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Corbin Davis
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Michigan Supreme Court
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Lansing, MI

48933-2012

RE: ADM File No. 2012-03 – Proposed Adoption of Rule 1.111 and Rule 8.127 of the Michigan Court Rules

Dear Clerk Davis:

At its July 27, 2012, meeting, the Board of Commissioners of the State Bar of Michigan considered the above rule adoption published for comment. In its review, the Board considered recommendations from the Committee on Justice Initiatives and the Civil Procedure & Courts Committee. The Board voted to adopt the report of the Committee on Justice Initiatives, provided with this letter.

We thank the Court for the opportunity to comment on the proposed rule adoption.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Julie I. Fershtman, President

MEMORANDUM

TO: Office of Governmental Relations

FROM: Committee on Justice Initiatives

RE: Recommendations re Michigan Supreme Court ADM File No. 2012-03

DATE: June 26, 2012

Introduction

In May of this year, the Committee on Justice Initiatives (CJI) created a Language Access Workgroup (Workgroup) to study and make recommendations on proposed MCR 1.111 and 8.127. The Workgroup consisted of knowledgeable practitioners from each of CJI's four initiatives. They have studied the issue of language access over time, worked on these issues on a national basis, and/or worked extensively with limited English persons and interpreters in the justice system. Some members of the Workgroup are bi-lingual. The Workgroup consisted of Pamela Enslen (Criminal Issues Initiative, Equal Access Initiative), Robert F. Gillett (Pro Bono Initiative), Hon. Katherine Hansen (Criminal Issues Initiative), Kay Felt (Equal Access Initiative), David Koelsch (Criminal Issues Initiative), Caridad Pastor (Criminal Issues Initiative), Hon. Angela Sherigan (Criminal Issues Initiative), and Thomas K. Thornburg (Justice Policy Initiative).

The Workgroup studied the proposed court rules, met several times to discuss the rules, and unanimously adopted recommendations that were then provided to the CJI. CJI met on June 25 to review those recommendations. Eight of the ten CJI members were present at that meeting, and those eight members voted to approve the recommendations of the Workgroup.

The Committee on Justice Initiatives strongly supports the adoption of court rules that address the issue of language access in Michigan's judicial proceedings. Court rules that provide direction on the right to interpreters in civil proceedings and that clarify responsibility for payment of interpreter fees in civil and criminal matters are needed to address a glaring policy gap in these areas. Rules will also assure that Michigan's justice system and the services afforded to the increasing number of people with limited English proficiency comply with Title VI of the Civil Rights Act of 1964 (Title VI), 42U.S.C. 2000d to 2000d-7. Direction in this area will make certain that limited English proficient persons throughout the state will be able to rely on consistent services that provide access to justice and increase public trust and confidence in our justice system. In writing these comments the CJI used Title VI, the National Center for State Courts "10 Key Components to a Successful Language Access Program in the Courts," and the American Bar Association Standards for Language Access in Courts, among other authority and resources on language access issues in the U. S. judicial system.

Rule 1.111 Foreign Language Interpreters

MCR 1.111 (A)(2)(a) through (c) “Certified foreign language interpreter”
MCR 1.111 (A)(5) “Qualified foreign language interpreter”

These rules establish a tiered credentialing of language interpreters and make it clear that family members, those with potential conflicts of interest, and otherwise unqualified people are not to be used to provide interpreter services. The CJI supports this development.

MCR 1.111 (B) Appointment of a Foreign Language Interpreter

The CJI recommends the adoption of Alternative B which provides for the assignment of language interpreters for court operations, as well as in court proceedings, for all “parties of interest,” as defined therein. It is felt that broad application of the rule to all court operated or managed points of public contact in the judicial process more adequately complies with the duty to provide meaningful access and fair administration of justice both in and out of the courtroom, as required by Title VI. Including language access for all parties who have a recognized interest in the proceeding or process benefits not only the parties themselves, but also contributes to insuring the integrity of the judicial process by improving communication throughout the justice system.

Alternative C unduly limits the appointment of language interpreters to “indigent” persons in court proceedings, or to “other instances at the court’s discretion.” By so restricting the scope of the appointment criteria, and deferring to the discretion of individual courts, this alternative fails to create a state interpreter policy that is compliant with Title VI’s mandate to provide all LEP individuals with meaningful access to state court proceedings and operations.

Alternative A similarly limits the mandatory appointment of an interpreter to “a party, a participant, or a witness while testifying in a civil or criminal case or court proceeding.” This option does not ensure meaningful access by LEP individuals to court functions that are conducted outside the courtroom, such as intake and filing offices, Friend of the Court offices, probation and parole, alternative dispute programs, and other points of public contact with the justice system.

MCR 1.111 (F)(4) Appointment of Foreign Language Interpreters

The CJI recommends the adoption of Alternative B, with an addition. Alternative B provides for court payment of all mandated language interpretation services. In making this recommendation, the CJI assumes the adoption of Alternative B to section B, above, which provides the broadest “scope” of mandated interpretation services. We recommend that the two “Alternative B’s” in MCR 1.111 be tie-barred in order to avoid the unintended consequence that a participant in the justice system could be required to have a language interpreter appointed for him/her, and then be mandated to pay for the interpretation services provided. We believe that rules or practices that subject LEP parties to an additional cost, or surcharge, for participating in a court matter violates Title VI and its regulations by impairing their participation based upon national origin.

