Agenda – Revised 11/7/22
Public Policy Committee
November 9, 2022 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……Daniel D. Quick, Chairperson

A. Reports

1. Approval of September 15, 2022 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2016-10: Proposed Amendments of MCR 2.002 and 7.109

The proposed amendments of MCR 2.002 and 7.109 would allow for waiver of appellate transcript fees for indigent individuals.

Status:	01/01/23 Comment Period Expires.
Referrals:	09/23/22 Access to Justice Policy Committee, Civil Procedure & Courts Committee, Appellate Practice Section.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Appellate Practice Section.
Liaison:	Nicholas M. Ohanesian

2. ADM File No. 2002-37: Amendment of MCR 1.109

The amendment of MCR 1.109 provides SCAO the flexibility to determine, when appropriate, when certain documents filed on paper do not need to be imported into the MiFILE document management system until bulk e-filing capability is available.

Status:	01/01/23 Comment Period Expires.
Referrals:	09/14/22 Civil Procedure & Courts Committee.
Comments:	Civil Procedure & Courts Committee.
Liaison:	Brian D. Shekell

3. ADM File No. 2021-49: Proposed Amendment of MCR 2.002

The proposed amendment of MCR 2.002 would provide procedural direction to courts regarding prisoner requests for fee waivers in civil actions.

Status:	01/01/23 Comment Period Expires.
Referrals:	09/24/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison:	Valerie R. Newman

4. ADM File No. 2021-32: Proposed Amendment of MCR 6.112

The proposed amendment of MCR 6.112 would require that the notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement.

Status:	01/01/23 Comment Period Expires.
Referrals:	09/23/22 Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Takura N. Nyamfukudza

5. ADM File No. 2021-40: Proposed Amendment of Rule 5 of the Rules for the Board of Law Examiners

The proposed amendment of Rule 5 of the Rules for the Board of Law Examiners would define the terms "full-time" and "instructor" to clarify that clinical instructors may be admitted to the bar without examination.

Status: 01/01/23 Comment Period Expires.
Referrals: 09/23/22 Access to Justice Policy Committee, Civil Procedure & Courts Committee.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison: Brian D. Shekell

C. Legislation

1. HB 6399 (Whitsett) Criminal procedure: mental capacity; outpatient treatment for misdemeanor offenders with mental health issues; provide for. Amends sec. 461 of 1974 PA 258 (MCL 330.1461) & adds sec. 1021 & ch. 10A.

Status: 09/27/22 Referred to House Committee on Health Policy.
Referrals: 09/27/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Judge Cynthia D. Stephens (Ret.)

2. HB 6437 (LaGrand) Criminal procedure: mental capacity; psychological evaluations for defendants ordered by judges; allow. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 1m to ch. IX.

Status: 10/11/22 Referred to House Committee on Judiciary.
Referrals: 10/18/22 Access of Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee.
Liaison: Kim Warren Eddie

3. SB 1162 (Wozniak) Courts: court of appeals; jurisdiction of the court of appeals to include admitting individuals to the state bar; expand.

Status: 09/14/22 Referred to Senate Committee on Judiciary & Public Safety.
Referrals: 09/19/22 Civil Procedure & Courts Committee.
Comments: Civil Procedure & Courts Committee.
Liaison: Judge Cynthia D. Stephens (Ret.)

4. SB 1175 (Hollier) Courts: juries; local jury boards; eliminate, and create a centralized jury process. Amends secs. 1301a, 1304a, 1326, 1332, 1345 & 1346 of 1961 PA 236 (MCL 600.1301a et seq.); adds sec. 1306 & 1307 & repeals secs. 1301, 1301b, 1302, 1303, 1303a, 1304, 1305, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1327, 1330, 1331, 1338, 1339, 1341, 1342, 1353, 1375, & 1376 of 1961 PA 236 (MCL 600.1301 et seq.) & repeals 1929 PA 288 (MCL 730.251 - 730.271) & repeals 1951 PA 179 (MCL 730.401 - 730.419).

Status: 09/20/22 Referred to Senate Committee on Judiciary & Public Safety.
Referrals: 09/27/22 Access to Justice Policy Committee, Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, All Sections.
Comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Suzanne C. Larsen

D. Proposed Amendments to Michigan Rules of Evidence

Referrals: 10/17/22 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Daniel D. Quick

E. Consent Agenda

To allow the Criminal Jurisprudence & Practice Committee and Criminal Law Section to submit their positions on each of the following items:

1. M Crim JI 5.10a

The Committee proposes to renumber, retitle, and amend M Crim JI 20.29 [Limiting Instruction on Expert Testimony (in Child Sexual Conduct Cases)] in order to broaden its scope to include other experts who may testify about victims' behaviors (such as victims of domestic abuse) and to add information that the jurors need not accept expert testimony, consistent with M Crim JI 5.10. The proposed instruction would renumber the instruction to M Crim JI 5.10a, and title it as Limiting Instruction on Behavioral Expert Testimony. The proposal would also add a Use Note for M Crim JI 5.10 [Expert Witness] directing the court to use M Crim JI 5.10a where an expert testifies regarding the behavioral characteristics of sexually abused children or victims of domestic violence. Deletions are in strike-through, and new language is underlined.

2. M Crim JI 7.16

The Committee proposes to amend M Crim JI 7.16 [Duty to Retreat to Avoid Using Force or Deadly Force] to correct an error in requiring fear of imminent death or serious harm for use of non-deadly force per a published Court of Appeals decision, People v Ogilvie (MCOA #354355), citing MCL 780.972(2). Deletions are in strike-through, and new language is underlined.

3. M Crim JI 17.25

The Committee proposes an amendment to M Crim JI 17.25 [Stalking] to correct it in accord with statutory language, to provide definitional language in the instruction for "unconsented contact, and to clarify the element for aggravated stalking. Deletions are in strike-through, and new language is underlined.

4. M Crim JI 20.1

The Committee proposes adding an alternative to M Crim JI 20.1 [Criminal Sexual Conduct in the First Degree] where the defendant is a woman who caused sexual penetration with a male under unlawful circumstances. The new language is underlined.

5. M Crim JI 20.2 and 20.13

The Committee proposes to add "allowed or caused" language to M Crim JI 20.2 [Criminal Sexual Conduct in the Second Degree] and M Crim JI 20.13 [Criminal Sexual Conduct in the Fourth Degree] to reflect an unpublished Court of Appeals decision, People v Zernec (MCOA #353490), interpreting MCL 750.520e. Deletions are in strike-through, and new language is underlined.

6. M Crim JI 36.1, 36.3, 36.4, 36.4a, and 36.6

The Committee proposes to amend M Crim JI 36.1, 36.3 36.4, 36.4a, and 36.6 [Human Trafficking] to add "coercion" language per a statutory amendment to MCL 750.462a. The new language is underlined. The Use Notes have not changed so they have not been included.

MINUTES
Public Policy Committee
September 15, 2022 – 12:00 p.m. to 1:30 p.m.

Committee Members: Lori A. Buiteweg, James W. Heath, Suzanne C. Larsen, Valerie R. Newman, Takura N. Nyamfukudza, Brian D. Shekell, Thomas G. Sinas, Judge Cynthia D. Stephens (Ret.), Mark A Wisniewski (9)
SBM Staff: Peter Cunningham, Carrie Sharlow, Nathan Triplett
GCSI Staff: Marcia Hune

A. Reports

1. Approval of July 21, 2022 minutes

The minutes were unanimously approved with one abstention.

B. Court Rule Amendments

1. ADM File No. 2022-09: Proposed Amendment of MCR 3.703

The proposed amendment of MCR 3.703 is necessary for design and implementation of the statewide electronic-filing system, will provide the court with necessary PPII in an appropriate format, and will reduce workload preparing personal protection orders. This particular amendment aligns with the Court's recent amendment of MCR 1.109(D)(9)(b)(iii), allowing proposed orders submitted to the court to contain protected personal identifying information (PPII), which the courts will continue to protect as if prepared or issued by the court under MCR 8.119(H)(5).

The following entities offered comments for consideration: Access to Justice Policy Committee.

The committee voted unanimously (9) to oppose the proposed amendment to Rule 3.703 as drafted.

2. ADM File No. 2020-08: Proposed Amendment of Administrative Order No. 2020-17 and MCR 4.201

The proposed amendments would permanently incorporate certain provisions from Administrative Order No. 2020-17 into court rule format under MCR 4.201 and would make a number of minor changes due to a relettering of the rule. The proposed amendments would also incorporate public comment received at the public hearing on March 16, 2022 and via email, as well as additional recommendations and input received from other stakeholders including the JFAC and the MDJA. Finally, the proposed amendments in this order reference MCR 2.407, which is amended effective September 9, 2022. Readers should refer to the amended version of that rule when reviewing the proposed amendments in this order.

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

The committee voted 8 to 1 to take no position.

3. ADM File No. 2021-20: Proposed Amendment of MCR 6.001 and Proposed Addition of MCR 6.009

The proposed addition of MCR 6.009 would establish a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the proposed amendment of MCR 6.001 would make the new rule applicable to felony, misdemeanor, and automatic waiver cases.

The following entities offered comments for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee voted 6 to 2 to support ADM File No. 2021-20 as drafted.

4. ADM File No. 2021-29: Proposed Amendment of MCR 6.201
The proposed amendment of MCR 6.201 would require redaction of certain information contained in a police report or interrogation record before providing it to the defendant.
The following entities offered comments for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee voted unanimously (9) to support ADM File No. 2021-29 with an additional amendment striking "the address, telephone or cell phone number, or" from the proposed language. Further, the proposed amendment should also be corrected read "MCR 1.109(D)(9)(a)."

5. ADM File No. 2021-48: Proposed Amendment of MCR 6.502
The proposed amendment of MCR 6.502 would allow a third exception to the "one and only one motion" rule based on a final court order vacating one or more of a defendant's convictions either described in the judgment or upon which the judgment was based.
The following entities offered comments for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee voted unanimously (9) to support ADM File No. 2021-48.

6. ADM File No. 2021-35: Proposed Amendment of MCR 7.202
The proposed amendment of MCR 7.202 would provide a definition of governmental immunity to include the state's, a tribal government's, or a political subdivision's immunity from suit or liability.
The following entities offered comments for consideration: Civil Procedure & Courts Committee; Appellate Practice Section.
The committee voted unanimously (8) to oppose ADM File No. 2021-35.

7. ADM File No. 2021-39: Proposed Amendment of MCR 7.215
The proposed amendment of MCR 7.215 would codify the Court of Appeals' practice for reissuing opinions and orders.
The following entities offered comments for consideration: Civil Procedure & Courts Committee.
The committee voted unanimously (8) to support ADM File No. 2021-39 and recommend that the Court give consideration to the issue of reissuing opinions and orders in trial courts identified by Mr. Bassett in his September 8, 2022 comment on this matter.

C. <u>Legislation</u>
1. HB 6344 (Lightner) Courts: other; duties of the appellate defender; include definition of youth. Amends title & secs. 2, 4, 6 & 7 of 1978 PA 620 (MCL 780.712 et seq.) & adds sec. 1a.

HB 6345 (Lightner) Criminal procedure: defenses; Michigan indigent defense commission act; expand definitions. Amends title & secs. 3, 5, 7, 9, 11, 13, 15, 17, 21 & 23 of 2013 PA 93 (MCL 780.983 et seq.).
The following entities offered comments for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee agreed that these bills are *Keller*-permissible in affecting the functioning of the courts and improving the availability of legal services to society.
The committee voted unanimously (8) to adopt the position of the Access to Justice Policy Committee, to support the bills in concept and recommend that they be amended to: (1) provide a broader definition of the youth defense mandate; and (2) establish appellate attorney fee incentives consistent with the MIDC Act and a requirement for the state to reimburse local systems for these fees.

2. HB 6356 (Johnson) Criminal procedure: other; certain requirements for the use of informants in criminal proceedings; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 36a, 36b, 36c, 36d, 36e, 36f, 36g & 36h to ch. VIII.
The following entities offered comments for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee recommends deferring consideration of this item at this time to allow the Access to Justice Policy and Criminal Jurisprudence and Practice Committees to present a more thorough recommendation to the Committee/Board.

Order

Michigan Supreme Court
Lansing, Michigan

September 21, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2016-10

Proposed Amendments of
Rules 2.002 and 7.109 of
the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering amendments of Rules 2.002 and 7.109 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 will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings 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 2.002 Waiver of Fees for Indigent Persons

(A) Applicability and Scope.

(1) [Unchanged.]

(2) Except as otherwise provided in subrule (I), for the purposes of this rule, "fees" applies only to fees required by MCL 600.857, MCL 600.880, MCL 600.880a, MCL 600.880b, MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, MCL 600.8420, MCL 700.2517, MCL 700.5104, and MCL 722.717. It also includes the cost of preparing a transcript for appeal.

(3)-(5) [Unchanged.]

(B)-(L) [Unchanged.]

Rule 7.109 Record on Appeal

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or by subrule (e), or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b)-(d) [Unchanged.]

(e) If the court finds that the appellant from an agency decision is receiving public assistance, represented by a legal services program, or indigent as described in MCR 2.002(C), (D), or (F), the court must order transcripts prepared at public expense.

(C)-(I) [Unchanged.]

Staff Comment (ADM File No. 2016-10): The proposed amendments of MCR 2.002 and 7.109 would allow for waiver of appellate transcript fees for indigent individuals.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or 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 submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2016-10. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

September 21, 2022

Clerk

Public Policy Position
ADM File No. 2016-10: Proposed Amendments of MCR 2.002 and 7.109

Support

Explanation

The Committee voted to support ADM File No. 2016-10. Amending MCR 2.002 and 7.109 would allow for waiver of appellate transcript fees for indigent individuals. The cost of transcripts often poses a significant barrier to indigent litigants and impacts their ability to effectively access the legal system. Providing courts with the authority to waive transcript fees in appropriate circumstances will therefore improve access to justice.

Position Vote:

Voted For position: 16
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 10

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
ADM File No. 2016-10: Proposed Amendments of MCR 2.002 and 7.109

Support

Explanation
The Committee vote unanimously to support ADM File No. 2016-10. Permitting waiver of transcript fees for indigent individuals would help these individuals fully access the legal system and it is preferable that the Rules establish a specific procedure to govern such waivers in the interest of clarity and consistency.

