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March 26, 2019

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

306 Townsend Street

Michael Franck Building

Lansing, MI

48933-2012

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

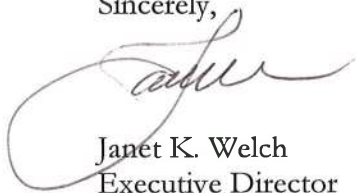
Dear Clerk Royster:

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 lorryb@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.geneseec.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

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**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 3,228 members. 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

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