act. August, 2014. 13(c). p. 3 ("the Louisiana Bar Agreement")

> other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization. (emphasis added).

The purpose of Question 54a is understandable. The Board of Law Examiners is attempting to determine whether an applicant is mentally and emotionally capable to handle the demands of legal work. In light of the direction and guidance memorialized in the Louisiana settlement agreement LJAP recommends amending this question to ask about *conduct* or *behavior* that interferes with the practice of law and *only* then ask about conditions or impairments that may have contributed to that conduct. Finally, and only after inquiring about conduct and underlying conditions should inquiry be made about any treatment the applicant has sought. Information requested should be narrowly tailored to the interfering conduct.

The language in Michigan's Question 54b asks about whether the applicant has been treated or refused treatment for a condition that *may* interfere with being . . .candid, truthful, handling funds, meeting deadlines, or otherwise representing the interest of others[.]"

> Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

To the extent it is not subsumed by the more general inquiry in Question 54a, Question 54b's inquiry regards conditions that *could* interfere with the competent practice of law. Projecting potential future problems due to a current mental health condition presents the applicants with such conditions to an impossible, speculative task of predicting future conduct. In light of the guidance provided by the Louisiana case LJAP recommends that the BLE ask only if there *has been prior conduct* that interferes with candor, financial propriety, and meeting obligations.

### *Considerations regarding use of mental health and treatment history by C&F panels: Does Michigan's Character & Fitness Process Handle the Protected Health Information Shared by an Applicant in a Respectful, Thoughtful, and Deferential Manner that Observes the Privacy and Dignity of the Applicant?*

LJAP concludes that problems with the use of *use* of mental health and treatment history by C&F panels are inextricably linked to problems with *inquiry* about those matters in the application for the Michigan Bar Examination.

LJAP staff have observed with concern that Character & Fitness hearing panel members sometimes focus on details from an applicant's mental health and health history to accuse the applicant of bad moral character.

An example brought to LJAP's attention is illustrative. In one case, during therapy, an applicant shared her reluctance to discuss certain sensitive issues with her mentally ill mother. During a C&F panel hearing, members seized on the record of this discussion to accuse the applicant of lacking good moral character because she "lied by omission" to her mother. One panel member went so far

as to raise his voice at the applicant in a judgmental manner.[4] While she was eventually admitted to practice, this misuse of the applicant's health history was egregious.

LJAP staff are also concerned by the lack of deference C&F panels sometimes give treating mental health professionals. In an illuminating instance, a panel questioned a highly experienced mental health provider about his treatment plan for an applicant, and then told the provider that the applicant needed more treatment before the applicant would be fit to practice law. In other words, the C&F panel member, who was not a mental health professional, made clinical recommendations to a health professional.

C&F panels' use of confidential health information causes concern because panel members are not mental health professionals. LJAP suggests that guidance should be taken from the Louisiana Bar Agreement, which states:

- Any inquiry into a mental health diagnosis or treatment shall be narrowly, reasonably, and individually tailored.

- The committee or a medical professional retained by the committee shall first request statements from the applicant, and if reasonably deemed necessary the applicant's treating professional.

- The treating professional's statements shall be accorded considerable weight, and the medical records shall not be requested unless a statement from, and any further dialogue with, the applicant's treating professional fails to resolve the committee's reasonable concerns.

- Any medical or hospital records requested shall be by way of narrowly tailored requests and releases that provide access only to information that is reasonably needed to assess the applicant's fitness to practice law.[5]

Additionally, LJAP recommends that C&F panels involve independent mental health professionals in the hearing process whenever there is a concern about conduct possibly stemming from a mental health diagnosis.[6] The independent health professional should review pertinent records, and advise the panel members of their significance.

At all times the C&F panel members should treat applicants, and their mental health histories, with respect, and should refrain from interpreting emotional or mental struggles as evidence of poor moral character. C&F panels should defer to the particular expertise of treating mental health professionals.

Following these recommendations will help C&F panels approach the constellation of issues surrounding mental health appropriately and respectfully.

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[4] First hand report of treating therapist present at this hearing to testify for the applicant. 2010.
[5] Louisiana Bar Agreement, A(c). p. 3.
[6] LJAP understands the State of Utah uses this approach in its bar application process.

## *Conclusions*

LJAP recommends that Questions 54a and 54b be retired in favor of the more conduct-oriented NCBE questions. LJAP also recommends that a new process for Character & Fitness hearings be established for cases where an applicant's conduct may be related to a mental health diagnosis. Inclusion of mental health professionals who can properly interpret the medical record, advise panel members, and guide further inquiry, is recommended. Finally, LJAP recommends that C&F panel members be required to complete structured education aimed at providing a basic understanding of mental health and substance use disorders.

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

February 13, 2019

ADM File No. 2018-25

Proposed Amendment of
Rule 7.312 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

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.312 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 7.312 Briefs and Appendixes in Calendar Cases and Cases Argued on the Application

(A) Form and Length. Briefs in calendar cases and cases to be argued on the application must be prepared in conformity with MCR 7.212(B), (C), (D), and (G) as to form and length. If filed in hard copy, ~~B~~briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. Typewritten, handwritten, or carbon copy pages may be used so long as the printing is legible.

(B)-(C) [Unchanged.]

(D) Appendixes.

(1) Form. Appendixes must be prepared in conformity with MCR 7.212(B), and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix (e.g., "Appellant's Appendix," "Appellee Appendix," "Joint Appendix"). If submitted in hard copy, ~~A~~appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.

(2) Appellant's Appendix. The appellant must file ~~A~~an appendix in calendar cases and in cases to be argued on the application. The appendix ~~filed by the appellant must be entitled "Appellant's Appendix,"~~ must be separately bound~~,~~ and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain:

(a)-(e) [Unchanged.]

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix~~, so designated,~~ containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) [Unchanged.]

(4) Appellee's Appendix. ~~An appendix, entitled "Appellee's Appendix," may be filed.~~ The appellee's appendix, if any, must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due

(a) within 56 days ~~after~~of the order granting the application for leave to appeal ~~is granted;~~, or

(b) within 42 days of the order directing the clerk to schedule oral argument on the application;

(2) the appellee's brief and appendixes, if any, are due

(a) within 35 days after the appellant's brief is served on the appellee in a calendar case, or

(b) within 21 days after the appellant's brief is served on the appellee in a case being argued on the application; and

(3) the reply brief is due

(a) within 21 days after the appellee's brief is served on the appellant in a calendar case, or

(b) within 14 days after the appellee's brief is served on the appellant in a case being argued on the application.

