



p 517-346-6300

p 800-968-1442

f 517-482-6248

www.michbar.org

306 Townsend Street

Michael Franck Building

Lansing, MI

48933-2012

March 1, 2018

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

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

Dear Clerk Royster:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Janet K. Welch
Executive Director

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