Position Vote:
Voted For position: 27
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Person:
Lori J. Frank lori@markofflaw.com

Public Policy Position
ADM File No. 2016-10 – Proposed Amendments of MCR 2.002 and 7.109

Support the Goal and Express Concerns

Explanation

The Appellate Practice Section of the State Bar of Michigan supports the goal of providing free transcripts to indigent individuals in principle. It has, however, concerns about the cost of doing so and the associated impact on district and circuit court funding units. The Council for the Section requests permission from the Executive Director of the State Bar to submit this comment to the Supreme Court.

Position Vote:

Voted for position: 24
Voted against position: 0
Abstained from vote: 0
Did not vote: 1

Contact Person: Joseph E. Richotte
Email: richotte@butzel.com

Order

Michigan Supreme Court
Lansing, Michigan

September 14, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2002-37

Amendment of Rule 1.109 of the Michigan Court Rules

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On order of the Court, this is to advise that the amendment of Rule 1.109 of the Michigan Court Rules is adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings 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)-(c) [Unchanged.]

(d) Converting Paper Documents. The clerk of the court shall convert to electronic format certain~~any~~ documents filed on paper in accordance with the electronic filing implementation plans established by the State Court Administrative Office.

(e)-(l) [Unchanged.]

(4)-(7) [Unchanged.]

(H) [Unchanged.]

Staff comment (ADM File No. 2002-37): The amendment of MCR 1.109 provides SCAO the flexibility to determine, when appropriate, when certain documents filed on paper do not need to be imported into the MiFILE document management system until bulk e-filing capability is available.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or 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 submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting 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.

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.

September 14, 2022

Clerk

Public Policy Position
ADM File No. 2002-37: Amendment of MCR 1.109

Support

Explanation
The Committee voted unanimously to support ADM File No. 2002-37, as the Committee recognizes the need for flexibility as the Court moves forward to fully implement MiFILE. Allowing this process to be guided by electronic filing implementation plans adopted by SCAO will promote efficiency and avoid unnecessary challenges created by an overly restrictive rule concerning the conversion of paper documents to electronic formats.

Position Vote:
Voted For position: 23
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

Contact Person:
Lori J. Frank lori@markofflaw.com

Order

Michigan Supreme Court
Lansing, Michigan

September 14, 2022

ADM File No. 2021-49

Proposed Amendment of
Rule 2.002 of the Michigan
Court Rules

_____

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.002 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 will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings 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 2.002 Waiver of Fees for Indigent Persons

(A) Applicability and Scope.

(1)-(2) [Unchanged.]

(3) Waiver of filing fees for prisoners who are under the jurisdiction of the Michigan Department of Corrections is governed by MCL 600.2963 and as provided in this rule.

(3)-(5) [Renumbered (4)-(6) but otherwise unchanged.]

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. If the request is being made by a prisoner under the jurisdiction of the Michigan Department of Corrections, the prisoner must also file a certified copy of their institutional account showing the current balance and a 12-month history of any deposits and withdrawals. The request must be on a form approved by the State Court Administrative Office entitled "Fee Waiver Request." Except as provided in subrule (K), no additional documentation may be required. The information contained on the form shall be

nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and may be signed either

(1)-(2) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Order Regarding a Request to Waive Fees. A judge shall enter an order either granting or denying a request made under subrules (E) or (F) within three business days and such order shall be nonpublic. If required financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(1) The clerk of the court shall send a copy of the order to the individual. Except as otherwise provided in this subrule, iIf the court denied the request, the clerk shall also send a notice that to preserve the filing date the individual must pay the fees within 14 days from the date the clerk sends notice of the order or the filing will be rejected. If the individual is a prisoner under the jurisdiction of the Michigan Department of Corrections, the clerk's notice shall indicate that the prisoner must pay the full or partial payment ordered by the court within 21 days from the date the clerk sends notice of the order or the filing will be rejected.

(2) De Novo Review of Fee Waiver Denials.

(a) Request for De Novo Review. Except as otherwise provided in this subrule, iIf the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the notice denying the waiver. A prisoner under the jurisdiction of the Michigan Department of Corrections may file the de novo review request within 21 days of the notice denying the waiver. There is no motion fee for the request. A request for de novo review automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request.

(b)-(c) [Unchanged.]

(H)-(L) [Unchanged.]

Staff Comment (ADM File No. 2021-49): The proposed amendment of MCR 2.002 would provide procedural direction to courts regarding prisoner requests for fee waivers in civil actions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or 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 submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-49. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

September 14, 2022

Clerk

Public Policy Position
ADM File No. 2021-49: Proposed Amendment of MCR 2.002

Support in Concept

Explanation

The Committee voted unanimously to support the proposed amendments in concept. The Committee believes that aligning provisions of related court rules and statutes promotes clarity for both the bench and bar. The Committee urges the Court and the Legislature to engage in further inquiry to determine if 21 days is a sufficient period of time for incarcerated persons to pay the required fees and explore whether different or additional processes should be adopted to ensure that MDOC responds in a timely manner in these circumstances.

The proposed amendments largely mirror MCL 600.2963 and provide helpful direction and clarification to courts regarding the processing of fee waiver requests made by incarcerated persons. In addition, if courts were previously applying the normal 14-day timelines to filings by incarcerated persons, then clarifying that the 21-day timelines provided in MCL 600.2963 should be applied to such filings is beneficial.

At the same time, the statute itself imposes what the Committee believes to be unreasonable and unrealistic timelines for incarcerated people even under the best of circumstances, and particularly with the lingering impacts of COVID. Based on recent reports by incarcerated individuals, many of the administrative processes within Michigan prisons have slowed substantially since the beginning of the pandemic. As a result, the burden of obtaining a certified copy of an institutional account is not a small one. Nonetheless, that hurdle would merely slow down the initial filing of a case. More troublingly, it is unrealistic to expect that within 21 days from the date that the order is mailed, an incarcerated person could receive the order in the mail, request disbursement from their account, have that request forwarded up the chain of command, and have the disbursement actually approved and sent to the court. The consequence for delay at any stage of that process, nearly all of which is beyond the control of the litigant, could be rejection of the filing. For those reasons, the Committee believes that further inquiry by the Court and Legislature into this issue is necessary before finalizing an amendment to the Michigan Court Rules.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
ADM File No. 2021-49: Proposed Amendment of MCR 2.002

Oppose

Explanation
The Committee voted unanimously to oppose ADM File No. 2021-49.

Position Vote:
Voted For position: 23
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

Contact Person:
Lori J. Frank lori@markofflaw.com

Order

Michigan Supreme Court
Lansing, Michigan

September 21, 2022

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-32

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

Proposed Amendment of
Rule 6.112 of the Michigan
Court Rules

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.112 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 will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings 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 6.112 The Information or Indictment

(A)-(E) [Unchanged.]

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must contain, if applicable, any mandatory minimum sentence required by law as a result of the sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense.

(G)-(H) [Unchanged.]

Staff Comment (ADM File No. 2021-32): The proposed amendment of MCR 6.112 would require that the notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or 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 submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-32. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

September 21, 2022

Clerk

Public Policy Position
ADM File No. 2021-32: Proposed Amendment of MCR 6.112

Support

Explanation

The Committee voted unanimously to support the proposed amendment to MCR 6.112, providing information regarding mandatory minimum sentences will assist defendants (especially *pro se* defendants) in making strategic decisions regarding taking a plea, pursuing a trial, etc. Additionally, transparency in both charging and sentencing recommendations is critical to reducing disparities in sentencing.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
ADM File No. 2021-32: Proposed Amendment of MCR 6.112

Support

Explanation:
The Committee voted unanimously to support the proposed amendment to MCR 6.112 as drafted. The Committee believes requiring that notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement will promote transparency and clarity in criminal proceedings.

Position Vote:
Voted For position: 22
Voted against position:
Abstained from vote: 0
Did not vote (absent): 5

Contact Persons:
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Sofia V. Nelson snelson@sado.org

Order

Michigan Supreme Court
Lansing, Michigan

September 21, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2021-40

Proposed Amendment of
Rule 5 of the Rules for
the Board of Law Examiners

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 5 of the Rules for the Board of Law Examiners. 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 will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings 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 5 Admission Without Examination

(A) An applicant for admission without examination must

(1)-(6) [Unchanged.]

(7) Definitions. For purposes of this rule, the following definitions apply.

(a) "Full-time" is 21 or more hours per week.

(b) "Instructor" includes a clinical instructor. A clinical instructor is someone whose responsibilities include teaching and supervising law students in a clinic organized by an accredited law school.

(B)-(F) [Unchanged.]

Staff Comment (ADM File No. 2021-40): The proposed amendment of Rule 5 of the Rules for the Board of Law Examiners would define the terms "full-time" and "instructor" to clarify that clinical instructors may be admitted to the bar without examination.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or 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 submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-40. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

September 21, 2022

Clerk

Public Policy Position
ADM File No. 2021-40: Proposed Amendment of Rule 5 of the Rules for the Board of Law Examiners

Support

Explanation

The Committee voted unanimously to support the proposed amendment to BLE Rule 5. Clinical instructors, as attorneys who regularly practice as part of their teaching, are at least as qualified as podium professors to practice law in Michigan. Furthermore, law school clinics are an important source of legal aid services to low-income Michiganders. As such, the proposed amendment will increase the number of people providing free legal services in Michigan and expand access to quality legal representation. Allowing clinical instructors at Michigan law schools to gain admission to the Bar without examination will expand access to essential legal services for those most in need of assistance in Michigan.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
ADM File No. 2021-40: Proposed Amendment of Rule 5 of the Rules for the Board of Law Examiners

Support

Explanation

The Committee voted unanimously to support ADM File No. 2021-40. The Committee believes that allowing clinical faculty to be admitted to the State Bar of Michigan without examination will expand access to essential legal services for indigent individuals and other litigants who are often left without adequate representation in the absence of clinical programs run by Michigan's law schools. At the same time, these individuals are well-qualified and their admission without examination does not create any concern regarding the integrity or quality of practice

Position Vote:

Voted For position: 27
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Person:

Lori J. Frank lori@markofflaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 8, 2022

Re: HB 6399 – Outpatient Mental Health Treatment for Misdemeanor Offenders

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Background

House Bill 6399 would amend the Mental Health Code, 1974 PA 258, by adding a new Chapter 10A concerning outpatient mental health treatment for individuals charged with misdemeanor offenses. This new chapter would permit a prosecuting attorney or the defendant/defense counsel to bring a motion seeking a mental health assessment if the defendant meets certain enumerated criteria. This procedure is intended as a substitute for the existing competency provisions found in Chapter 10 of the Act.

In the event that a defendant's motion is opposed by the prosecuting attorney, defendant, or defense counsel, the defendant may not be diverted into outpatient treatment and the standard competency provisions must be followed, as applicable.

If the assessment conducted pursuant to a motion brought under the provisions of the new Chapter 10A determines that the defendant meets the criteria for outpatient treatment, the prosecuting attorney must file a petition for admission under MCL 330.1434(7). If such a petition is filed, HB 6399 would permit a district court judge to request that SCAO assign a probate judge to hear the petition or direct the prosecuting attorney to file the petition in probate court. If either the prosecutor or defendant object to the entry of an order for outpatient treatment, the petition must be dismissed and the case would then proceed under the competency provisions of Chapter 10. If there is no objection, the court shall enter the order for outpatient treatment. Such an order may provide for outpatient treatment for not more than 180 days.

HB 6399 requires that the misdemeanor charges against the defendant remain pending until dismissed by the court for the purpose of enforcing conditions of release for outpatient treatment. Note that conditions of release must be separate from compliance with the treatment plan and compliance with the treatment plan must not be made a condition of release. The bill also provides that a pending misdemeanor charge must be dismissed by the district court 90 days after the entry of an assisted outpatient treatment order. In the case of "serious misdemeanors," as defined in the William Van Regenmorter Crime Victim's Rights Act, 1985 PA 87, the misdemeanor must be dismissed within 180 days of an assisted outpatient treatment order.

Keller Considerations

Historically, the Bar has deemed most legislation concerning diversion programs as *Keller*-permissible because diversions significantly impact both the procedure by which courts process impacted criminal cases and the volume of cases that come before the courts, with the attendant impact of judicial economy and court procedures. The most notable example of this approach is the Bar's longstanding view that legislation concerning the establishment and operation of various problem-solving courts is reasonable related to the functioning of the courts and is therefore *Keller*-permissible. Providing prosecuting attorneys, defendants/defense counsel, and courts with a detailed procedure by which a misdemeanor defendant may be diverted from criminal prosecution into outpatient mental health treatment functions similarly. HB 6399 establishes specific parameters to guide diversion that must be adhered to by the courts. If its provisions were invoked, that would guide the application—or lack thereof—of traditional competency proceedings in certain misdemeanor cases. Like problem-solving courts, the diversion proposed in HB 6399 would also impact the volume and nature of criminal cases ultimately heard and decided by Michigan courts. While legislation that simply made more mental health resources available to those in need would not pass the bar set by *Keller*, the type of deep entanglement between assessment, outpatient treatment, attorneys, and the courts, makes HB 6399 reasonably related to the functioning of the courts and therefore, like other diversion legislation of this kind, *Keller*-permissible.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

Legislation concerning diversion programs deeply enmeshed in the criminal legal system and involving the active involvement of the courts and their officers, such as HB 6399, is reasonably related to the functioning of the courts. The bill is therefore *Keller*-permissible and may be considered on its merits.

HOUSE BILL NO. 6399

September 22, 2022, Introduced by Reps. Whitsett and Calley and referred to the Committee on Health Policy.

A bill to amend 1974 PA 258, entitled

"Mental health code,"

by amending section 461 (MCL 330.1461), as amended by 2018 PA 593, and by adding section 1021 and chapter 10A.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 461. (1) ~~An~~ **For a petition filed under section 434(1) to (6), an** individual may not be found to require treatment unless at least 1 physician or licensed psychologist who has personally examined that individual testifies in person or by written deposition at the hearing.