(F) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal for both calendar cases and cases being argued on the application. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief for both calendar cases and cases being argued on the application. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief in a calendar case and within 14 days after service of the responsive brief in a case being argued on the application.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subsection (2) or as directed by the Court.

(2) [Unchanged.]

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and.

(4) Unless the Court directs a different time for filing, an amicus brief must be filed

(a) within 21 days after the brief of the appellee has been filed or the time for filing such brief has expired in a calendar case, or

(b) within 14 days after the brief of the appellee has been filed or the time for filing such brief has expired in a case being argued on the application~~, or at any other time the Court directs~~.

(~~4~~5) An amicus curiae may not participate in oral argument except by Court order.

(I)-(J) [Unchanged.]

(K) For cases argued on the application, parties should focus their argument on the merits of the case, and not just on whether the Court should grant leave.

*Staff Comment*: The proposed amendment of MCR 7.312 would incorporate into the Supreme Court rules the procedure to be followed for cases being argued on the application. These rules have been previously included in orders granting argument on the application. A proposed new subrule (K) would alert parties to the fact that they should argue the merits of the case even for motions being heard on the application.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

VIVIANO, J. (*concurring*). I concur in the Court's order publishing for comment proposed changes to MCR 7.312 that are designed to standardize and make uniform the filing procedures for cases argued on the application (commonly referred to as "MOAAs," an acronym derived from "mini oral arguments on the application"). I write separately because this seems an opportune time to also consider whether MOAAs are serving their intended purpose—or any purpose—well or whether it is time to consider ending the practice altogether.

The MOAA procedure was created in 2003 in an amendment to MCR 7.302 (now MCR 7.305).[1] According to a statement signed by the four justices who voted in support of the amendment, the purpose of the amendment was "to afford something beyond summary review to more cases being appealed to this Court."[2] The statement asserted that allowing oral argument on the application would "not come at the expense of fuller oral argument, but as an alternative to no oral argument at all."[3] In recent years, while the number of MOAAs has increased, the number of cases in which the Court has granted leave to appeal has decreased significantly.[4] Therefore, it appears that MOAAs may no longer be serving their intended purpose.

Rather than functioning to allow substantive consideration and resolution of more cases, it appears that MOAAs primarily serve two purposes. First, MOAAs give us the option of hearing a case but limiting oral argument to 15 minutes per side, as opposed to the traditional 30 minutes per side in cases where leave to appeal is granted.[5] Second, they give the Court the option of disposing of a case after arguments without a decision on the merits by simply denying leave, instead of our traditional practice following a grant of leave to appeal, i.e., entry of an order vacating the grant order and denying leave (thereby implicitly recognizing that leave was improvidently granted).[6]

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[1] See MCR 7.302, 469 Mich cxlv. The amendment added the following underlined language to MCR 7.302(G)(1):

> The Court may grant or deny the application, enter a final decision, or issue a peremptory order. There is no oral argument on applications unless ordered by the Court. The clerk shall issue the order entered and mail copies to the parties and to the Court of Appeals clerk.

[2] MCR 7.302, 469 Mich cxlvi (MARKMAN, J., concurring).

[3] *Id.*

[4] In the past six terms, our Court has ordered 20, 16, 23, 36, 41, and 53 MOAAs, respectively. By contrast, we have ordered 45, 46, 26, 27, 17, and 17 grants, respectively.

[5] See MCR 7.314(B).

[6] This appears to be happening with increasing frequency—by one account, the Court has issued denials in 50 of the 150 MOAAs it has considered during the past five terms.

Beyond the question of whether the MOAA is serving the purpose intended by the Court at the time of its adoption, it appears that MOAAs have also become a source of frustration and confusion to the appellate bar.[7] The members of this Court frequently field questions about MOAAs—why we do them, how they are different from grants, how arguments should be presented, etc. Parties have also expressed confusion over the fact that MOAAs are nominally intended to address "whether to grant leave to appeal," when in reality our Court will regularly decide a case on the merits following a MOAA. Some practitioners have argued that MOAAs are ill-suited to decide significant issues because the truncated briefing schedule does not allow time for full-merits briefing and amicus involvement. And MOAAs certainly present a unique challenge to the advocates, who must argue in a compressed time frame both why the case is jurisprudentially significant (such that we should not simply deny leave) and why the issue presented should be resolved in their client's favor.

The proposed changes are intended to address some of these concerns. However, in contemplating whether to adopt them, I believe we should also consider the broader question of whether the MOAA procedure should be preserved and improved, or whether it no longer serves its intended purpose and the practice should be ended.

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[7] In fact, the 2019 Michigan Appellate Bench Bar Conference is scheduled to include two breakout sessions entitled "Michigan Supreme Court Mini-Oral Arguments (MOAs)—How Are They Working?" Michigan Appellate Bench Bar Conference Foundation, *Michigan Appellate Bench Bar Conference*, available at <https://benchbar.org/wp-content/uploads/2019/01/MABBCF-Brochure-1-22-19-2.pdf> (accessed February 6, 2019), pp 4, 6 [https://perma.cc/7K5A-YVW8]. According to the event brochure, the session will include "a candid discussion of the costs and benefits derived from the increased use of MOAs in recent years." *Id.*

# Public Policy Position
# ADM File No. 2018-25

**Support**

**Explanation**

The committee voted unanimously (13) to support the proposed amendment of Rule 7.312, as providing beneficial instruction for those attorneys who normally don't practice before the high court, as well as lining up with current practice. Subsection (K) provides an accurate description in the court rule of current practice.

**Position Vote:**

Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote: 3

**Contact Persons:**

Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
Kathryn L. Hennessey, Public Policy Counsel

Date: April 1, 2019

Re: HB 4296

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**Background**
HB 4296 would extend the sunset on the Michigan's court electronic filing system fee for ten years. The electronic filing system fee is assessed in civil actions filed in both trial-level and appellate-level courts. The fees are set forth in MCL 600.1986 and are waived for indigency.

