

October 29, 2021

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

RE: ADM File No. 2020-08 – Rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, 2020-19, and 2020-21 and Amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17

Dear Clerk Royster:

Thank you for the opportunity to comment on the above ADM File. To provide the Court with the fullest array of comments on this important topic, the Executive Committee of the State Bar of Michigan, after careful consideration, has authorized all committees and sections of the State Bar to submit their comments to the Court.

Enclosed with this letter are the comments received from the Access to Justice Policy Committee, the Civil Procedure & Courts Committee, and the Criminal Jurisprudence & Practice Committee.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dana M. Warnez, President

Public Policy Position
ADM File No. 2020-08

The Access to Justice Policy Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Access to Justice Policy Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan has authorized this committee to submit its position.

The Access to Justice Policy Committee has a public policy decision-making body with 28 members. On September 2, 2021, the Committee adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Committee's position, 0 members voted against this position, 0 members abstained, 12 members did not vote due to absence.

Oppose

Explanation

The committee supports improving court and litigant access to technology and capacity to conduct and participate in remote proceedings, but much more needs to be done to address the concerns that have been articulated by this committee and others.

The committee recommends that the amendments not be adopted without revisions to ensure persons without sufficient means to participate electronically are not denied access to the courts and also that participants' privacy interests are sufficiently protected. To the extent that the amendments can be read to create a presumption in favor of remote proceedings, the committee should oppose them, consistent with its previous vote to support a presumption in favor of in-person hearings.

The amendments to the court rules continue the Court's exercise of its supervisory authority to direct trial courts to allow for remote participation by litigants and electronic process tools whenever possible. One concern with the amendments, however, is that the rule changes don't always make it clear that the rules cannot be enforced against someone without sufficient electronic means to participate. The inquiry mandated by MCR 2.407(G) does require trial courts to verify that participants are able to proceed remotely, but it is not consistently cross-referenced in the other rules. Compare MCR 2.506(J) and MCR 6.006(E). A potential improvement would be to include a cross-reference to MCR 2.407(G) in all the rules providing for increased use of remote proceedings.

Another potential for concern is MCR 2.407(G)(4), which requires trial courts conducting remote proceedings to provide access to the public either during the proceeding or immediately after via access to a video recording, unless the proceeding is closed, or access would otherwise be limited by

statute or court rule. The committee is not confident that this provides adequate guidance to avoid publication of proceedings that could cause harm to the participants. Many court proceedings involve sensitive topics and facts which could be damning to individuals if widely published on the internet. Publishing a trial on the Internet is far beyond the access granted by an open court room. Once in the ether, embarrassing or harmful material is nearly impossible to block or determine the identity of the poster. Certainly, doing so is well beyond the resources of most litigants and most courts. A strong regulation must be put into place that 1) limits the duration of the public access to a proceeding, 2) makes it criminal contempt to record and republish a proceeding or to use any part of the proceeding to harass or shame a person using electronic media, and 3) institute a warning before each airing of a court action of the regulations and penalties.

With respect to Rule 5.206 (J), 2.621(C), 9.221(C), it would be helpful if there was an exception for non-party witnesses to decline to appear remotely when they do not have the technology to participate in the manner designated in the subpoena, by notifying the party issuing the subpoena. A non-party witness should not be required to hire an attorney and file a motion to quash because it has been subpoenaed to appear via a remote participation method for which they do not have access to or capacity.

Contact Persons:

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

Public Policy Position
ADM File No. 2020-08

The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Civil Procedure & Courts Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan has authorized this committee to submit its position.

The Civil Procedure & Courts Committee has a public policy decision-making body with 34 members. On August 7, 2021, the Committee adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Committee's position, 1 member voted against this position, 0 members abstained, 17 members did not vote due to absence.

Oppose in Part

Explanation

The committee recommends that the Court rescind its amendments to MCR 2.407(G), (G)(1) and (G)(3). These amendments are unnecessary, and the previous version of the court rule adequately addressed the use of videoconferencing technology. The committee continues to oppose the court rules requiring the use of remote proceedings "to the greatest extent possible." The use of videoconferencing technology should be within the discretion of the courts, and courts should freely permit the use of videoconferencing technology when all parties agree to its use for a particular hearing.

Contact Person: Randy J. Wallace

Email: rwallace@olsmanlaw.com

Public Policy Position
ADM File No. 2020-08

The Criminal Jurisprudence & Practice Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Criminal Jurisprudence & Practice Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan has authorized this committee to submit its position.

The Criminal Jurisprudence & Practice Committee has a public policy decision-making body with 23 members. On September 10, 2021, the Committee adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Committee's position, 0 members voted against this position, 0 members abstained, 6 members did not vote due to absence.

Oppose

Explanation:

The committee voted (17) to oppose the adoption of ADM File No. 2020-08. While the use of videoconferencing is sometimes helpful, as the committee noted in its comments on the *Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021: Findings, Best Practices, and Recommendations*, there are significant concerns with the presumption in favor of videoconferencing for adversarial proceedings, and there are concerns with access to the needed technology for victims, witnesses, and defendants. The committee also has concerns with the use of Court Rule changes for clearly temporary situations, and the implementation of rules prior to seeking public comments, making the situation seemingly be a fait accompli.

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org