(2) For a petition filed under section 434(7), that does not seek hospitalization before the hearing, an individual may not be found to require treatment unless a psychiatrist who has personally examined that individual testifies. A psychiatrist's testimony is not necessary if a psychiatrist signs the petition. If a psychiatrist signs the petition, at least 1 physician or licensed psychologist who has personally examined that individual must testify. The requirement for testimony may be waived by the subject of the petition. If the testimony given in person is waived, a clinical certificate completed by a physician, licensed psychologist, or psychiatrist must be presented to the court before or at the initial hearing.

(3) The examinations required under this section for a petition filed under section 434(7) ~~shall~~ **must** be arranged by the court and the local community mental health services program or other entity as designated by the department.

(4) A written deposition may be introduced as evidence at the hearing only if the attorney for the subject of the petition was given the opportunity to be present during the taking of the deposition and to cross-examine the deponent. This testimony or deposition may be waived by the subject of a petition. An individual may be found to require treatment even if the petitioner does not testify, as long as there is competent evidence from which the relevant criteria in section 401 can be established.

Sec. 1021. Sections 1022 to 1044 do not apply to an individual charged with a misdemeanor offense who has been diverted to assisted outpatient treatment under chapter 10A.

CHAPTER 10A

Sec. 1075. (1) At the time a misdemeanor offense is charged,

or at any later time before trial, the prosecuting attorney, the defendant, or defense counsel may bring a motion seeking an assessment by a physician, psychologist, or, if working under the supervision of a psychiatrist, a psychiatric nurse practitioner or physician's assistant to determine if the defendant meets the criteria for assisted outpatient treatment under this chapter.

(2) The defendant or defense counsel may oppose a motion made by the prosecuting attorney under subsection (1). The prosecuting attorney may oppose a motion made by the defendant or defense counsel under subsection (1).

(3) If a motion under subsection (1) is opposed by the prosecuting attorney, defendant, or defense counsel, the defendant must not be diverted into assisted outpatient treatment and the competency provisions of chapter 10 must be followed, as applicable.

(4) If upon assessment under subsection (1) it is determined that the defendant meets the criteria for assisted outpatient treatment, the prosecuting attorney shall file a petition as provided for a person requiring treatment under section 434(7).

(5) If a petition is filed under subsection (4), the judge of the district court may request assignment from the state court administrative office as a probate judge to hear and determine the petition or direct the prosecuting attorney to file the petition in the probate court in the defendant's county of residence. If the petition is filed in the probate court as provided under this subsection, the probate court shall hear and determine the petition.

(6) If, at the hearing on the petition for assisted outpatient treatment, the prosecuting attorney or the defendant objects to

entry of the order for assisted outpatient treatment, the petition must be dismissed and the procedures under sections 1022 to 1044 apply to the case.

(7) If, at the hearing on the petition for assisted outpatient treatment, there is no objection to entry of the order for assisted outpatient treatment, the court shall enter the order.

(8) As used in this section, "person requiring treatment" means that term as defined in section 401.

Sec. 1076. (1) If diversion from criminal prosecution and into assisted outpatient treatment is ordered after a hearing on a petition under section 1075, the court that heard the petition shall enter an order providing for assisted outpatient treatment for not more than 180 days.

(2) If a defendant fails to comply with the terms of the assisted outpatient treatment order, the provisions under section 475 apply to the case. Any bond or bond conditions are separate from and not to be included in the determination of whether or not the defendant has complied with the assisted outpatient treatment order.

(3) If a designated community treatment program is not in compliance with delivery of services required by the assisted outpatient treatment order, the court shall conduct a hearing and determine whether to order the program to deliver services.

Sec. 1077. (1) The misdemeanor charges against the defendant receiving assisted outpatient treatment must remain pending until dismissed by the district court for purposes of enforcing conditions of release. The conditions of release for a defendant receiving assisted outpatient treatment must be separate from compliance with the treatment plan. Compliance with the assisted

outpatient treatment must not be a condition of release.

(2) All matters concerning noncompliance with the assisted outpatient treatment plan must be addressed in a civil proceeding under section 475.

(3) Except as otherwise provided in this subsection, a pending misdemeanor charge must be dismissed by the district court 90 days after the entry of the assisted outpatient treatment order. If the defendant was charged with a serious misdemeanor, the misdemeanor charge must be dismissed 180 days after the entry of the assisted outpatient treatment order.

(4) As used in this section, "serious misdemeanor" means that term as defined in section 61 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.811.

Sec. 1078. The provider of the assisted outpatient treatment shall notify the prosecutor, district court, and probate court, as applicable, that the assisted outpatient treatment has terminated upon its termination.

Enacting section 1. This amendatory act does not take effect unless House Bill No. 5593 of the 101st Legislature is enacted into law.

Public Policy Position
HB 6399

Explanation

The Committee voted unanimously (17) to recommend that the Board of Commissioners table consideration of House Bill 6399. If the legislation is reintroduced in the upcoming 2023-2024 legislative session, the Committee and ultimately the Board should review the proposal at that time.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
HB 6399

Support in Principle, but Oppose as Drafted

Explanation:
The Committee voted unanimously to support House Bill 6399 in principle, but to oppose the legislation as drafted. The legislation raises a number of practical and procedural questions that cannot be answered fully in the waning days of the current Legislature. Like the Access to Justice Policy Committee, the Criminal Jurisprudence & Practice Committee believes that, if this legislation is reintroduced in the upcoming 2023-2024 legislative session, the Committee and ultimately the Board should review the proposal in greater depth at that time.

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 5

***Keller*-Permissibility Explanation:**
Establishing procedures for the diversion of certain defendants from criminal prosecution and into assisted outpatient mental health treatment, like other diversion programs that the Bar has previously taken a position on, is reasonably related to the functioning of the courts. The Committee believes, in keeping with the Bar's prior positions, that the legislation is therefore *Keller*-permissible.

Contact Persons:
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Sofia V. Nelson snelson@sado.org

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 8, 2022

Re: HB 6437 – Post-Conviction Psychological Evaluations

Background

House Bill 6437 would amend the Code of Criminal Procedure, 1927 PA 175, to provide for post-conviction psychological evaluations to inform judge's sentencing decisions. The bill provides that after a defendant has been convicted at trial or entered a guilty plea, but before sentencing, the court may, in its discretion, order the defendant to undergo a psychological evaluation. It similarly permits the prosecuting attorney, defense counsel, or defendant to request such an evaluation, which the court may grant or deny in its discretion. The bill would also permit the prosecuting attorney, defense counsel, or defendant to object to an evaluation request by another party, but not an evaluation ordered by the court.

A defendant may refuse to participate in an evaluation ordered under HB 6437 but may not challenge the findings of the evaluation if the defendant does agree to participate.

If an evaluation is performed under the provisions proposed by HB 6437, the sentencing court *shall* review the evaluation and state its finding on the record at the time of sentencing. The court must indicate on the record whether the results of the evaluation influenced its sentencing decision.

***Keller* Considerations**

HB 6437 would establish a new procedure for post-conviction psychological evaluations intended to inform the sentencing decisions made by judges. It sets forth specific requirements for the court, as well as for prosecuting attorneys, defense counsel, and defendants. While it is unknown what substantive impact these evaluations would have on sentencing decisions, the availability of such evaluations would impact how criminal cases proceed through the criminal legal system and court procedures. These impacts make HB 6437 reasonably related to the functioning of the courts and therefore *Keller*-permissible.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

HB 6437 would establish a new procedure for post-conviction psychological evaluations intended to inform the sentencing decisions made by judges. It is reasonably related to the functioning of the courts and therefore *Keller*-permissible. It may be considered on its merits.

HOUSE BILL NO. 6437

October 11, 2022, Introduced by Reps. LaGrand, Hope, Ellison, Glanville, Kuppa, Brenda Carter, Garza, Haadsma and Sowerby and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding section 1m to chapter IX.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER IX

Sec. 1m. (1) After a defendant has been convicted at trial or entered a guilty plea but before the defendant has been sentenced, the court, in its discretion, may order that the defendant undergo a psychological evaluation. The prosecuting attorney, defense

counsel, or defendant may request a psychological evaluation under this section.

(2) The court, in its discretion, may grant or deny a request by the prosecuting attorney, defense counsel, or defendant under subsection (1).

(3) The prosecuting attorney, defense counsel, or defendant may object to a psychological evaluation requested by another party under this section. The court, in its discretion, may sustain an objection under this subsection.

(4) If a psychological evaluation is ordered under this section, the defendant may refuse to participate; however, if the defendant agrees to participate in the evaluation, the defendant may not challenge the findings of the evaluation.

(5) An evaluation ordered under this section must be performed by a mental health professional and completed before a sentence is entered.

(6) If a psychological evaluation is performed under this section, the sentencing court shall review the evaluation and state its findings on the record at the time of sentencing. The court shall indicate on the record whether or not the results of the psychological evaluation influenced its sentencing of the defendant.

(7) As used in this section, "mental health professional" means that term as defined in section 100b(19)(a), (b), and (d) of the mental health code, 1974 PA 258, MCL 330.1100b.

Public Policy Position
HB 6437

Oppose

Explanation:
The Committee voted 20 in favor with one abstention to oppose HB 6437. While the Committee believes that availability and use of psychological evaluations play an important role in criminal proceedings, the legislation has drafted raises far too many questions that cannot reasonably be addressed in the waning days of the current Legislature.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 6

***Keller*-Permissibility Explanation:**
Empowering courts with the discretion to order a psychological evaluation, after conviction but prior to sentencing, and outlining the procedures that must be used when a court orders such an evaluation or such an evaluation is requested by the defendant or prosecutor, is reasonable related to the functioning of the courts. The Committee believes the bill is therefore *Keller*-permissible.

Contact Persons:
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Sofia V. Nelson snelson@sado.org

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 8, 2022

Re: SB 1162 – Court of Appeals Jurisdiction to Admit Individuals to the Bar

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Background
Among other things, MCL 600.910 grants the Michigan Supreme Court and each circuit court with jurisdiction to admit qualified individuals to the State Bar of Michigan. Senate Bill 1162 would amend Sec. 910 to expand jurisdiction over Bar admissions to include each Court of Appeals judicial district. The bill would also amend Sec. 913 to prescribe the duties of the Chief Clerk of the Court of Appeals when a judicial district of the Court of Appeals admits an individual to the Bar.

***Keller* Considerations**
The qualifications required for admission to the Bar and the procedures by which qualified individuals are admitted are quintessential examples of those issues that are necessarily related to the regulation of attorneys and the legal profession. As such, legislation addressing which Michigan courts have jurisdiction to admit individuals to the State Bar of Michigan, such as SB 1162, is *Keller*-permissible.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	✓ Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	• Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation
Senate Bill 1162 concerns court jurisdiction to admit qualified individuals to the State Bar of Michigan. It is necessarily related to the regulation of attorneys and the legal profession and, as such, is *Keller*-permissible. It may be considered on its merits.

SENATE BILL NO. 1162

September 14, 2022, Introduced by Senator WOZNIAK 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 910 and 913 (MCL 600.910 and 600.913).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 910. The supreme court and each circuit court has jurisdiction to admit to the bar of this state ~~, persons~~ **individuals** who possess the required qualifications, to disbar or suspend members of the bar for misconduct, and to reinstate licenses to practice law. **In addition, each court of appeals judicial district has jurisdiction to admit to the bar of this**

state individuals who possess the required qualifications. All ~~such~~ **of the** matters and proceedings **described in this section** are declared to be civil in nature, and the venue ~~thereof~~ **of these matters and proceedings** is subject to regulation by the supreme court.

Sec. 913. **(1)** The clerk of the supreme court, **the chief clerk of the court of appeals**, and **the clerk** of each circuit court shall, when ~~a person~~ **an individual** is admitted to the bar by that court, ~~administer~~ **do all of the following:**

(a) Administer to the ~~person~~ **individual** the oath prescribed by the supreme court for members of the bar. ~~, and upon~~

(b) Upon payment of the sum of $25.00, issue to that ~~person~~ **individual** a certificate of admission. ~~, and keep~~

(c) Keep a record of the admission in the roll of attorneys and the journal of that court. ~~, and transmit~~

(d) Transmit promptly to the clerk of the supreme court and to the ~~state bar~~ **State Bar** of Michigan without charge certified copies of the orders of admission.

(2) ~~When~~ **If** a member of the bar is suspended or disbarred, or is held in contempt, and ~~when a person~~ **if an individual** is reinstated as a member of the bar, the clerk of the court so doing shall transmit to the clerk of the supreme court and to the ~~state bar~~ **State Bar** of Michigan without charge certified copies of those orders.

Public Policy Position
SB 1162

Support with Suggested Amendment

Explanation
The Committee voted unanimously to support Senate Bill 1162. The Committee saw no reason that the Court of Appeals should not have jurisdiction to admit qualified individuals to the State Bar of Michigan, alongside the Supreme Court and Circuit Courts. The Committee further recommends that this same authority be extended to other courts as well (e.g., District Courts).

Position Vote:
Voted For position: 27
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

***Keller*-Permissibility Explanation**
Legislation addressing the authority to admit qualified individuals to the State Bar of Michigan is necessarily related, in fact core to, the regulation of the legal profession. As such, the Committee believes SB 1162 is *Keller*-permissible and may be considered on its merits.

Contact Person:
Lori J. Frank lori@markofflaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: November 8, 2022

Re: SB 1175 – Jury Reform

Background

Senate Bill 1175 is the product of a workgroup convened by State Senator Adam Hollier to draft legislation aimed at reforming jury selection procedures in Michigan and diversifying jury lists/pools. The bill would make numerous amendments across several sections of the Revised Judicature Act, 1961 PA 236. In short, these amendments would centralize the process of jury selection under the authority of circuit court administrators and clerks, pursuant to rules and policies promulgated by the Michigan Supreme Court through the State Court Administrative Office (SCAO). SCAO would, for example, create a standard juror qualifications questionnaire. The bill would also have SCAO collect data from circuit courts on jurors' age, race, ethnicity, sex, and religion, as well as jurors removed for cause and without cause. This centralized system would replace local jury boards in each county.