The State Court Administrative Office (SCAO) administers the funds to implement the statewide electronic filing system. In written testimony to the House Judiciary committee, Tom Clement, SCAO General Counsel, stated that extending these funds "is essential to the continued successful statewide implementation of electronic filing in the State of Michigan."

***Keller* Considerations**
The implementation of the statewide electronic filing system affects the functioning of the courts and the availability of legal services. In 2015, the State Bar of Michigan supported legislation that authorized SCAO to implement an electronic filing system.[1] As Mr. Clement testified, the statewide electronic filing system "is a significant technological transformation which dramatically improves access to justice for all users of the judicial system while allowing courts to streamline their processes and improve efficiencies."

The funding of the electronic filing system also affects the functioning of the courts and the availability of legal services because, according to SCAO, "if the funding stream stops, the program will stop."

[1] *See* SB 531, 532, and 533 of 2015.

***Keller* Quick Guide**

| THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*: | | |
|---|---|---|
| | **Regulation of Legal Profession** | **Improvement in Quality of Legal Services** |
| **As interpreted** | • Regulation and discipline of attorneys<br>• Ethics<br>• Lawyer competency<br>• Integrity of the Legal Profession<br>• Regulation of attorney trust accounts | ✓ Improvement in functioning of the courts<br>✓ Availability of legal services to society |

**Staff Recommendation**

The legislation satisfies the requirements of *Keller* and may be considered on its merits.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Wednesday, March 27, 2019
Michigan Compiled Laws Complete Through PA 578 of 2018

# House Bill 4296 (2019) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2019-HB-4296

## Sponsor

Graham Filler (district 93)
(click name to see bills sponsored by that person)

## Categories

Civil procedure: costs and fees; Courts: other;

Civil procedure; costs and fees; e-filing fee; extend sunset. Amends sec. 1993 of 1961 PA 236 (MCL 600.1993).

## Bill Documents

Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

### Documents

**House Introduced Bill**
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**As Passed by the House**
As Passed by the House is the bill, as introduced, that includes any adopted House amendments.

**As Passed by the Senate**
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

**House Enrolled Bill**
Enrolled bill is the version passed in identical form by both houses of the Legislature.

## Bill Analysis

### House Fiscal Agency Analysis

**Summary As Introduced (3/10/2019)**
This document analyzes: HB4296

**Summary as Reported From Committee (3/20/2019)**
This document analyzes: HB4296

## History

(House actions in lowercase, Senate actions in UPPERCASE)

| Date ▲ | Journal | Action |
|---|---|---|
| 3/6/2019 | HJ 23 Pg. 223 | introduced by Representative Graham Filler |

| | | | |
|---|---|---|---|
| 3/6/2019 | HJ 23 | Pg. 223 | read a first time |
| 3/6/2019 | HJ 23 | Pg. 223 | referred to Committee on Judiciary |
| 3/7/2019 | HJ 24 | Pg. 235 | bill electronically reproduced 03/06/2019 |
| 3/19/2019 | HJ 28 | Pg. 290 | reported with recommendation without amendment |
| 3/19/2019 | HJ 28 | Pg. 290 | referred to second reading |
| 3/20/2019 | HJ 29 | Pg. 315 | read a second time |
| 3/20/2019 | HJ 29 | Pg. 315 | placed on third reading |
| 3/20/2019 | HJ 29 | Pg. 317 | placed on immediate passage |
| 3/20/2019 | HJ 29 | Pg. 317 | read a third time |
| 3/20/2019 | HJ 29 | Pg. 317 | passed; given immediate effect Roll Call # 35 Yeas 106 Nays 0 |
| 3/20/2019 | HJ 29 | Pg. 317 | transmitted |
| 3/21/2019 | SJ 30 | Pg. 263 | REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY |

# HOUSE BILL No. 4296

March 6, 2019, Introduced by Rep. Filler and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 1993 (MCL 600.1993), as added by 2015 PA 233.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

Sec. 1993. ~~An~~ **A CLERK SHALL NOT COLLECT AN** electronic filing system fee ~~shall not be collected~~ under section 1986(1) after February 28, ~~2021.~~**2031.**

HOUSE BILL No. 4296

# Legislative Analysis

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

**EXTEND ELECTRONIC FILING FEE SUNSET**

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

**House Bill 4296 as reported from committee**
**Sponsor: Rep. Graham Filler**
**Committee: Judiciary**
**Complete to 3-20-19**

## SUMMARY:

House Bill 4296 would amend the Revised Judicature Act to extend the sunset (expiration date) pertaining to collections by a court clerk of an electronic filing system fee. Instead of collections ending after February 28, 2021, the new date would be February 28, 2031, thereby allowing the fees to be collected for an additional 10 years.

MCL 600.1993

## BACKGROUND INFORMATION:

2015 PAs 230 through 235 created a statewide e-filing system intended to increase efficiency and provide cost benefits not only to the state's courts, but also to attorneys and their clients when filing documents. Electronic filing fees are collected only on filings in civil actions and are waived for the indigent and also for governmental entities. Fees are collected by the state treasurer and deposited into the Judicial Electronic Filing Fund. The fund is administered by the State Court Administrative Office (SCAO) to implement, operate, and maintain the electronic filing system. SCAO is reimbursed by the fund for its costs in doing so. The public may retrieve and view on the site documents filed both manually and electronically and pay only if they choose to copy those documents. Currently, participation in the e-filing system is not mandatory, and people pay only when accessing the system.

## BRIEF DISCUSSION:

Sunset provisions are typically used when an issue warrants revisiting in the future before a provision is made a permanent part of law. The electronic filing fees established by the 2015 legislation have generated approximately $8 million, which, according to SCAO, has already been expended. To continue to expand, support, and maintain the system, and to educate people about the benefits of the e-filing system, collections will need to continue past the current sunset date. If the e-filing fees end before the system is fully operational statewide, the program will stop and benefits to the public, such as the ability of people representing themselves to use the e-filing system to file anytime, will also stop. The bill would not raise the fee amount or create new fees, but would allow the remaining money needed for a full, statewide rollout of the program to be collected.