The CJI recognizes that current DOJ guidance provides that language interpretation services be provided free of charge, see letter from Thomas E. Perez, assistant attorney general, to Chief

Justices and Court Administrators, August 16, 2010

http://www.justice.gov/crt/lep/final_courts_ltr_081610.pdf; the CJI also recognizes the financial burden that interpretation services might pose for some courts, especially during a transition period to full compliance with the new rule. The CJI would not object if the court provides in Alternative B for the ability to assess or recoup costs in the limited circumstances described in the commentary to Standard 2.3 of the ABA Standards for Language Access in Courts (Feb. 2012), see ABA Standards at pp. 24-25. The standard suggested by the ABA for “recoupment” of payment for language interpretation services is based on “a well-resourced party who has the ability to pay” and not on “indigency.”

Alternatives A and C to section (F)(4) are both objectionable to the CJI because they both allow for placing the burden of paying for required language access disproportionately on LEP individuals. Such a result would impermissibly chill LEP persons’ right to meaningful access to the justice system in violation of T.VI. Allowing such costs to be taxed against an LEP person requesting an interpreter would inhibit their requests for language interpretation services that are necessary to allow full participation in the proceedings and to ensure that evidence is communicated accurately and that judicial determinations are duly made upon the record.

MCR 1.111(G) Administration of Oath or Affirmation to Interpreters

The CJI recommends substitute language¹ for two reasons. First, because the interpreter appointment process will be a new program in many courts and because the rule contemplates, under some circumstances, the appointment of non-certified and non-qualified interpreters, the CJI believes a fuller explanation of the interpreter’s role and ethical responsibilities is appropriate. The language we are suggesting is taken from the oath adopted by the Nebraska Supreme Court. Second, in the area of Title VI compliance, cultural sensitivity is very important. Because some cultures do not permit the invocation of God’s name in conjunction with secular proceedings, we recommend deleting the phrase “so help you God.”

The CJI recommends the addition of a new MCR 1.111(H):

The CJI believes that the rule should make it clear that any participant can raise an objection to an interpreter at any time during the proceeding, that the court has a responsibility to insure that

¹ “The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: I do solemnly affirm that I will be bound by the Michigan Code of Professional Responsibility for Court Interpreters in the performance of my duties and assignment as a court interpreter in the Michigan court system. I will maintain high standards of conduct to preserve the integrity, independence, and neutrality of the adjudicative system. I will conduct myself in a manner consistent with the dignity of the Court. I will remain impartial, protect confidentiality, refrain from giving legal advice or personal opinions, and disclose to the Court any conflict of interest. In all legal proceedings, I will thoroughly assess and honestly reveal to the Court my ability to satisfy an assignment competently. When appointed to serve, I will interpret completely and accurately using my best skill and judgment. I will continually strive to improve my skills and knowledge as a Court Interpreter and to elevate the standards of the profession. I will respect the Courts of Michigan, its judicial officers, and all parties involved in legal proceedings.”

interpreters are competent and acting in accord with the professional responsibility code, and that the court has the authority to act in response to an objection. These points, which are implicit in the rule, should be made explicit. A judge or hearing officer has the right and the obligation to manage proceedings so that translated testimony is introduced in an open, fair, coherent manner; a participant in a proceeding has the right to raise concerns about translator competence or bias to the tribunal; the tribunal has the right and obligation to address valid concerns, up to and including removal of the interpreter. Suggested language is in footnote 2.²

MCR 8.127 Foreign Language Board of Review

The CJI supports the creation of this board, but recommends that the board have a broader function. The CJI believes that court policies in this area will be developing rapidly as a result of these proposed rule changes. In addition, communication, planning, coordination, and training functions would be a very positive addition to the regulatory functions in the draft rule. A broader role for a statewide body would bring Michigan closer to the “10 Key Components to a Successful Language Access Program in the Courts” developed by the National Center for State Courts and to Standard 10 of the ABA Standards for Language Access in Courts. Suggested language for a MCR 8.127 (B) (4) is in footnote 3.³

MCR 8.127 (D) Interpreter Misconduct or Incompetence

The CJI believes that interpreter incompetence is likely to be a more common and significant issue in assuring fair proceedings to persons with limited language skills than Code violations. The intent of the suggested changes in MCR 8.127 (D) (1), (2), (7), and (8)⁴ is to clarify that the Foreign

²“Any participant in a proceeding can raise an objection to an interpreter at any time during the proceeding. The court or tribunal has a responsibility to insure that interpreters are competent and are acting in accord with the Michigan Code of Professional Responsibility for Interpreters. The court or tribunal has the authority to take appropriate action in response to an objection, including instructing the interpreter regarding his role in the proceeding or, in the court’s discretion, replacing the interpreter.”

³ MCR 8.127 (B)(4) The board shall have the responsibility to communicate on an ongoing basis with the state court administrator, the Court, and the profession on language access issues, including but not limited to making recommendations regarding best practices, making recommendations regarding the coordination of services; and assisting the state court administrator on resource development issues.

⁴ (D)(1): add “An interpreter, trial court judge or attorney who becomes aware of incompetence on the part of an interpreter in the course of a trial or other court proceeding such that the incompetence affects the fundamental fairness of the proceedings must report the details of the misconduct to the State Court Administrative Office.”

(D)(2): add to second sentence: “...describe in detail the incident and the alleged incompetence, misconduct, or omission.”

(D)(7): add to first sentence: “...who are sanctioned for incompetence or misconduct.”

(D)(8): revise: “This rule shall not be construed to:

Language Board of Review has the authority to address complaints regarding interpreter competence.

(a) restrict an aggrieved person from raising a complaint or objection as to the competence of an interpreter or raising a complaint or objection regarding the interpreter's compliance with the Michigan Code of Professional Responsibility for Court Interpreters during the course of a trial or other proceeding;

(b) restrict an aggrieved person from raising a complaint or objection as to the competence of an interpreter or raising a complaint or objection regarding the interpreter's compliance with the Michigan Code of Professional Responsibility for Court Interpreters as an issue on appeal;

(c) [same as draft]