SB 1175 was introduced in late September 2022 and referred to the Senate Committee on Judiciary and Public Safety. It has not been set for a hearing at this time.

***Keller* Considerations**

SB 1175 would make significant changes to the administration of jury selection in Michigan courts and impose new requirements on both circuit courts and SCAO to implement a new, centralized jury selection process. As the selection of a jury is a foundational component of many trials and the reforms proposed by this legislation would alter jury selection in Michigan significantly from existing procedures, this legislation is necessarily related to the functioning of the courts and therefore *Keller*-permissible.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

The procedures governing the selection of juries are foundational to many trials and have a significant impact on how trial courts operate. As such, legislation like SB 1175 that would make fundamental changes to how jury selection is administered, as well as require new duties of both circuit courts and SCAO is necessarily related to the functioning of the courts. It is therefore *Keller*-permissible. The bill may be considered on its merits.

SENATE BILL NO. 1175

September 20, 2022, Introduced by Senator HOLLIER 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 1301a, 1304a, 1326, 1332, 1345, and 1346 (MCL 600.1301a, 600.1304a, 600.1326, 600.1332, 600.1345, and 600.1346), as amended by 2004 PA 12, and by adding sections 1306 and 1307; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1301a. (1) ~~Except as provided in subsection (2), this~~ **This** chapter governs the selection of juries in the following courts:

(a) Circuit court.

(b) Probate court.

(c) District court.

(d) Municipal court.

(2) ~~Sections 1310, 1311, 1312, 1321(1), 1322, 1323, 1330, 1338, and 1343 do not apply to a court that adopts a method of jury selection described in section 1371.~~**Only circuit courts shall determine the qualifications of jurors in each county through the circuit court administrator or the clerk of the circuit court, as designated by the chief judge.**

Sec. 1304a. (1) ~~The~~ **Until September 30, 2023, the** jury board may use electronic and mechanical devices in carrying out its duties under this chapter. **Beginning October 1, 2023, a court or clerk of the court may use a computerized, electronic, and mechanical process within a jury management software or other software in carrying out its duties under this chapter.**

(2) ~~The~~ **Until September 30, 2023, the** jury board may use the historic method of preparing separate slips of paper for the second jury list and drawing slips from a jury board box to determine a panel or array of jurors. **Beginning October 1, 2023, the circuit court administrator or clerk of the circuit court may use the historic manual method of preparing separate slips of paper for the second jury list and drawing slips from a container to determine the jurors to send the juror qualifications questionnaire to or the jurors to summon.**

Sec. 1306. (1) The supreme court shall promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices, and procedures relating to the provision of jury pool lists.

(2) The state court administrative office shall create and implement a jury selection program in accordance with this chapter and court rules.

(3) The state court administrative office shall compile a first jury list of individuals who reside in each jurisdiction to serve as potential jurors under this chapter from the driver license and personal identification cardholder list of names received from the secretary of state.

(4) Each year before April 15, the secretary of state shall transmit to the state court administrative office at no cost a randomized full, current, and accurate copy of a list that combines the driver license list and personal identification cardholder list of the name, address, gender, race, ethnicity, and date of birth of individuals residing in each jurisdiction. Upon request, the secretary of state shall furnish additional lists to any federal, state, or local governmental agency, other than the clerk of each county, for the purpose of jury selection. An agency that requests and receives a list shall reimburse the secretary of state for actual costs incurred in the preparation and transmittal of the list and all reimbursements must be deposited in the state general fund. If an agency uses electronic or mechanical devices to carry out its duties, the agency may request and receive a copy of the combined driver license and personal identification cardholder list on any electronically produced medium as required by the secretary of state. The secretary of state shall create and use standard size, format, and content of media utilized specifications to transmit information used for jury selection.

(5) The state court administrative office shall electronically transmit the first jury list to the clerk of the court of record.

(6) The state court administrative office shall repeat the first jury list process under this section as necessary if additional jurors are required.

(7) The state court administrative office shall create a standard juror qualifications questionnaire to be used by either the circuit court administrator or the clerk of the circuit court. The standard juror qualifications questionnaire must contain blanks for the information the state court administrative office desires concerning qualifications for, and exemptions from, jury service.

Sec. 1307. (1) The circuit court administrator or the clerk of the circuit court shall receive the first jury list provided by the state court administrative office under section 1306 and remove from the list any individuals who served as a petit or grand juror in that jurisdiction within the last year. If the names are not to be immediately used, the names must be protected or sealed and remain in the custody of the circuit court administrator or the clerk of the circuit court until additional names are needed or until ordered to be released by the chief judge.

(2) On or before May 1, the chief judge of the circuit court shall receive from the chief judge of each court of record in the circuit an estimate of the number of jurors that will be needed by the court for a 1-year period beginning September 1 of that year. This estimate must be submitted in writing and delivered to the circuit court administrator or the clerk of the circuit court, as designated by the chief judge.

(3) The circuit court administrator or the clerk of the circuit court shall randomly select individuals from the first jury list. The circuit court administrator or the clerk of the circuit court shall mail the standard juror qualifications questionnaire

created in section 1306 to individuals selected as needed to ensure sufficient potential jurors in accordance with subsection (2). If the trial court determines that a supplemental juror qualifications questionnaire is necessary, the circuit court administrator or the clerk of the circuit court may include the supplemental juror qualifications questionnaire in the mail sent to the selected individuals. The individual must fully complete and return any questionnaire that was sent under this subsection to the circuit court administrator or the clerk of the circuit court within 10 days after it is received. All juror qualifications questionnaires must be kept on file by the clerk of the court for a period of 3 years, but the chief circuit judge may order the juror qualifications questionnaires to be kept on file for a longer period.

(4) The circuit court administrator or the clerk of the circuit court shall provide annual reports to the state court administrative office as required by the supreme court. The state court administrative office shall develop and adopt rules regarding the contents of the annual reports and determining access to the annual reports data for research and litigation purposes. In addition to the information required for the annual reports, the circuit court administrator or the clerk of the circuit court of record shall collect and record of all of the following information:

(a) The name, sex, race, ethnicity, and religion of an individual who is selected and summoned from the first jury list.

(b) The name of an individual who does not return the juror qualifications questionnaire.

(c) The name of an individual who is disqualified from jury

service based on the individual's juror qualifications questionnaire responses.

(d) The name of an individual examined under subsection (6) and a record of the individual's qualifications to serve as a juror.

(e) The name of an individual excused from service under subsection (7).

(f) For an individual examined on a jury panel, all of the following, if applicable:

(*i*) The case name and number.

(*ii*) The name of an individual removed from a jury panel for cause by a judge.

(*iii*) The name of an individual removed from a jury panel by peremptory challenge.

(*iv*) If a party challenged the validity of an individual's removal from the jury by peremptory challenge.

(g) The name of each individual who was selected to serve on the jury or as an alternate juror.

(5) On the basis of the answers to the juror qualifications questionnaire, the circuit court administrator or the clerk of the circuit court may excuse from service an individual on the first jury list who claims exemption and gives satisfactory proof of the right and any individual who is not qualified for jury service. The circuit court administrator or the clerk of the circuit court may investigate the accuracy of the answers to a juror qualifications questionnaire and may call on law enforcement agencies for assistance in the investigation.

(6) The chief circuit judge, or the clerk of the court, may require any individual on the first jury list to appear before the

circuit court at a specified time, for the purpose of testifying under oath or affirmation concerning the individual's qualifications to serve as a juror, in addition to completing the juror qualifications questionnaire. Notice must be given, personally or by mail, to an individual not less than 7 days before the individual is required to appear before the circuit court. The circuit court shall hold evening sessions as necessary for examining prospective jurors who are unable to attend at other times. The clerk of the court may administer an oath or affirmation in relation to the examination of any matter embraced in this chapter.

(7) If a prospective juror without legal disqualification or exemption applies to the clerk of a court of record to be excused from jury service, the clerk may, with the written approval of the chief circuit judge, excuse the prospective juror if it appears that the interests of the public or of the prospective juror will be materially injured by the prospective juror's attendance or if the health of the prospective juror or that of a member of the prospective juror's family requires the prospective juror's absence from court.

(8) If an individual who was selected for jury service is deceased, the name of that individual must be removed from the first jury list and that fact may be forwarded to the local clerk.

(9) The trial judge, in the trial judge's discretion, may grant a deferral of jury service to an individual if the individual claims that serving on the date the individual is called creates a hardship. If the trial judge grants a deferral, the individual must be rescheduled by the court to serve on a future date. The circuit court administrator or clerk of the court may also

reschedule a prospective juror with written permission of the chief judge.

(10) Upon the order of the chief circuit judge, jury panels or parts of jury panels selected for any court in the county may be used for jury selection in any court of record in the county, if jurors on the panel or part of a panel selected are otherwise eligible to serve as jurors in the particular court.

(11) The circuit court administrator or clerk of the circuit court shall make an additional list consisting of the names of prospective jurors segregated by the geographical area of the jurisdiction of each district court district and transmit the list to the district court.

(12) If a city located in more than 1 county is placed entirely within a single district of the district court pursuant to chapter 81, the supreme court by rule shall specify the procedure for compiling the jury list for that district court district so as to include the names and addresses of residents from the parts of the counties that comprise that district.

(13) The judges of each circuit court may establish rules, not inconsistent with this chapter, necessary to carry out and ensure the proper selection of jurors.

Sec. 1326. **(1)** ~~If~~ **Until September 30, 2023, if** a grand jury is ordered by the court, or required by statute, the board shall select the names of a sufficient number of ~~persons,~~ **individuals**, as determined by the chief circuit judge, to serve as grand jurors in accordance with the provisions of section 11 of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.11. The names ~~shall~~ **must** be selected in the same manner and from the same source as petit jurors. The term of service of grand jurors ~~shall be as~~ **is**

prescribed ~~by~~ **under** section 7a of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.7a.

(2) Beginning October 1, 2023, if a grand jury is ordered by the court, or required by statute, the trial court shall select the names of a sufficient number of individuals to serve as grand jurors in accordance with the provisions of section 11 of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.11. The names must be selected in the same manner and from the same source as petit jurors. The term of service of grand jurors shall be as is prescribed under section 7a of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.7a.

Sec. 1332. **(1)** ~~The~~ **Until September 30, 2023, the** clerk, jury board, or sheriff shall summon jurors for court attendance at ~~such~~ **those** times and in ~~such~~ **the** manner as directed by the chief judge or by the judge to whom the action in which jurors are being called for service is assigned. For a juror's first required court appearance, service ~~shall~~ **must** be by a written notice addressed to the juror at the juror's place of residence as shown by the records of the board. ~~, which~~ **The** notice **for a juror's first required court appearance** may be by ordinary mail or by personal service. For subsequent service notice may be in any manner directed by the judge. The officer giving notice to jurors shall keep a record of the service of the notice and ~~shall~~ make a return if directed by the court. The return ~~shall be~~ **is** presumptive evidence of the fact of service.

(2) Beginning October 1, 2023, the circuit court administrator, the clerk of the circuit court, or the sheriff shall summon jurors for attendance at those times and in the manner as directed by the chief judge or by the judge to whom the action in

which jurors are being called for service is assigned. For a juror's first required court appearance, service must be by a written notice addressed to the juror at the juror's place of residence as shown by the records of the court. The notice for a juror's first required court appearance may be by ordinary mail or by personal service. For subsequent service notice may be in any manner directed by the judge. The person or officer giving notice to jurors shall keep a record of the service of the notice and make a return if directed by the court. The return is presumptive evidence of the fact of service. The circuit court administrator or the clerk of the circuit court shall, within 14 days, notify a juror in writing by ordinary mail or electronic communication if the juror is excused.

Sec. 1345. **(1)** ~~A~~ **Until September 30, 2023, a** board member shall report to the prosecuting attorney and the chief circuit judge the name of any ~~person~~ **individual** who in any manner seeks by request, hint, or suggestion to influence the board or its members in the selection of any juror.

(2) Beginning October 1, 2023, the clerk of the court of record shall report to the prosecuting attorney and the chief circuit judge the name of any individual who in any manner seeks by request, hint, or suggestion to influence the selection of a juror.

Sec. 1346. The following acts are punishable by the circuit court as contempts of court:

(a) Failing to answer the questionnaire provided for in **former** section 1313.

(b) ~~Failing~~ **Until September 30, 2023, failing** to appear before the board or a member of the board, without being excused at the time and place notified to appear. **After October 1, 2023, failing**

to appear before the circuit court that sent the juror qualifications questionnaire.

(c) Refusing to take an oath or affirmation.

(d) ~~Refusing~~ **Before September 30, 2023, refusing** to answer questions pertaining to ~~his or her~~ **the individual's** qualifications as a juror, when asked by a member of the board. **After October 1, 2023, refusing to answer questions pertaining to the individual's qualifications as a juror when asked by the circuit court.**

(e) Failing to attend court, without being excused, at the time specified in the notice, or from day to day, when summoned as a juror.

(f) Giving a false certificate, making a false representation, or refusing to give information that ~~he or she~~ **the individual** can give affecting the liability or qualification of ~~a person~~ **an individual** other than ~~himself or herself~~ **the individual** to serve as a juror.

(g) Offering, promising, paying, or giving money or anything of value to, or taking money or anything of value from, a person, firm, or corporation for the purpose of enabling ~~himself or herself~~ **the individual** or another ~~person~~ **individual** to evade service or to be wrongfully discharged, exempted, or excused from service as a juror.

(h) Tampering unlawfully in any manner with a jury list or the jury selection process.

(i) Willfully doing or ~~omitting~~ **failing** to do an act with the design to subvert the purpose of this act.

(j) Willfully omitting ~~to put on~~ **from** the jury list the name of ~~a person~~ **an individual** qualified and liable for jury duty.

(k) Willfully ~~omitting~~ **failing** to prepare or file a list or

slip.

(*l*) Doing or ~~omitting~~ **failing** to do an act with the design to prevent the name of ~~a person~~ **an individual** qualified and liable to serve as a juror from being placed on a jury list or from being selected for service as a juror.

(m) Willfully placing the name of ~~a person upon~~ **an individual on** a list who is not qualified as a juror.