However, some may say that extending the deadline by an additional 10 years when the current sunset date is still almost two years away defeats the purpose of sunsets—that is,

to provide legislative oversight in a timely manner to see whether that law should continue as is, be amended to address issues that have come up, or be ended because it has accomplished what was intended or has been shown to be ineffective. To allow another 12 years without such oversight may not be prudent. A shorter sunset extension would enable the legislature to review the program and decide at that time how many more years the e-filing fees would be needed to finish expanding the program to the entire state.

**FISCAL IMPACT:**

The bill would have no fiscal impact on the state or on local units of government until after the year 2031. A fiscal impact to the state could occur at that time, but only if the sunset is not extended again. Under the bill, the fees would continue to be collected until February 28, 2031. After that date, if there is a balance remaining in the fund, the balance would be used to pay ongoing costs of the e-filing system. Any costs not covered by revenue in the fund would have to be paid from the general fund.

**POSITIONS:**

A representative of the State Court Administrative Office (SCAO) testified in support of the bill. (3-12-19)

The Prosecuting Attorneys Association of Michigan (PAAM) indicated support for the bill. (3-19-19)

The Michigan Creditors Bar Association indicated a neutral position on the bill. (3-12-19)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

# Legislative Analysis

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

**EXTEND ELECTRONIC FILING FEE SUNSET**

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

**House Bill 4296 as introduced**
**Sponsor: Rep. Graham Filler**
**Committee: Judiciary**
**Complete to 3-10-19**

## SUMMARY:

House Bill 4296 would amend the Revised Judicature Act to extend the sunset (expiration date) pertaining to collections by a court clerk of an electronic filing system fee. Instead of collections ending after February 28, 2021, the new date would be February 28, 2031, thereby allowing the fees to be collected for an additional 10 years.

MCL 600.1993

## BACKGROUND INFORMATION:

Public Acts 230 through 235 of 2015 created a statewide e-filing system intended to increase efficiency and provide cost benefits not only to the state's courts, but also to attorneys and their clients. Electronic filing fees are waived for the indigent and also for governmental entities. Fees are collected by the state treasurer and deposited into the Judicial Electronic Filing Fund. The fund is administered by the State Court Administrative Office (SCAO) to implement, operate, and maintain the electronic filing system. SCAO is reimbursed by the fund for its costs in doing so. The public may retrieve and view on the site documents filed both manually and electronically and pay only if they choose to copy those documents.

## FISCAL IMPACT:

The bill would have no fiscal impact on the state or on local units of government until after the year 2031. A fiscal impact to the state could occur at that time, but only if the sunset is not extended again. Under the bill, the fees would continue to be collected until February 28, 2031. After that date, if there is a balance remaining in the fund, the balance would be used to pay ongoing costs of the e-filing system. Any costs not covered by revenue in the fund would have to be paid from the general fund.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

# Public Policy Position
# HB 4296

**Support**

**Explanation**
The committee voted to support HB 4296 extending the sunset for the electronic filing system fee to February 28, 2031.

**Position Vote:**
Voted For position: 13
Voted against position: 0
Abstained from vote: 1
Did not vote: 3

***Keller* Explanation:**
The committee agreed that this legislation is *Keller* permissible in affecting the functioning of the courts.

**Contact Persons:**
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

**House Judiciary**
**Testimony – Tom Clement, General Counsel**
**House Bill 4296 – Electronic System Filing Fee Sunset Extension**
**March 12, 2019**

Thank you, Mr. Chairman and members of the Committee, my name is Tom Clement and I am general Counsel for the State Court Administrative Office and Michigan Supreme Court.

I thank you for taking up this simple, but vitally important bill which will extend the sunset on the electronic system filing fee which is essential to the continued successful statewide implementation of electronic filing in the State of Michigan.

Electronic-Filing (E-Filing), known in Michigan as *MiFile*, is a significant technological transformation which dramatically improves access to justice for all users of the judicial system while allowing courts to streamline their processes and improve efficiencies. In its most basic form, E-Filing eliminates the need for the filing of paper copies, including the arduous tasks of printing, copying, separating, and mailing, and replaces it with electronic filing that can be accomplished from anywhere at any time in a few simple steps. For members of the public and attorneys using the judicial system, *MiFile* vastly reduces the sometimes confusing process of proper filing and service of process.

On December 22, 2015, former Governor Snyder signed a series of bills which amended the Revised Judicature Act of 1961 to allow for statewide E-Filing. These bills became effective on January 1, 2016. Among the changes, MCL 600.176 allows for the "implementation, operation, and maintenance of a statewide electronic filing system and supporting technology" and created the judicial electronic filing fund which is to be used for all "reasonable costs associated with the administration of this section, including judicial staff and training, on-site management assistance, and software development and conversion." The fund is funded through the electronic system filing fee, which is collected at case initiation in civil matters only and

supports the entire *MiFile* transformation. Put differently, there is no appropriation or other funding source for statewide e-filing. The project is completely supported through this user fee and the user receives a tremendous benefit from the system.

The bottom line is this: The *MiFile* initiative takes in about $8 million annually and expends that same amount. This is projected to remain consistent over time with the focus shifting from building and implementing to support, maintenance, and education. Please note that when I talk about support, maintenance and education, I am referring to full engagement with all 244 courts we have throughout the state. Maintenance alone is a huge undertaking, but as technology advances so will the *MiFile* solution and the associated case management systems, thereby requiring constant upgrading and re-tooling. The statewide rollout is moving forward according to our plans. In fact, the five original pilot courts are now on a version of the statewide system and have already processed more than 1.1 million filings. This spring, model circuit, probate, and district court standard solutions will go online. At the same time, the Supreme Court is adopting rules to make sure that all filers, whether they have a lawyer or not, are able to file online, anytime.

This is the most important technological change in court administration in at least a generation. However, if the funding stream stops, the program will stop. It's that simple. Extending the sunset is critically important to keep the program going and make sure that this dramatic improvement in court administration reaches its full potential of increased efficiency and convenience for our customers.

Thank you and I would be happy to answer any questions.

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
Kathryn L. Hennessey, Public Policy Counsel

Date: April 1, 2019

Re: SB 0076

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**Background**

SB 76 is tie-barred with SB 70, which would create an address confidentiality program whose purpose would be to help protect victims of domestic violence, sexual assault, stalking, and human trafficking. As part of the program, SB 70 would require the attorney general to certify application assistants and victim advocates to assist program applicants and participants. SB 76 provides that an applicant assistant or victim advocate would not be engaged in the unauthorized practice of law when assisting program participants. In addition, SB 76 provides that participants in the address confidentiality program may claim an exemption from jury service while they participate in the program.

***Keller* Considerations**

The Access to Justice Policy and Criminal Jurisprudence & Practice committees reviewed SB 76 and agreed that it was *Keller*-permissible because the bill (1) affects the regulation of attorney by clarifying that victim advocates are not engaged in the unauthorized practice or law, and (2) affects the functioning of the courts by exempting program participants from jury service. The Board has regularly found bills impacting who may serve on a jury *Keller*-permissible. *See, e.g.*, HB 4869 of 2015 (proposing exemption for physicians); SB 1092 of 2018 (proposing postponement for farmers).

***Keller* Quick Guide**

| | **THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:** | |
|---|---|---|
| | **Regulation of Legal Profession** | **Improvement in Quality of Legal Services** |
| **As interpreted** | ✓ Regulation and discipline of attorneys<br>• Ethics<br>• Lawyer competency<br>• Integrity of the Legal Profession<br>• Regulation of attorney trust accounts | • Improvement in functioning of the courts<br>✓ Availability of legal services to society |

**Staff Recommendation**

The legislation satisfies the requirements of *Keller* and may be considered on its merits.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Wednesday, March 27, 2019
Michigan Compiled Laws Complete Through PA 578 of 2018

# Senate Bill 0076 (2019) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2019-SB-0076

## Sponsors

Kimberly LaSata (district 21)
Ruth Johnson, Adam Hollier, Jeff Irwin, Stephanie Chang, Paul Wojno, Lana Theis, Dayna Polehanki, Mallory McMorrow, Jeremy Moss, Rosemary Bayer, Tom Barrett, Kevin Daley
(click name to see bills sponsored by that person)

## Categories

Courts: other; Courts: juries; Crime victims: other; Occupations: other;

Courts; other; certain crime victims; exempt from jury duty and provide that certain individuals are not practicing law in violation of the revised judicature act. Amends secs. 916 & 1307a of 1961 PA 236 (MCL 600.916 & 600.1307a). TIE BAR WITH: SB 0070'19

## Bill Documents

Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

### Documents

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**As Passed by the Senate**
As Passed by the Senate is the bill, as introduced, that includes any adopted Senate amendments.

**As Passed by the House**
As Passed by the House is the bill, as received from the Senate, that includes any adopted House amendments.

**Senate Enrolled Bill**
Enrolled bill is the version passed in identical form by both houses of the Legislature.

## Bill Analysis

## History

(House actions in lowercase, Senate actions in UPPERCASE)

| Date ▲ | Journal | Action |
|---|---|---|
| 1/29/2019 | SJ 9 Pg. 85 | INTRODUCED BY SENATOR KIM LASATA |
| 1/29/2019 | SJ 9 Pg. 85 | REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY |

# SENATE BILL No. 76

January 29, 2019, Introduced by Senators LASATA, JOHNSON, HOLLIER, IRWIN, CHANG, WOJNO, THEIS, POLEHANKI, MCMORROW, MOSS, BAYER, BARRETT and DALEY and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending sections 916 and 1307a (MCL 600.916 and 600.1307a), section 916 as amended by 2000 PA 112 and section 1307a as amended by 2012 PA 69.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

Sec. 916. (1) A person shall not practice law or engage in the law business, shall not in any manner whatsoever lead others to believe that he or she is authorized to practice law or to engage in the law business, and shall not in any manner whatsoever represent or designate himself or herself as an attorney and counselor, attorney at law, or lawyer, unless the person is regularly licensed and authorized to practice law in this state. A person who violates this section is guilty of contempt of the

SENATE BILL No. 76

supreme court and of the circuit court of the county in which the violation occurred, and upon conviction is punishable as provided by law. This section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter.

(2) A domestic violence victim advocate's assistance that is provided in accordance with section 2950c does not violate this section.

**(3) AN APPLICATION ASSISTANT'S OR VICTIM ADVOCATE'S ASSISTANCE THAT IS PROVIDED IN ACCORDANCE WITH THE ADDRESS CONFIDENTIALITY PROGRAM ACT DOES NOT VIOLATE THIS SECTION.**

Sec. 1307a. (1) To qualify as a juror, a person ~~shall~~ **MUST** meet all of the following criteria:

(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the person is selected, and in the case of a district court in districts of the second and third class, be a resident of the district.

(b) Be able to communicate in the English language.

(c) Be physically and mentally able to carry out the functions of a juror. Temporary inability ~~shall~~ **MUST** not be considered a disqualification.

(d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.

(e) Not have been convicted of a felony.

(2) A person more than 70 years of age may claim exemption from jury service and ~~shall~~ **MUST** be exempt upon making the request.

(3) A nursing mother may claim exemption from jury service for

the period during which she is nursing her child and ~~shall~~ **MUST** be exempt upon making the request if she provides a letter from a physician, a lactation consultant, or a certified nurse midwife verifying that she is a nursing mother.

**(4) AN INDIVIDUAL WHO IS A PARTICIPANT IN THE ADDRESS CONFIDENTIALITY PROGRAM CREATED UNDER THE ADDRESS CONFIDENTIALITY PROGRAM ACT MAY CLAIM EXEMPTION FROM JURY SERVICE FOR THE PERIOD DURING WHICH HE OR SHE IS A PROGRAM PARTICIPANT. TO OBTAIN AN EXEMPTION UNDER THIS SUBSECTION, THE INDIVIDUAL SHALL PROVIDE HIS OR HER PARTICIPATION CARD ISSUED BY THE DEPARTMENT OF ATTORNEY GENERAL UPON HIS OR HER CERTIFICATION AS A PROGRAM PARTICIPANT TO THE COURT PROVIDING EVIDENCE THAT HE OR SHE IS A CURRENT PARTICIPANT IN THE ADDRESS CONFIDENTIALITY PROGRAM.**

**(5)** ~~(4)~~ For the purposes of this section and sections 1371 to 1376, a person has served as a juror if that person has been paid for jury service.