Enacting section 1. Sections 1301, 1301b, 1302, 1303, 1303a, 1304, 1305, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1327, 1330, 1331, 1338, 1339, 1341, 1342, 1353, 1375, and 1376 of the revised judicature act of 1961, 1961 PA 236, MCL 600.1301, 600.1301b, 600.1302, 600.1303, 600.1303a, 600.1304, 600.1305, 600.1308, 600.1309, 600.1310, 600.1311, 600.1312, 600.1313, 600.1314, 600.1315, 600.1316, 600.1317, 600.1318, 600.1319, 600.1320, 600.1321, 600.1322, 600.1323, 600.1324, 600.1327, 600.1330, 600.1331, 600.1338, 600.1339, 600.1341, 600.1342, 600.1353, 600.1375, and 600.1376, are repealed.

Enacting section 2. 1929 PA 288, MCL 730.251 to 730.271, is repealed.

Enacting section 3. 1951 PA 179, MCL 730.401 to 730.419, is repealed.

Enacting section 4. This amendatory act takes effect October 1, 2023.

Public Policy Position
SB 1175

No Position

Explanation
The Committee voted unanimously to take no position on House Bill 1175. While the Committee recognizes the importance of the issues raised by this legislation (e.g., jury selection procedures and composition), the Committee felt that the short time remaining between now and the *sine die* adjournment of the current Legislature was inadequate to fully evaluate this legislation. Should the bill be reintroduced in the next Legislature, the Committee could evaluate it on its merits at that time.

Position Vote:
Voted For position: 27
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

***Keller*-Permissibility Explanation**
The composition of juries and the procedures by which they are selected is a foundational element of court proceedings, as such legislation impacting those procedures is necessarily related to the functioning of the courts.

Contact Person:
Lori J. Frank lori@markofflaw.com

Public Policy Position
SB 1175

Support in Concept, But Oppose as Drafted

Explanation:
The Committee voted unanimously to support the concept of a more centralized and uniform process for jury selection, as well as stronger and more diverse jury pools/lists, but to oppose the bill as drafted. The legislation as drafted raises far too many questions that cannot reasonably be addressed in the waning days of the current Legislature. If this legislation is reintroduced in the upcoming 2023-2024 legislative session, the Committee and ultimately the Board should review the proposal in greater depth at that time.

Position Vote:
Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 8

***Keller*-Permissibility Explanation:**
The composition of juries and the procedures by which they are selected is a foundational element of court proceedings, as such legislation impacting those procedures is necessarily related to the functioning of the courts. In additional, legislation aiming to create more representative jury pools/lists arguably improves, and is therefore reasonably related to, access to legal services.

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Updated As of November 5, 2022

M E M O R A N D U M

To: State Bar of Michigan Board of Commissioners

From: Daniel D. Quick, Chair
MRE 702/703 Review Workgroup

Date: November 5, 2022

Re: Final Report

In 1999, the Michigan Supreme Court ("MSC") appointed the Advisory Committee on the Rules of Evidence in light of the pending 2000 amendments to the Federal Rules of Evidence ("FRE"). Ultimately, the MSC adopted various changes, including to the rules applicable to expert witness testimony: Michigan Rule of Evidence ("MRE") 702 (which addresses when expert testimony is permitted) and MRE 703 (which addresses the bases of opinion testimony by experts). Neither rule has been updated since then.

Effective January 1, 2004, the MSC amended MRE 702, choosing to model it after the then-current version of FRE 702.[1] FRE 702 was amended in 2000 as a response to the U.S. Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals*, which affirmed the trial judge's role as gatekeeper of expert testimony.[2] FRE 702 was amended again in 2011, but the Michigan rule was not updated. FRE 702 is (most likely) due for further amendment effective in 2023.

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[1] See, e.g., *Gilbert v DaimlerChrysler*, 470 Mich 749, 781; 685 NW2d 391 (2004) ("MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability.").
[2] 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

MRE 703 was last amended effective September 1, 2003. FRE 703 allows experts to base opinions on facts or data without admission of same in to evidence. MRE 703, on the other hand, mandates all underlying facts or data particular to the case to "be in evidence." Michigan is one of only two states with this sort of provision.

In December 2021, the Michigan Supreme Court appointed a new "Michigan Rules of Evidence Review Committee" to evaluate the "restyling" of the Federal Rules since 2011 and to review the Michigan Rules "for potential amendments similar to those adopted" for the Federal Rules.[3] The Chair of that Committee, Timothy Baughman, has confirmed that the Committee's work is limited to stylistic edits; the Committee is not evaluating the substantive law inherent in the Rules. He further confirmed that his Committee will not take in to consideration, as it pertains to MRE 702, the additional potential changes to FRE 702 set for 2023.

This Workgroup was charged with examining whether we should recommend any changes to MRE 702 or 703. During the course of our work, the Workgroup also reviewed whether FRE 704(b) ought to be adopted in Michigan.

The Workgroup consisted of the following members:

- Daniel D. Quick (chair) (Dickinson Wright PLLC; Troy)
- Hon. Chris Yates (Court of Appeals)
- Susan McKeever (Bush Seyferth PLLC; Troy)
- Beth A. Wittmann (Kitch; Detroit)
- Steven Stawski (Stawski Law, PLC; Traverse City)

[3] Michigan Supreme Court, Administrative Order No. 2021-8 (Adopted December 22, 2021) ("In an effort to remain as consistent as possible with the federal rules, the Michigan Supreme Court is forming a committee to review the Michigan Rules of Evidence for potential amendments similar to those adopted for the Federal Rules of Evidence.").

- Richard Friedman (Univ. of Michigan Law School)
- Eli Savit (Prosecutor, Washtenaw County)

The Workgroup convened remotely multiple times between July and September 2022 and reviewed substantial materials as to the origin of the applicable rules (including materials from 1999-2003 from the Advisory Committee on the Rules of Evidence), academic literature, and materials concerning the evolution of the Federal Rules.

After due consideration, the Workgroup proposes that the Board of Commissioners advance this report to the Michigan Supreme Court for consideration. Since the Michigan Rules of Evidence Review Committee will also be suggesting various proposed changes to the MRE in a final report to be submitted in short order, it is important that the MSC receive this report timely so that it may holistically consider any proposed changes to the Rules.

The Workgroup proposes only one change: an updating of MRE 702 to capture the changes made to FRE 702 over the last 20 years. Two options are presented for consideration, as discussed below and included in Attachment A. The Workgroup, after review, did not have a consensus as to whether MRE 703 should be revised; some description of that deliberation is provided below. Lastly, the Workgroup rejected the adoption of FRE 704(b) in to MRE 704 for reasons discussed below.

Beyond these specific recommendations, the Workgroup also urges the MSC to reconvene a standing committee regarding the MRE. A body like this existed for some number of years but was disbanded. While (as this Report demonstrates) the State Bar of Michigan is an excellent conduit for recommendations concerning the MRE, a standing committee has its unique benefits, including the development of rule-making expertise, the imprimatur of the MSC, the ability to

receive input directly from the MSC (and ability to work with other arms of the judiciary, such as the MJI), and greater ease of inclusion of both civil and criminal practitioners.

Should the Court elect to make any substantive changes to MRE 702 and 703, the Workgroup further recommends coordinating with the State Bar of Michigan to aid in education of the bench and bar concerning the rule, the changes, and the underlying policy considerations.

MRE 702

A. FRE 702 Amendments

1. The 2011 amendments

In 2011, the federal Advisory Committee on Evidence Rules (the "Federal Rules Committee") approved stylistic updates to FRE 101–1103.[4] As part of this update, the Committee reworded FRE 702 and enumerated the factors for consideration more clearly. The Committee's goal was to "make [the rules] more easily understood and to make style and terminology consistent throughout the rules."[5] The Committee made clear: "[t]here is no intent to change any result in any ruling on evidence admissibility."[6]

2. The 2023 amendments

[4] May 6, 2009 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 2, https://www.uscourts.gov/Advisory_Committee_Rules Evidence May 2009. The update was approved in December 2008. December 1, 2008 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 1, https://www.uscourts.gov/Advisory Committee Rules Evidence December 2008.
[5] FRE 702 advisory committee's note to 2011 amendment.
[6] *Id.* See also Michigan Supreme Court, Administrative Order No. 2021-8 (Adopted December 22, 2021) ("[The federal] 'restyling' only included stylistic changes such as reformatting, reducing the use of inconsistent terms, minimizing the use of ambiguous words, and removing outdated or redundant words and concepts; no substantive changes were made.").

The Committee on Rules of Practice and Procedure unanimously approved changes to FRE 702 on June 7, 2022.[7] The Judicial Conference of the United States adopted the proposal with a small language change and recommended adoption to the Supreme Court via October 18, 2022 memorandum.[8] Assuming the rule is adopted by the Supreme Court (and unless Congress then intervenes), the amendments will take effect on December 1, 2023. If adopted, FRE 702 will read as follows (presented here with redlining against the rule's current text):

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

a) Statement of the burden of proof

[7] https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (pp. 870-873, 891-1009). See also *The Phillip D Reed Lecture Series,* 88 Fordham L Rev 1216 (2020) (transcribing comments from members of the federal advisory committee in October 2019 with regard to the "best practices for managing *Daubert* questions" and addressing proposed and potential rule changes).

[8] https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf

The proposed amendment will incorporate the standard of decision-making directly into FRE 702.[9] This requires the proponent of an expert witness to demonstrate by a preponderance of evidence that the enumerated factors are satisfied.

This amendment reflects an attempt to correct judicial missteps, rather than to substantively change the law. Judges must make Rule 702 determinations under FRE 104(a).[10] FRE 104(a), in turn, mandates the court to actively decide whether the evidence is admissible. While the "preponderance" standard is the appropriate standard for those decisions, this fact is not readily apparent. Instead courts must search case law to find it.[11]

The Committee also felt that FRE 702 has been widely misinterpreted by treating factors (b) and (d) as questions of weight, rather than admissibility.[12] Questions of weight are decided by the jury, whereas questions of admissibility are questions for the court. This leaves jurors to weigh

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[9] Committee on Rules of Practice and Procedure, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence 308 (August 2021).

[10] FRE 104(a) states: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."

[11] December 1, 2020 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules December 2020 ("Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard … requiring a resort to case law.").

[12] See Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM & Mary L Rev 1 (2015); May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 818, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021; Advisory Comm. on Rules of Evidence, Agenda of May 3, 2019, at 62 (2019), https://www.uscourts.gov/Evidence Agenda Book May 2019 [https://perma.cc/99JE-PUTQ] ("The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence."). See also Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702,* 57 William & Mary L Rev 1 (2015).

up flawed testimony that should not have reached the courtroom, and leaves practitioners with cross-examination as their only recourse. Nonetheless, many courts misinterpret the requirement so greatly as to presume that expert testimony is admissible.[13] In fact, a study on 2020 federal court decisions found that 13% of judicial decisions on expert testimony incorrectly noted a presumption of admissibility under FRE 702.[14] The Committee believes that embedding the standard directly into the rule will help judges take notice, and follow through, on actively making Rule 702 determinations.[15]

The advisory committee notes to this amendment provide further guidance. They explain which types of decisions go to weight, and reiterate the types of decisions that require a Rule 702 admissibility determination.[16] The amendment intends to make compliance with Rule 702 difficult to ignore.[17]

The goals of the "preponderance standard" amendment to FRE 702 are to correct judicial misapplications and clarify how these decisions should be made. Several criticisms and alternative suggestions for achieving those goals were considered. For example, some commenters are

[13] May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 823, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021 .
[14] Jackson et al., Lawyers For Civil Justice, *Federal Rule Of Evidence 702: A One-Year Review And Study Of Decisions In 2020*, pp. 3-4 (2021).
[15] FRE 702 advisory committee's note to 2023 amendment.
[16] *Id.*
[17] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 41, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

skeptical that this amendment will change judicial behavior. Courts have ignored the plain rule on a wide scale, and some fear an amendment will not affect judicial behavior in the manner hoped.[18]

Further, the Federal Rules Committee was concerned that inserting the "preponderance" standard into this rule and not others—even though it applies to most evidentiary determinations—might "raise negative inferences" about the other rules.[19] Despite that concern, the pervasive disregard of the applicable standard warranted its explicit mention in the text of the rule.[20]

The Federal Rules Committee also considered, and rejected, three alternatives to this amendment:

- Amending only sub-section (d) and appending a committee note to communicate the preponderance standard instead of adding the language.[21]
- Educating the judiciary by way of a practice manual or otherwise. It was suggested that this could be effective in soliciting adherence to the rule. Ultimately, the Committee decided against that avenue due to questions about its authority to author practical guidance outside of the Rules.[22]

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[18] Nov. 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[19] December 1, 2020 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules December 2020. Ultimately, the Committee felt that including the standard would be a "substantial improvement." May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021.

[20] After the amendments were approved, the William and Mary Law Review published an article critiquing the Federal Rules Advisory Committee's solutions as being only part of the answer. Imwinkelried, *(Partial) Clarity: Eliminating the Confusion about the Regulation of the "Fact"ual Bases for Expert Testimony under the Federal Rules of Evidence*, 63 WM & Mary L Rev 719 (2022).

[21] Minutes of the Meeting on October 19, 2018, in November 15, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 4, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2018.