**(6)** ~~(5)~~ For purposes of this section:

(a) "Certified nurse midwife" means an individual licensed as a registered professional nurse under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, who has been issued a specialty certification in the practice of nurse midwifery by the board of nursing under section 17210 of the public health code, 1978 PA 368, MCL 333.17210.

(b) "Felony" means a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a

felony.

(c) "Lactation consultant" means a lactation consultant certified by the ~~international board of lactation consultant examiners.~~**INTERNATIONAL BOARD OF LACTATION CONSULTANT EXAMINERS.**

(d) "Physician" means an individual licensed by the state to engage in the practice of medicine or osteopathic medicine and surgery under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

Enacting section 1. This amendatory act takes effect 180 days after the date it is enacted into law.

Enacting section 2. This amendatory act does not take effect unless Senate Bill No. 70

of the 100th Legislature is enacted into law.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Wednesday, March 27, 2019
Michigan Compiled Laws Complete Through PA 578 of 2018

# Senate Bill 0070 (2019) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2019-SB-0070

## Sponsors

Ruth Johnson (district 14)
Adam Hollier, Jeff Irwin, Stephanie Chang, Paul Wojno, Lana Theis, Dayna Polehanki, Mallory McMorrow, Jeremy Moss, Rosemary Bayer, Kevin Daley
(click name to see bills sponsored by that person)

## Categories

Crime victims: other; Crimes: domestic violence; Crimes: criminal sexual conduct; Crimes: stalking; State agencies (existing): state; State agencies (existing): attorney general; State agencies (existing): technology, management, and budget;

Crime victims; other; address confidentiality program for certain victims and individuals; create. Creates new act. TIE BAR WITH: SB 0073'19, SB 0074'19, SB 0075'19

## Bill Documents

Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

### Documents

**Senate Introduced Bill**
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

**As Passed by the Senate**
As Passed by the Senate is the bill, as introduced, that includes any adopted Senate amendments.

**As Passed by the House**
As Passed by the House is the bill, as received from the Senate, that includes any adopted House amendments.

**Senate Enrolled Bill**
Enrolled bill is the version passed in identical form by both houses of the Legislature.

## Bill Analysis

## History

(House actions in lowercase, Senate actions in UPPERCASE)

| Date ▲ | Journal | Action |
|---|---|---|
| 1/29/2019 | SJ 9 Pg. 84 | INTRODUCED BY SENATOR RUTH JOHNSON |
| 1/29/2019 | SJ 9 Pg. 84 | REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY |

# SENATE BILL No. 70

January 29, 2019, Introduced by Senators JOHNSON, HOLLIER, IRWIN, CHANG, WOJNO, THEIS, POLEHANKI, MCMORROW, MOSS, BAYER and DALEY and referred to the Committee on Judiciary and Public Safety.

A bill to create the address confidentiality program; to provide certain protections for victims of domestic violence, sexual assault, stalking, or human trafficking; to prescribe duties and responsibilities of certain state departments; to require the promulgation of rules; to create a fund; to prohibit the disclosure of certain information and obtaining a certification under this act by fraud; and to prescribe penalties.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

Sec. 1. This act shall be known and may be cited as the "address confidentiality program act".

SENATE BILL No. 70

Sec. 3. As used in this act:

(a) "Application assistant" means an employee or volunteer at an agency or organization that serves victims of domestic violence, stalking, human trafficking, or sexual assault who has received training and certification from the department of the attorney general to help individuals complete applications to become program participants.

(b) "Confidential address" means the address of a program participant's residence, as specified on an application to be a program participant or on a notice of change of information as provided under section 5 that is classified confidential by the department of the attorney general.

(c) "Designated address" means the mailing address at which the department of technology, management, and budget receives mail to forward to program participants.

(d) "Domestic violence" means a violation of section 81 of the Michigan penal code, 1931 PA 328, MCL 750.81.

(e) "Governmental entity" means this state, a local unit of government, or any department, agency, board, commission, or other instrumentality of this state or a local unit of government.

(f) "Guardian of a ward" means a person who has qualified as a guardian of a legally incapacitated individual under a court appointment.

(g) "Human trafficking" means a violation of chapter LXVIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h.

(h) "Law enforcement agency" means that term as defined in section 2 of the Michigan commission on law enforcement standards

act, 1965 PA 203, MCL 28.602.

(i) "Local unit of government" means a city, village, township, or county in this state.

(j) "Municipally owned utility" means electric, gas, or water services provided by a municipality.

(k) "Program" means the address confidentiality program created under this act.

(*l*) "Program participant" means an individual who is certified by the department of the attorney general as a program participant under section 5.

(m) "Sexual assault" means a violation, attempted violation, or solicitation or conspiracy to commit a violation of section 520b, 520c, 520d, 520e, 520f, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, 750.520d, 750.520e, 750.520f, and 750.520g.

(n) "Stalking" means that term as defined in section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

(o) "Victim" means an individual who suffers direct or threatened physical, financial, or emotional harm as the result of a commission of a crime.

(p) "Victim advocate" means an employee of the department of the attorney general, the department of state, or the department of technology, management, and budget who has received training and certification from the department of the attorney general to help individuals complete applications to become program participants, and who is available to help individuals complete the applications

and is responsible for assisting program participants in navigating through and accessing all aspects of the program.

(q) "Ward" means that term as defined in section 1108 of the estates and protected individuals code, 1998 PA 386, MCL 700.1108.

Sec. 5. (1) The address confidentiality program is created in the department of the attorney general.

(2) Except for an individual described in subsection (11), beginning 180 days after the effective date of this act, the following individuals are eligible to apply to the program and may submit an application, with the assistance of an application assistant or a victim advocate, for certification as a program participant by the department of the attorney general:

(a) If changing his or her residence, an individual who is 18 years of age or older.

(b) If changing the residence of a minor, the parent with legal custody or the guardian of the minor.

(c) If the residence of a ward is changing, the guardian of that ward if the guardian is granted the power to apply by a court under section 5306 of the estates and protected individuals code, 1998 PA 386, MCL 700.5306.

(3) The application under subsection (2) must be filed with the department of the attorney general in the manner and form prescribed by the department of the attorney general and must contain the following:

(a) A notarized statement that meets 1 of the following requirements:

(*i*) If the applicant is an individual 18 years of age or

older, a statement by that individual that disclosure of the address provided under subdivision (d) will increase the risk that he or she will be threatened or physically harmed by another person or that the individual is a victim of domestic violence, stalking, human trafficking, or sexual assault.