[22] Minutes of the Meeting on April 26-27, 2018, in May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 8, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

- Amending FRE 702 to refer directly to FRE 104(a), rather than stating the standard. The Committee concluded that explicitly stating the standard would be more effective.[23]

b) The Subsection (d) change

A recent national critique of conventional forensic evidence techniques by two leading scientific advisory groups spurred the initial discussion of a FRE 702 amendment.[24] The bodies criticized courts for failing to exclude questionable forensic evidence testimony[25] and failing to limit expert testimony that overstates the reliability of forensic techniques such as ballistics and handwriting analysis.[26] For example, DNA analysis in the 1990s exonerated many inmates who had been falsely convicted, often due to faulty forensic evidence allowed into trials.[27] Other national studies found similarly disturbing results: frequent use of forensic evidence "without any meaningful scientific validation, determination or error rates, or reliability testing."[28] Many forensic techniques have a long history at trial, and courts are hesitant to disrupt historically-permitted types of expert testimony. However, based on these and other reports, many believe that FRE 702 has failed to accomplish its goal of ensuring that expert testimony is reliable.[29] A study by the President's Council of Advisors on Science and Technology ("PCAST") recommended

[23] November 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.
[24] The National Academy of Sciences ("NAS"), and the President's Council of Advisors on Science and Technology ("PCAST"). See Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 Fordham L Rev 1661, 1676 (2018).
[25] *Id.* at 1662.
[26] November 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.
[27] Lander, *supra* note 23, at 1662.
[28] *Id.* at 1663, citing Nat'l Research Council, *Strengthening Forensic Science in The United States: A Path Forward*, pp. 107-108 (2008).
[29] Lander, *supra* note 23, at 1676.

clarifying the meaning of "reliable methods" in FRE 702 as the most effective way to curb this failure.[30]

The Federal Rules Committee considered several proposals, and ultimately determined that amending sub-section (d) as approved will best accomplish two key goals. While sub-section (d) currently reads "the expert has reliably applied" the principles and methods, it will read "the expert's opinion reflects a reliable application of" the principles and methods. This amendment aims to refocus the court on the expert's opinion itself, ensuring that the opinion or conclusion is also a reliable application of the principles and methods.[31] Relatedly, it will empower the court to assert its gatekeeping authority and not shy away from excluding illogical or overstated opinions even when based on reliable principles and methods.

While the above amendment was ultimately approved, the following suggestions were considered as alternatives.

- The PCAST report suggested a clarifying advisory note or judicial education.[32] However, new advisory notes are issued only when rules themselves change. Similarly, education efforts via a best practices manual authored by the Advisory Committee might be challenged as being outside of the Federal Rules Committee's rulemaking authority.[33]

- The Federal Rules Committee considered adding a new subsection (e) to Rule 702: **"**if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results."[34] The Committee rejected

[30] *Id.* at 1677.
[31] Nov. 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.
[32] Lander, *supra* note 23, at 1667.
[33] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 32, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.
[34] November 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.

this amendment due to concern about unintended consequences for testimony on subjects other than forensic evidence. Further, subsection (d) already addresses the overstatement situation: "[i]f an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d)."[35]

- The Committee also considered drafting a freestanding rule that prohibits overstatements, but determined it would overlap problematically with Rule 702.[36]

- Further, prescribing more detailed guidance on forensic science via amendments to the committee notes or a best practices manual both suffer a key problem: they would need extensive, laborious input from the scientific community, and standards are controversial.[37]

- Another option was to distinguish separate rules for scientific and other types of expert opinion testimony, but the Committee decided this option may be "less viable."[38]

Many of the rejected suggestions risked adding unintended confusion. Instead, the Federal Rules Committee ultimately decided on a conservative change, emphasizing that the trial court must also find that the expert's opinion itself correctly applies the underlying principles and methods. This amendment has received only sparse criticism.

B. MRE 702[39]

[35] *Id.* at 5.
[36] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 35, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.
[37] November 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 4, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.
[38] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 37, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.
[39] Two Michigan statutes also relate to expert testimony: MCL 600.2169 and MCL 600.2955. MCL 600.2169 further restricts expert testimony on appropriate standard of practice or care in medical malpractice actions. MCL 600.2955 lists factors the court must consider before admitting expert testimony in particular tort actions. The MSC has found these requirements to supplement, rather than conflict with, the Michigan Rules of Evidence. See, e.g., *Clerc v Chippewa Cnty War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007) (finding that the trial court should have ensured the expert was qualified under all three guidelines in order to fulfill its gatekeeping role).

1. MRE 702 in 2004

In 1999, the MSC appointed the Advisory Committee on the Rules of Evidence in light of the 2000 amendments to the Federal Rules of Evidence. The Committee's August 2000 report to the MSC recommended no change to the existing rule.[40] The Committee noted that the then-existing version of MRE 702 already recognized the trial court's gatekeeping function emphasized in *Daubert* (by virtue of the language "If the court determines that recognized…."). The Committee's minutes suggest that there was some debate as to whether *Daubert* really changed Michigan law under the so-called *Davis-Frye* "general acceptance" test, *People v Davis,* 343 Mich 348; 72 NW2d 649 (1955), as applied by Michigan courts, and this uncertainty can be seen in the Committee report's non-committal approach towards revising MRE 702.

Notwithstanding the Committee's suggestion, the MSC did in fact propose amendment of MRE 702 to conform to the 2000 version of FRE 702. Judge Dan Ryan wrote a law review article opposing the amendment, arguing that the MSC had not clearly adopted *Daubert* and that existing Michigan law provided an ample framework.[41] This objection was largely done away in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), wherein the Court stressed the gatekeeping role of the trial courts and noted that MRE 702 was designed to incorporate *Daubert.* See also *Elher v Misra*, 499 Mich 11, 878 NW2d 790 (2016).

2. Should Michigan adopt the changes?

The proposed 2023 changes would apply to the Michigan Rules in similar ways to the federal rule – they would state existing law, not change it.

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[40] August 2000 Report to the Michigan Supreme Court of the Advisory Committee on the Rules of Evidence, pp. 30-33.

[41] Ryan, *Michigan Rule of Evidence 702: Amend or Leave it to Schanz,* 19 TM Cooley L Rev 1 (2002).

As to the burden of proof, MRE 104(a) is essentially the same as FRE 104(a).[42] Case law similarly accepts the preponderance of evidence standard as that governing MRE 104(a).[43] As to the subsection (d) change, that too is already Michigan law, albeit (as noted below) sometimes misapplied.[44]

To the extent one purpose of the rule amendment is to prod courts to remember their gatekeeping functions, the salutary function of the rule is unobjectionable.

One might question whether Michigan courts have "drifted" from the intent of *Daubert* and their gatekeeping role as has been observed in the federal courts. A full review of all Michigan opinions since *Daubert* regarding the admission of expert witnesses is beyond the scope of this Report[45], and it may be that different elements of the bar (*e.g.,* plaintiff and defense medical malpractice attorneys) have different anecdotal perceptions of the issue. Several members of the Workgroup observed that busy trial courts often allow experts to testify without an exacting

[42] MRE 104(a) initially mirrored FRE 104(a), but FRE 104(a) was amended in 2011 as part of the stylistic overhaul, and Michigan's remains the same as the prior version.

[43] *People v Hendrickson*, 459 Mich 229, 241–242, 586 NW2d 906 (BOYLE J., concurring) ("Under MRE 104(a), preliminary factual questions of admissibility are determined by the trial court utilizing a preponderance-of-the-evidence standard."), citing *Bourjaily v United States,* 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144 (1987); *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 790; 685 NW2d 391, 413 (2004).

[44] E.g., *Ketterman v City of Detroit*, unpublished opinion of the Court of Appeals, issued May 16, 2006 (Docket No. 258323), 2006 WL 1328846, p *5 ("Our Supreme Court in *Gilbert* spoke of "analytical gap[s]" between data and opinions given by experts, warning that insufficient inquiry into an expert's qualification to testify based on reliable application of reliable methods to the specific facts of a case might let in testimony that could "serve as a Trojan horse that facilitates the surreptitious advance of ... spurious, unreliable opinions." *Gilbert, supra,* p. 783. The trial court must vigilantly play the gatekeeper role to prevent just this from happening…").

[45] A study at the federal level by one public commentator on FRE 703 can be reviewed at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_public_comment_on_rule_702_amendment_sept_1_2021.pdf .

Daubert analysis (and often without a hearing as sometimes occurs in federal court[46]) and courts will often justify their decisions by claiming that the challenge goes to "weight" rather than admissibility and thus for the jury to sort out. In the appellate courts, there are cases that arguably get the Rule wrong.[47] But whether this evidences a broader trend or problem is unclear; there does not appear to have been any recent law review articles or academic study of these issues in Michigan courts.[48] On the other hand, there is no reason to believe the same problems affecting federal courts would not also affect state courts; arguably, given less resources, busier dockets and many cases involving lesser financial stakes, one might hypothesize that the problem would be worse in state courts.

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[46] This seems to occur somewhat more frequently in the business courts; see, e.g., https://www.courts.michigan.gov/4a47f4/siteassets/business-court-opinions/c20-2017-4997-cb-(april-6,-2020)2-of-2.pdf (which also contains a particularly thorough analysis of the *Daubert* standard).

[47] A particularly interesting opinion is *B&L Dev LLC v City of Norton Shores*, unpublished Court of Appeals opinion Case No. 311183, 2014 WL 3973296 (2014), where a party questioned the trial court's admission of an expert opinion regarding valuation by challenging the methods (or lack thereof) of the expert. Appellant's key argument was that, while the expert was qualified and relied upon acceptable facts, his method of applying those facts was "junk" and could not satisfy the rule. The trial court and the Court of Appeals both rejected the challenge, but without taking on its gatekeeping function as to methodology, essentially finding that since he was qualified as an expert, everything else went to weight. In so doing, the Court of Appeals cited to and misapplied *Surman v Surman*, 277 Mich App 287; 745 NW2d 802 (2007), and *Lenawee Co v Wagley*, 301 Mich App 134; 836 NW2d 193 (2013). *Surman* dealt only with the qualifications of the expert, yet the Court of Appeals cited it to apply to the methodology argument which was not at issue in *Surman*. *Wagley* contained no substantive analysis and simply cited to *Surman*. There are also examples of the Court of Appeals reversing a trial court which neglected its gatekeeping obligation where a party raised issues as to both qualifications as an expert and the methodology but the trial court only addressed the former. *MacKenzie v Koziarski*, unpublished Court of Appeals opinion, Case No. 289234, 2011 WL 1004174 (2011).

[48] There are instances of elements of the MSC questioning whether some particular area needs to be re-examined under *Daubert* instead of continuing to be accepted as reliable based upon precedent. See, e.g., *People v Mejia*, 505 Mich 963; 937 NW2d 121, 122 (2020) (MCCORMACK, CJ, dissenting) (addressing the court's continued acceptance of the validity and reliability of child sexual abuse accommodation syndrome in light of questions raised in other states).

The lengthy advisory committee note on FRE 702 (proposed 2023 amendments) indicates a dual purpose: both to signal to judges that they should take note of this rule and also to guide those decisions. Even if the Michigan judiciary does not require the same extent of flag-waving, the guiding role of the amendment, through a comment to the revised rule, may nonetheless be useful to judges on which decisions should be addressed by weight and which are an issue of admissibility. Additionally, given the MSC's decision to 'catch up' the MREs based upon the FREs stylistically, it likely makes sense to incorporate the 2023 amendments in to MRE 702.

Another consideration is the opportunity for judicial education presented by the newly implemented Mandatory Continuing Judicial Education Program. While the federal bar does not require judicial officers to undertake continued education, Michigan will begin a mandatory continuing judicial education program, effective 2024.[49] This may present additional opportunities for judicial education that are absent at the federal level.[50]

3. Proposed text

If a change is to be made, what should it be? Of course, one solution is simply adopt FRE 702. Another option would be to keep the format and structure of the existing rule, but add language to reflect the 2023 FRE changes. The Workgroup was relatively agnostic on this issue. While adopting the language of FRE 702 has the potential benefit of directly mirroring the federal rule and thus suggesting the relevance of federal cases applying the rule, the intent to capture the 2023 FRE change can also be conveyed in a comment. The Workgroup also believed there was something to be said for committing the least amount of violence necessary to a long-standing rule of evidence lest unintended consequences follow and to ease digestion amongst bench and bar.

[49] See Michigan Supreme Court, Administrative Order No. 2021-7 (Adopted October 20, 2021).
[50] Nonetheless, both the state and federal judiciary have long had other educational institutes, e.g., Michigan Judicial Institute; Federal Judicial Center.

Attached as Attachment A is a clean and redline proposal for a revised MRE 702 which preserves the existing structure and language as much as possible.

MRE 703

Rule 703 prescribes the facts or data on which experts may base their opinion testimony. Under FRE 703, the bases need not be admissible as long as experts in the particular field would "reasonably rely" on them. Under MRE 703, the bases must be in evidence.

While the Workgroup does not recommend any changes to MRE 703, the following background and commentary is provided so as to share with the Court the bases for the Committee's recommendation.

C. FRE 703

The Federal Rules Committee originally drafted FRE 703 as a liberal standard, prioritizing efficiency and practicality.[51] The Committee reasoned that if other experts rely on particular information in their day-to-day practice, it should be reliable enough for in-court testimony.[52] In its pre-2000 form, FRE 703 did not clarify whether the relied-upon documents were themselves viewable by the jury.[53] This controversy led to a conflict between courts, with some allowing all underlying facts and data to be admitted, in addition to the opinion itself.[54] In 2000, FRE 703 was

[51] 29 Wright & Miller, Federal Practice and Procedure §6267 (2d ed.).
[52] FRE 703 advisory committee's note to 1972 proposed rules; Levine, *Locking the Backdoor: Revised MRE 703 and Its Realized Impact on Bases of Expert Testimony*, 87 U Det Mercy L Rev 505, 522 (2010); McCormick, *Evidence*, p. 38 (6th ed 1992) ("The rationale for this view is that an expert in a science is competent to judge the reliability of statements made to her by other investigators or technicians.").
[53] Benner & Carlson, *Should Michigan Rule of Evidence 703 be Revised?*, 70 Mich B J 572 (June 1991).
[54] See, e.g., Federal Trial Evidence, p. 129 (James Publishing Co., 1992 ed) (urging practitioners to "consider whether by giving [inadmissible evidence] to your expert you will be able to have it presented to the jury".).

amended to exclude inadmissible facts or data used as the basis for expert testimony unless the probative value substantially outweighs its prejudicial effect.[55]

Courts and commentators have addressed two main issues under FRE 703. The first is the perception that FRE 703 is a giant hearsay loophole in derogation of the rest of the rules of evidence and common law. The second is unique to criminal law and involves the Confrontation Clause. A leading law review article after the 2000 revision suggested that the balance struck by the revised FRE 703 largely worked as to the hearsay concerns but that the rule sometimes raised concerns in the criminal context.[56] This debate has also played out in state courts following the federal rule formulation.[57]

D. MRE 703

1. Adoption in 2003

Prior to 2003, MRE 703 (1978) departed from the then-existent Federal Rule, but more in style than substance. Whereas FRE 703 expressly sanctioned the bases of expert testimony not being in evidence, MRE 703 took a different tactic and gave the trial court discretion to require that such bases be in evidence. While this garnered some attention,[58] by the time it was addressed in 2000, at least some members of the Committee felt it was a relatively inconsequential difference (if not an improvement over the federal rule).

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[55] FRE 703 advisory committee's note to 2000 amendment ("Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.").

[56] Volek, *Federal Rule of Evidence 703: The Backdoor and the Confrontation Clause, Ten Years Later*, 80 Fordham L Rev 959, 996-997 (2011).

[57] See, e.g., Hamilton, *The End of Smuggling Hearsay: How People v Sanchez Redefined the Scope of Expert Basis Testimony in California and Beyond*, 21 Chap L Rev 509 (2018).

[58] See Benner & Carlson, *supra* note 52.

The Advisory Committee on the Rules of Evidence generated a report to the MSC in August 2000. In a rare split, the majority of the committee favored a version of the rule requiring the bases of the expert be in evidence, a departure from the then-existing version of the rule.[59] The reason provided for this formulation was a concern that the then-existing Michigan rule, let alone the Federal rule, provided an untrammeled back door for the admission of what would otherwise be inadmissible hearsay.

> The contradictions presented by the federal amendment exist, we submit, because it does not reach the fundamental flaw that inheres in both the federal and Michigan versions of Rule 703, i.e., the grant of authority to decide disputed issues and the substantive rights of parties on the basis of facts that are never proved. We believe that it is time to frankly acknowledge that the well-intentioned innovation of Rule 703 has proved to be unworkable and that we should return to the former practice, which required nothing more than that litigants who make assertions in court be required to prove them.[60]

Two of the eleven members dissented. Judge Tahvonen and Professor John Reed opined in favor of the federal rule (or at least the existing Michigan rule), noting that "if it be thought that Michigan's trial judges are not prepared to exercise their discretion to prevent abuse, there may be a role for the Michigan Judicial Institute."[61]

After submission of the report and an opportunity for public comment, various elements of the bench and bar opposed the proposed amendment. Judge William Giovan, who chaired the Committee and favored the majority opinion,[62] filed lengthy written comments dated January 28, 2003 to the MSC, strongly advocating the adoption of the proposed rule and attempting to rebut

[59] See August 2000 Report of the Advisory Committee on the Rules of Evidence, p. 7.
[60] *Id.* at 12.
[61] *Id.* at 15.
[62] Judge Giovan had, even prior to the appointment of the Committee, argued for this position to the MSC, as noted in the Committee minutes.

the dissenting opinions expressed at the public hearing and in written comments. The MSC adopted his view.

2. Other States

Like FRE 703, 46 states allow expert opinion testimony even where the bases of the opinion are not admissible.[63] Of these, 9 states have an identical rule to FRE 703. Nineteen have not yet adopted the probative/prejudicial value balancing test reflecting the 2003 FRE amendments. Other states have mildly different wording, but in each of the 46, an expert may base testimony on out-of-court statements as long as there is reasonable reliance.

Only four states, then, diverge significantly from FRE 703. Massachusetts Rule of Evidence 703 requires that facts or data used as the basis of an expert opinion or inference be "independently admissible in evidence and [be] a permissible basis for an expert to consider in formulating an opinion." New York does not have codified rules of evidence, but current law allows reliance on out-of-court material only where it is reasonably relied upon, there is other evidence establishing the material's reliability, and it is not exclusively relied upon for the expert's opinion.[64]

Michigan and Ohio are the other two minority jurisdictions. Both require external bases to be in evidence.[65]

3. MRE 703: pros and cons

[63] See table attached as Attachment B. The exceptions are Massachusetts, Michigan, New York, and Ohio.

[64] However, as of 2022, the courts have created a guide which compiles statutes and case law making up evidentiary practices. See *Guide to New York Evidence*, Chapter 7.01(5)(b) (accessed June 7, 2022) https://nycourts.gov/Judges Opinion (defining when an expert may rely on out-of-court material).

[65] MRE 703; Ohio R Evid 703.

Since the adoption of MRE 703, it has not been subject to study or commentary as to whether the reasons justifying the departure from FRE 703 proved out in practice. The one exception is a 2010 law review comment[66] which summarized the history of the federal and state rules and analyzed a handful of cases citing the rule.

Within the courts, the different formulations have been noted on occasion. In *People v Inge*, unpublished opinion of the Court of Appeals, issued October 23, 2018 (Docket No. 337346), 2018 WL 5276413, the Court of Appeals noted that the trial court incorrectly allowed an expert to opine based upon another report which was not in evidence, noting that a different result might result under FRE 703. And there is not much discussion of the Confrontation Clause issue in Michigan since a strict reading of MRE 703 tends to also support the Confrontation Clause argument.[67] There are, however, examples of the Court of Appeals arguably wrongly relying upon the pre-2003 version of the rule in allowing inadmissible hearsay.[68]

What does not exist is a comprehensive review of the issues. For example, the MRE 703 formulation was thought to increase costs and trial time, especially regarding routine testimony. The classic example is that of a physician testifying to a simple diagnosis: all underlying scans and tests that the physician used for his diagnosis would first need to be admitted, thus necessarily

[66] Levine, *supra* note 51.
[67] *Id.* See also *People v Fackelman*, 489 Mich 515, 535; 802 NW2d 552, 562 (2011).
[68] In *People v Bundy*, unpublished opinion of the Court of Appeals, issued February 1, 2022 (Docket No. 349072), 2022 WL 303327, p *13, the court allowed an expert to rely upon inadmissible hearsay, stating, "It is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." (quoting *People v Lonsby*, 268 Mich App 375, 382-383; 707 NW2d 610 (2005)). *Lonsby*, however, cited a 1992 opinion for that proposition, which relied upon the pre-2003 version of MRE 703.

increasing costs and court time.[69] Additionally, it was also hoped that the conservative approach would "curtail erroneous use of experts at trial," ultimately offsetting litigation costs.[70]

Nor has there been systematic study of the main issue driving the MRE 703 formulation – the concern that the federal version regularly allowed in hearsay. Given that the federal courts and those of 46 states (to varying degrees) follow the federal formulation, one might think that if an avalanche of offensive hearsay was being permitted it would garner some attention. Yet, the Workgroup found no recent article analyzing the issue nor detailed lament by a federal court. Moreover, the Workgroup can find no record of the issue coming before the Rules Advisory Committee; that body regularly attracts proposed rule changes where issues are perceived to exist.

4. Should a change be made?

The Workgroup was evenly split on this issue but tilted toward no change. Most agreed that existing MRE 703 can cause unnecessary burdening of the trial process and trial evidence with "bases" of the expert's opinion which will never, in trial, be reviewed or discussed. Moreover, the rule is a trap for the unwary, who may be more familiar with the FRE version. On the other hand, some Workgroup members expressed concern about hearsay issues should the FRE version be adopted, and the FRE version would also unsettle the Confrontational Clause jurisprudence in Michigan. Moreover, while the strict wording of MRE 703 provides opportunities to make the trial process more burdensome, there was no overwhelming sense that this is such a pervasive problem without other potential solutions such that a rule change was justified. The Workgroup also considered the pre-2003 version of MRE 703 (which granted discretion to the trial court) but

[69] See, e.g., Levine, *supra* note 51, at 522–523 (discussing concerns that experts will have to consult more closely with attorneys to ensure that the underlying basis of each intended statement is in evidence).
[70] *Id.* at 523.

some Workgroup members were concerned about judges letting in too much hearsay and that appellate review might not be sufficient to address abuses.

FRE 704(b)

The Committee briefly considered whether this rule should be adopted in Michigan. In brief, this rule was added in the wake of the John Hinckley trial by some who thought his insanity defense to be spurious. Since its adoption it has caused some confusion in the courts and has not been adopted in the vast majority of states. The Workgroup saw no good reason to adopt the rule.

ATTACHMENT A

Potential revision of MRE 702

EXISTING MRE 702:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

2023 REVISION TO FRE 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent has demonstrated by a preponderance of the evidence that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

POTENTIAL REVISION TO MRE 702

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify ~~thereto~~ in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the ~~witness~~ expert's opinion reflects a reliable application of ~~has applied~~ the principles and methods ~~reliably~~ to the facts of the case. The proponent bears the burden of demonstrating to the court that it is more likely than not that the expert opinion testimony satisfies this rule.

Cross-jurisdictional Survey on FRE 703 and its Counterparts

Current as of June 1, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Massachusetts	Mass R Evid 703 Mass Guide to Evidence Section 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.
Michigan	MRE 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.
Ohio	Ohio R Evid 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.
New York	NY CPLR 4515 Guide to NY Evid 7.01(5)[2]	Minority	If relying on out-of-court material, must provide evidence of reliability	CPLR 4515 (b) An expert also may rely on out-of-court material if: (i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material; or the out-of-court material comes from a witness in the proceeding who was subject to full cross-examination by the opposing party; and (ii) it is a link in the chain of data and accordingly not exclusively relied upon for the expert's opinion.
Colorado	Colo R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Delaware	Del R Evid 703	Majority	Different in form only	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. Upon objection, if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Florida	Fla Stat Ann § 90.704	Majority	Different in form only	The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Georgia	Ga Code Ann § 24-7-703	Majority	Different in form only	The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Updated As of November 5, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Kansas	Kan Stat Ann § 60-458	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of such facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs any prejudicial effect.
Maryland	Md R 5-703	Majority	Different in form only	(a) Admissibility of Opinion. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Vermont	Vt R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Virginia	Va Code Ann § 8.01-401.1	Majority	Different in form only	In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
Wisconsin	Wis Stat Ann § 907.03	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.
North Carolina	NC R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Alaska	Alas R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.
Oklahoma	Okla Stat tit xii, § 2703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Updated As of November 5, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Tennessee	Tenn R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Idaho	Idaho R Evid 703	Majority	Different in form only	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Hawaii	Hawaii Rev Stat § 626-1, Rule 703	Majority	Different in form only; adds trustworthiness clause	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Kentucky	Ky R Evid 703	Majority	Different in form only; adds trustworthiness clause	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
Arizona	Ariz R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
New Hampshire	NH R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
South Dakota	SD Codified Laws § 19-19-703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Utah	Utah R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Updated As of November 5, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
West Virginia	W Va R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Wyoming	Wy R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
New Mexico	NM R Evid 11-703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
North Dakota	ND R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Missouri	Mo Rev Stat § 490.065.2(2)	Majority	Identical; Only applies in civil rules here	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;
Arkansas	Ark R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
California	Cal Evid Code § 801	Majority	Omits probative value test	If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.
Connecticut	Conn Code of Evid § 7-4(b)	Majority	Omits probative value test	(b) Bases of Opinion Testimony by Experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.
Illinois	Ill R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Updated As of November 5, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Indiana	Ind R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.
Iowa	Iowa R Evid 5.703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Louisiana	La Code Evid Ann art. 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Maine	Me R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or has personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, the facts or data need not be admissible for the opinion to be admitted.
Mississippi	Miss R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.
Montana	Mont R Evid 703	Majority	Omits probative value test	The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nebraska	Neb Rev Stat § 27-703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nevada	Nev Rev Stat 50.285	Majority	Omits probative value test	1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
New Jersey	NJ R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Oregon	Or Rev Stat § 40.415 Or R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Pennsylvania	Pa R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
South Carolina	SC R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence
Texas	Tex R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Washington	Wash R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Updated As of November 5, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Alabama	Ala R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect
Minnesota	Minn R Evid 703	Majority	Similar rule	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.
Rhode Island	RI R Evid 703	Majority	Underlying facts are admissible if reasonably relied upon	An expert's opinion may be based on a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence. If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source.

[1] Rule categorized as "Majority" if it allows expert testimony where the bases of opinion are not in evidence

[2] New York does not have a comprehensive code of evidence. As of 2022, the *Guide to NY Evidence* compiles statutory and case law on evidentiary

Public Policy Position
MRE 702/703 Workgroup

Support Amendment of MRE 702 and MRE 703

Explanation
The Committee voted 22 in favor, 3 opposed, with 2 abstentions to support amending MRE 702 to align with the "2023 Revision to FRE 702," as presented on page 23 of the Final Report of the MRE 702/703 Review Workgroup.

The Committee voted 22 in favor, 3 opposed, with 2 abstentions to recommend that MRE 703 be amended to reinstate the language of MRE 703 that was in use prior to 2003.

Position Vote on MRE 702:
Voted For position: 22
Voted against position: 3
Abstained from vote: 2
Did not vote (absence): 6

Position Vote on MRE 703:
Voted For position: 22
Voted against position: 3
Abstained from vote: 2
Did not vote (absence): 6

Contact Person:
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Public Policy Position
MRE 702/703 Workgroup

Support Workgroup Recommendation

Explanation:
The Committee voted 16 in favor with 3 abstentions to support the proposed amendments to MRE 702, as set forth as "Potential Revision to MRE 702" on page 23 of the Final Report of the MRE 702/703 Review Workgroup.

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 3
Did not vote (absent): 8

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes to renumber, retitle, and amend M Crim JI 20.29 [Limiting Instruction on Expert Testimony (in Child Sexual Conduct Cases)] in order to broaden its scope to include other experts who may testify about victims' behaviors (such as victims of domestic abuse) and to add information that the jurors need not accept expert testimony, consistent with M Crim JI 5.10. The proposed instruction would renumber the instruction to M Crim JI 5.10a, and title it as Limiting Instruction on Behavioral Expert Testimony. The proposal would also add a Use Note for M Crim JI 5.10 [Expert Witness] directing the court to use M Crim JI 5.10a where an expert testifies regarding the behavioral characteristics of sexually abused children or victims of domestic violence. Deletions are in strike-through, and new language is underlined.

[AMENDED and RE-NUMBERED]

M Crim JI ~~20.29~~ 5.10a **Limiting Instruction on ~~Expert Testimony (in Child Criminal Sexual Conduct Cases)~~ Behavioral Expert Testimony**

(1) ~~You have heard [*name expert*]'s opinion about the behavior of sexually abused children.~~ [*Name expert*] testified as an expert in the field of _____ and gave an opinion in [his / her] area of expertise. Experts are allowed to give opinions in court.