(*ii*) If the applicant is the parent with legal custody or the guardian of a minor, a statement by that parent or guardian that disclosure of the address provided under subdivision (d) will increase the risk that the minor will be threatened or physically harmed by another person or that the parent or guardian, or the minor, is a victim of domestic violence, stalking, human trafficking, or sexual assault.

(*iii*) If the applicant is the guardian of a ward as provided under subsection (2)(c), a statement by that guardian that the disclosure of the address provided under subdivision (d) will increase the risk that the ward will be threatened or physically harmed by another person or that the ward is a victim of domestic violence, stalking, human trafficking, or sexual assault.

(b) A knowing and voluntary designation of the department of technology, management, and budget as the agent for the purposes of receiving mail and service of process.

(c) The mailing address, telephone number, and electronic mail address, if applicable, at which the department of the attorney general, the department of state, or the department of technology, management, and budget, may contact the individual, minor, or ward.

(d) The address of residence that the applicant requests not be disclosed.

(e) The signature of the applicant, the name and signature of any application assistant or victim advocate who assisted the applicant, and the date the application was signed.

(4) Beginning 180 days after the effective date of this act, the department of the attorney general shall do all of the following after an individual, the parent or guardian of a minor, or a guardian of a ward files a completed application:

(a) Except as provided in subsection (5), certify the individual, minor, or ward as a program participant.

(b) Issue the program participant a unique identification number and a participation card.

(c) Classify each eligible address listed in the application as a confidential address.

(d) Provide the program participant with information concerning the manner in which the program participant may use the department of technology, management, and budget as the agent of the program participant for the purposes of receiving mail and service of process.

(e) If the program participant is eligible to vote, provide the program participant with information concerning the process to register to vote and to vote as a program participant under the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992.

(f) Provide the program participant with information concerning the procedure from which the program participant will receive a corrected operator's or chauffeur's license under section 310f of the Michigan vehicle code, 1949 PA 300, MCL 257.310f, a corrected enhanced driver license or enhanced official state

personal identification card under section 4 of the enhanced driver license and enhanced official state personal identification card act, 2008 PA 23, MCL 28.304, or a corrected official state personal identification card under section 2a of 1972 PA 222, MCL 28.292a.

(5) An individual, minor, or ward must not be certified as a program participant if the department of the attorney general knows the confidential address provided in the application as described in subsection (3)(d) is not a new address for that individual, minor, or ward.

(6) A program participant shall update information provided in an application within 30 days after a change to that information has occurred by submitting a notice of change of information to the department of the attorney general on a form prescribed by the department of the attorney general.

(7) Unless the certification is canceled under section 9, the certification of a program participant is valid for 4 years from the date listed on the application under subsection (3) or on the renewal application under subsection (9).

(8) The department of the attorney general may, with proper notice, cancel the certification of a program participant as provided under section 9.

(9) A program participant who continues to be eligible to participate in the program may renew the certification of the program participant. The renewal application must be on a form prescribed by the department of the attorney general and must meet the requirements under subsections (2) and (3). The department of the attorney general must make the form for a renewal application

available no later than 180 days after the effective date of this act. A renewal of certification of the program participant must not alter the unique identification number issued under subsection (4)(b).

(10) The information of a program participant described under section 15(1) is not a public record and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(11) An offender who is required to be registered under the sex offenders registration act, 1994 PA 295, MCL 28.721 to 28.736, is not eligible to submit an application and must not be certified as a program participant.

(12) The department of the attorney general shall create a participation card for the program. A participation card must contain the name and unique identification number of a program participant, and the designated address.

Sec. 7. (1) A program participant may request that a governmental entity use the designated address as the program participant's address. Except as otherwise provided in subsection (6) and in the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, a governmental entity shall use the designated address. The program participant may provide his or her participation card as proof of his or her certification as a program participant.

(2) If a program participant's employer, school, or institution of higher education is not a governmental entity, the program participant may request that the employer, school, or institution of higher education use the designated address as the

program participant's address.

(3) The department of technology, management, and budget shall, on each day the department of technology, management, and budget is open for business, place all first-class, registered, or certified mail of a program participant that the department of technology, management, and budget receives into an envelope or package and mail that envelope or package to the program participant at the mailing address the program participant provided on the application under section 5(3)(c) for that purpose. The department of technology, management, and budget may contract with the United States Postal Service for special rates for the mail forwarded under this subsection.

(4) Upon receiving service of process on behalf of a program participant, the department of technology, management, and budget shall immediately forward the process by certified mail, return receipt requested, to the program participant at the mailing address the program participant provided on the application under section 5(3)(c) for that purpose.

(5) If a person intends to serve process on an individual and makes an inquiry with the department of the attorney general or the department of technology, management, and budget to determine if the individual is a program participant, the department of the attorney general or the department of technology, management, and budget shall only confirm that the individual is or is not a program participant and must not disclose further information regarding the program participant.

(6) Subsection (1) does not apply to a municipally owned

utility. The confidential address of a program participant that is maintained by a municipally owned utility must not be released, and is not a public record and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 9. (1) The department of the attorney general may cancel the certification of a program participant if the program participant is not reachable at the mailing address, telephone number, and any electronic mail address provided under section 5(3)(c) for 60 or more days.

(2) The department of the attorney general shall cancel the certification of a program participant in any of the following circumstances:

(a) The program participant's application contained 1 or more false statements.

(b) The program participant or the parent or guardian of a program participant that is a minor or the guardian of a ward that is a program participant files a notarized request for cancellation on a form prescribed by the department of the attorney general.

(c) The program participant fails to file a renewal application while the initial certification as a program participant is valid as provided in section 5(7). The department of the attorney general may promulgate a rule to provide for a grace period.

Sec. 11. (1) A department of this state, a law enforcement agency, or a local unit of government may request the department of the attorney general to provide the confidential address, telephone number, and electronic mail address of a program participant if the

requesting department of this state, a law enforcement agency, or a local unit of government requires access to the confidential address, telephone number, or electronic mail address of the program participant for a legitimate governmental purpose. Upon receiving a request under this subsection, the department of the attorney general shall confirm whether an individual, minor, or ward is a program participant but may not disclose further information except as provided under subsection (3).

(2) Upon the filing of a request under this section, the department of the attorney general shall provide the program participant with notice of the request.

(3) The department of the attorney general may grant the request submitted under subsection (1) if the department of the attorney general determines that disclosure of the confidential address, telephone number, or electronic mail address of the program participant to the requesting department of this state, law enforcement agency, or local unit of government is necessary for a legitimate governmental purpose.

Sec. 13. (1) Not later than 4 months after the effective date of this act, the department of the attorney general shall develop and offer a training program for application assistants and victim advocates to obtain certification under this act.

(2) The department of the attorney general shall certify a person applying for certification as an application assistant or as a victim advocate under this act if that person has completed the training program under subsection (1). Not later than 180 days after the effective date of this act, the department of the

attorney general shall make available on its website the names and contact information of the application assistants and victim advocates.

(3) An application assistant or victim advocate who provides assistance in accordance with this act does not violate section 916 of the revised judicature act of 1961, 1961 PA 236, MCL 600.916.

Sec. 15. (1) Not later than 180 days after the effective date of this act, the department of the attorney general must create and maintain a computerized database that contains the name, unique identification number, confidential address, mailing address, telephone number, and any electronic mail address of each program participant. The department of the attorney general, the department of technology, management, and budget, and the department of state may have access to the database as required to implement this act.

(2) The department of the attorney general must ensure the database under subsection (1) immediately provides the department of technology, management, and budget and the department of state, upon the certification of a program participant, the information listed in subsection (1), and upon the cancellation of a certification of a program participant under section 9, that status.

Sec. 17. The department of the attorney general may, in consultation with the Michigan domestic and sexual violence prevention and treatment board, the department of technology, management, and budget, and the department of state promulgate rules to implement this act in compliance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

Sec. 19. (1) The confidential address fund is created in the state treasury. The fund shall be administered by the attorney general.

(2) The state treasurer may receive money and assets from any source for deposit into the fund. The state treasurer shall direct the investment of the fund. The state shall credit to the fund interest and earnings from fund investments.

(3) Money in the fund at the close of the fiscal year must remain in the fund and must not lapse to the general fund.

(4) The department of the attorney general shall expend money from the fund, upon appropriation, for the purpose of administering the program.

Sec. 21. (1) A person shall not knowingly make a false statement in an application submitted under section 5.

(2) Except as otherwise provided by law, a person who has access to a confidential address, telephone number, or electronic mail address of a program participant through the database created under section 15 shall not knowingly disclose that confidential address, telephone number, or electronic mail address to any other person.

(3) A person that violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

Sec. 23. (1) The department of the attorney general shall establish an address confidentiality program advisory council composed of the following members:

(a) The attorney general, or his or her designee.

(b) The director of the department of technology, management, and budget, or his or her designee.

(c) The secretary of state, or his or her designee.

(d) The executive director of the Michigan Coalition to End Domestic and Sexual Violence, or his or her designee.

(e) The executive director of the Michigan domestic and sexual violence prevention and treatment board, or his or her designee.

(2) Not later than 3 years after the effective date of this act, the first meeting of the advisory council must be called by the member described under subsection (1)(a).

(3) Except as provided in subsection (6), information collected by the advisory council under this section is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(4) The advisory council shall not deliberate toward or render a decision on public policy, and a meeting of the advisory council is not a meeting of a public body under the open meetings act, 1976 PA 267, MCL 15.261 to 15.275.

(5) Members of the advisory council shall serve without compensation. However, members of the advisory council may be reimbursed for their actual and necessary expenses incurred in the performance of their official duties as members of the advisory council.

(6) The advisory council shall prepare and submit a report to the legislature of findings in evaluating the program. The advisory council shall not include in the report the name, confidential address, telephone number, or electronic mail address of a program

participant or any other information that could reasonably be expected to identify a program participant. The report submitted under this subsection must be made available to the public in compliance with the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Enacting section 1. This act does not take effect unless all of the following bills of the 100th Legislature are enacted into law:

(a) Senate Bill No. 73

(b) Senate Bill No. 75

(c) Senate Bill No. 74

# Public Policy Position
# SB 0076

**Support**

**Explanation:**
SB 70 proposes the creation of the Address Confidentiality Program to provide protections to victims of domestic violence, sexual assault, stalking, or human trafficking. SB 76 is tie-barred with SB 70 and amends MCL 600.916 to clarify that individuals, without a law license, who provide assistance with program applications or act as a victim advocate under the Address Confidentiality Act are not engaged in the unlawful practice of law. SB 76 would also create a jury service exemption for people who participate in the Address Confidentiality Program.

The ATJ Policy Committee recommends that that SBM support SB 76 as these amendments would help maintain the protections offered in the Address Confidentiality Program Act.

**Position Vote:**
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote: 5

***Keller* Explanation:**
SB 76 is *Keller*-permissible because it affects the regulation of attorneys by clarifying that victim advocates are not practicing law. SB 76 also affects the functioning of the courts by exempting program participants from jury service.

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

# Public Policy Position
# SB 0076

**Support**

**Explanation**
The committee voted to support SB 0076 as written. An individual who is participating in the address confidentiality program for safety should be provided an exemption for jury service through the program date to provide for continued safety.

**Position Vote:**
Voted For position: 9
Voted against position: 2
Abstained from vote: 3
Did not vote: 3

***Keller* Explanation:**
The committee agreed that this legislation is *Keller* permissible in the availability of legal services to society and the functioning of the courts.

**Contact Persons:**
Sofia V. Nelson snelson@sado.org
Michael A. Tesner mtesner@co.genesee.mi.us

# Public Policy Position
# SB 0076

## OPPOSE

**Explanation**
The majority opposed because they did not believe additional exemptions from jury service should be created legislatively. The majority felt this was an issue that could be handles adequately by the court.

**Position Vote:**
Voted For position: 10
Voted against position: 5
Abstained from vote: 2
Did not vote: 7

***Keller* Explanation**
The improvement of the functioning of the courts.
The bill relates to exempting a category of persons from jury service.

**Contact Person:** Judge Hugh Clarke
**Email:** hugh.clarke@lansingmi.gov