(2) However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When deciding whether you believe an expert's opinion, think carefully about the reasons and facts [he / she] gave for [his / her] opinion and whether those facts are true. You should also think about the expert's qualifications and whether [his / her] opinion makes sense when you think about the other evidence in the case.

(3) ~~You should consider that evidence~~ If you do believe [*name expert*]'s opinion, you should consider it only for the limited purpose of deciding whether [*name complainant*]'s ~~acts~~ behavior and words after the alleged crime were consistent with those ~~of sexually abused children~~ described by the expert. ~~That evidence cannot be used to show~~ You cannot use [*name expert*]'s opinion as proof that the crime charged here was committed or that the defendant committed it.[1] Nor can it be considered an opinion by [*name expert*] that [*name complainant*] is telling the truth.

Use Note

~~This instruction is intended for use where expert testimony is offered to rebut an inference that a child complainant's behavior is inconsistent with that of actual victims of child sexual abuse. *People v Beckley*, 434 Mich 691, 725, 456 NW2d 391 (1990).~~ This instruction is used where expert testimony is offered to explain the behavior of a sexually abused child or of a physically or psychologically abused person that may appear inconsistent with having been abused. *See, e.g.*, *People v Beckley*, 434 Mich 691, 725, 456 NW2d 391 (1990).

1. The language in this sentence may have to be eliminated or amended where the expert is not testifying for the prosecution describing conduct applicable to a criminal case.

[AMENDED] Use Note for **M Crim JI 5.10 Expert Witness**:

Use Note

~~Do *not* use this instruction where the expert testifies regarding the characteristics of sexually abused children and about whether the complainant's behavior is consistent with those characteristics. Instead, see M Crim JI 20.29, Limiting Instruction on Expert Testimony (Child Criminal Sexual Conduct Cases).~~

See **M Crim JI 5.10a Limiting Instruction on Behavioral Expert Testimony** where the expert testifies regarding the behavioral characteristics of sexually abused children or victims of domestic violence.

Public Policy Position
Model Criminal Jury Instructions 5.10a

Support as Drafted

Explanation:
The Committee voted unanimously to support Model Criminal Jury Instructions 5.10a, regarding Limiting Instruction on Behavioral Expert Testimony.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes to amend M Crim JI 7.16 [Duty to Retreat to Avoid Using Force or Deadly Force] to correct an error in requiring fear of imminent death or serious harm for use of non-deadly force per a published Court of Appeals decision, *People v Ogilvie* (MCOA #354355), citing MCL 780.972(2). Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 7.16 Duty to Retreat to Avoid Using Force or Deadly Force

(1) A person can use [force / deadly force] in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he / she] needed to use [force / deadly force] in self-defense.*

(2) However,* a person is never required to retreat if attacked in [his / her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.

(3) Further, a person is not required to retreat if he or she

(a) has not or is not engaged in the commission of a crime at the time the [force / deadly force] is used,

(b) has a legal right to be where he or she is at that time, and

[*Select from the following according to whether the defendant used deadly force or nondeadly force:*]

(c) has an honest and reasonable belief that the use of ~~[force / ~~deadly force~~]~~ is necessary to prevent imminent [death / great bodily harm / sexual assault] of [himself / herself] or another person.

or

(c) has an honest and reasonable belief that the use of force is necessary to prevent the imminent unlawful use of force ~~of~~ against [himself / herself] or another person.

Use Note

*Paragraph (1) and "However" should be given only if there is a dispute whether the defendant had a duty to retreat. *See People v Richardson*, 490 Mich 115, 803 NW2d 302 (2011).

Use this instruction when requested where some evidence of self-defense has been introduced or elicited. Where there is evidence that, at the time that the defendant used force or deadly force, he or she was engaged in the commission of some other crime, the Committee on Model Criminal Jury Instructions believes that circumstances of the case may provide the court with a basis to instruct the jury that the defendant does not lose the right to self-defense if the commission of that other offense was not likely to lead to the other person's assaultive behavior. *See People v Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974). The committee expresses no opinion regarding the availability of self-defense where the other offense may lead to assaultive behavior by another.

Public Policy Position
Model Criminal Jury Instructions 7.16

Support as Drafted

Explanation:
The Committee voted unanimously to support Model Criminal Jury Instructions 7.16, regarding Duty to Retreat to Avoid Using Force or Deadly Force.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

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Sofia V. Nelson snelson@sado.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes an amendment to M Crim JI 17.25 [Stalking] to correct it in accord with statutory language, to provide definitional language in the instruction for "unconsented contact, and to clarify the element for aggravated stalking. Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 17.25 Stalking

(1) [The defendant is charged with / You may consider the lesser offense of] stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact~~[1]~~ with (*name complainant*). *Unconsented contact* means that the defendant initiated or continued contact with (*name complainant*) without [his / her] consent and includes [following or appearing within sight of (*name complainant*) / approaching (*name complainant*) in public or on private property / appearing at (*name complainant*)'s workplace or home / entering or remaining on property owned, leased, or occupied by (*name complainant*) / contacting (*name complainant*) by telephone / sending an electronic communication or mail to (*name complainant*) / placing an object on or delivering an object to property owned, leased or occupied by (*name complainant*)].[1]

(3) Second, that the contact would cause a reasonable individual to suffer emotional distress.

(4) Third, that the contact caused [*name complainant*] to suffer emotional distress.[2]

(5) Fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested.[3]

(6) Fifth, that the contact caused [*name complainant*] to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

[*For aggravated stalking, add the following:*]

(7) Sixth, ~~the stalking~~ at least one act of unconsented contact[4]

[was committed in violation of (a court order / a condition of [parole / probation])]

[was committed in violation of a restraining order of which the defendant had actual notice]

[included the defendant making one or more credible threats[4] against [*name complainant*], a member of (his / her) family, or someone living in (his / her) household]. A credible threat is a threat to kill or physically injure a person made in a manner or context that causes the person hearing or receiving it to reasonably fear for his or her safety or the safety of another person.[5]

~~[was a second or subsequent stalking offense].~~

[*Where appropriate under the evidence, add the following:*]

(8) You have heard evidence that the defendant continued to make repeated unconsented contact with [*name complainant*] after [he / she] requested the defendant to discontinue that conduct or some different form of unconsented contact and requested the defendant to refrain from any further unconsented contact. If you believe that evidence, you may, but are not required to, infer that the continued course of conduct caused [*name complainant*] to feel terrorized, frightened, intimidated, threatened, harassed, or molested. Even if you make that inference, remember that the prosecutor still bears the burden of proving all of the elements of the offense beyond a reasonable doubt.

Use Note

1. *Unconsented contact* is defined at MCL 750.411h(1)(e) and is not limited to the forms of conduct described in this jury instruction. The court may read all of the types of contact mentioned in the statute or may select those that apply according to the charge and the evidence, or the court may describe similar conduct it finds is included under the purview of the statute.

2. The second and third elements constitute *harassment* as defined at MCL 750.411h(1)(c).

3. The fourth and fifth elements are part of *stalking* as defined at MCL 750.411h(1)(d).

4. If the basis for aggravated stalking is a prior conviction, do not read this element.

5. *Credible threat* is defined at MCL 750.411i(1)(b). By this definition, a "credible threat" appears to meet the "true threat" standard of *Virginia v Black*, 538 US 343, 358 (2003).

Public Policy Position
Model Criminal Jury Instructions 17.25

Support as Drafted

Explanation:
The Committee voted unanimously to support Model Criminal Jury Instructions 17.25, regarding Stalking.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes adding an alternative to M Crim JI 20.1 [Criminal Sexual Conduct in the First Degree] where the defendant is a woman who caused sexual penetration with a male under unlawful circumstances. The new language is underlined.

[AMENDED] M Crim JI 20.1 Criminal Sexual Conduct in the First Degree

(1) The defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant engaged in a sexual act that involved

[*Choose (a), (b), (c), or (d):*]

(a) entry into [(*name complainant)* / the defendant]'s [genital opening[1] / anal opening] by [(*name complainant)* / the defendant]'s [penis / finger / tongue / (*name object*)]. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

(b) entry into [(*name complainant)* / the defendant]'s mouth by [(*name complainant)* / the defendant]'s penis. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

(c) touching of [(*name complainant)* / the defendant]'s [genital openings[1] / genital organs] with [(*name complainant)* / the defendant]'s mouth or tongue.

(d) entry by [any part of one person's body / some object] into the genital or anal opening[1] of another person's body. Any entry, no matter how slight, is enough. It is alleged in this case that a sexual act was committed by [*state alleged act*]. It does not matter whether the sexual act was completed or whether semen was ejaculated.

(3) [*Follow this instruction with one or more of the nine alternatives, M Crim JI 20.3 to M Crim JI 20.11, as warranted by the evidence*.]

(4) [*Where the defendant is charged under MCL 750.520b(2)(b) with the 25-year mandatory minimum for being 17 years of age or older and penetrating a child under 13 years old, instruct according to M Crim JI 20.30b.*]

Public Policy Position
Model Criminal Jury Instructions 20.1

Support as Drafted

Explanation:
The Committee voted unanimously to support Model Criminal Jury Instructions 20.1, regarding Criminal Sexual Conduct in the First Degree.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
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Sofia V. Nelson snelson@sado.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes to add "allowed or caused" language to M Crim JI 20.2 [Criminal Sexual Conduct in the Second Degree] and M Crim JI 20.13 [Criminal Sexual Conduct in the Fourth Degree] to reflect an unpublished Court of Appeals decision, *People v Zernec* (MCOA #353490), interpreting MCL 750.520e. Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 20.2 Criminal Sexual Conduct in the Second Degree

(1) The defendant is charged with the crime of second-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [touched (*name complainant*)'s / made (*name complainant*) touch (his / her) / allowed (*name complainant*) to touch[1] (his / her) / caused (*name complainant*) to touch[1] (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.

(3) Second, that this was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.

(4) [*Follow this instruction with one or more of the 13 alternatives, M Crim JI 20.3 to M Crim JI 20.11d, as warranted by the evidence. See the table of contents on p. 20-1 for a list of the alternatives.*]

Use Note

1. These alternatives may only be used where "consent" is not a possible defense, e.g., where the victim is under-age or mentally incapable.

[AMENDED] M Crim JI 20.13 Criminal Sexual Conduct in the Fourth Degree

(1) The defendant is charged with the crime of fourth-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [touched (*name complainant*)'s / made (*name complainant*) touch (his / her) / allowed (*name complainant*) to touch[1] (his / her) / caused (*name complainant*) to touch[1] (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.

(3) Second, that this was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.

Use Note

~~Use this instruction where the facts describe an offensive touching.~~

~~Where an offensive touching involving an employee of the Department of Corrections is alleged, an appropriate instruction conforming to MCL 750.520e(1)(c) should be drafted.~~

1. These alternatives may only be used where "consent" is not a possible defense, e.g., where the victim is under-age or mentally incapable.

Public Policy Position
Model Criminal Jury Instructions 20.2 and 20.13

Support as Drafted

Explanation:
The Committee voted unanimously to support Model Criminal Jury Instructions 20.2 and 20.13, regarding Criminal Sexual Conduct in the Second Degree.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by December 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes to amend M Crim JI 36.1, 36.3 36.4, 36.4a, and 36.6 [Human Trafficking] to add "coercion" language per a statutory amendment to MCL 750.462a. The new language is underlined. The Use Notes have not changed so they have not been included.

[AMENDED] M Crim JI 36.1 Obtaining a Person for Forced Labor or Services

(1) The defendant is charged with the crime of obtaining a person for forced labor or services. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*] to perform forced labor or services.

(3) Second, that when the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*], the defendant knew that it was for the purpose of having [*name complainant*] perform forced labor or services, whether or not such labor or service was actually provided.

(4) "Forced labor or services" are labor or services obtained or maintained by force, fraud, or coercion.

[*Provide any or all of the following definitions, according to the evidence:*]

(a) Force includes physical violence, restraint, or confinement, or threats of physical violence, restraint, or confinement.

(b) Fraud includes false or deceptive offers of employment or marriage.

(c) Coercion includes [s*elect any that apply*]:

(i) threats of harm or restraint to any person.

(ii) using a [scheme / plan / pattern] intended to cause someone to think that [psychological harm / physical harm / harm to the person's reputation] would result from failing to perform an act.

(iii) abusing or threatening to abuse the legal system by threatening to have the person [arrested / deported], regardless of whether the person could be [arrested / deported].

(iv) [destroying / concealing / removing / confiscating] a [passport / immigration document / government identification document] from any person, even if the document was fraudulently obtained.

(v) facilitating or controlling access to [*identify controlled substance(s) per MCL 333.7104*] without a legitimate medical purpose.

These are examples of [force / fraud / coercion] and not an exhaustive list.

[*This crime is a 10-year offense that may be increased by aggravating factors. If the prosecution has charged one of those factors, the jury must be instructed under M Crim JI 36.5.*]

[AMENDED] M Crim JI 36.3 Knowingly Subjecting a Person to Forced Labor or Debt Bondage

(1) The defendant is charged with the crime of knowingly subjecting a person to [forced labor or services / debt bondage]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant purposefully recruited, enticed, harbored, transported, provided, or obtained [*name complainant*] by any means.

(3) Second, that when the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*], the defendant knew

that [*name complainant*] would be subjected to [perform forced labor or services / debt bondage].

[*Provide appropriate definitions:*]

(4) "Forced labor or services" are labor or services obtained or maintained by force, fraud, or coercion.

[*Provide any or all of the following definitions, according to the evidence:*]

(a) Force includes physical violence, restraint, or confinement, or threats of physical violence, restraint, or confinement.

(b) Fraud includes false or deceptive offers of employment or marriage.

(c) Coercion includes [s*elect any that apply*]:

(i) threats of harm or restraint to any person.

(ii) using a [scheme / plan / pattern] intended to cause someone to think that [psychological harm / physical harm / harm to the person's reputation] would result from failing to perform an act.

(iii) abusing or threatening to abuse the legal system by threatening to have the person [arrested / deported], regardless of whether the person could be [arrested / deported].

(iv) [destroying / concealing / removing / confiscating] a [passport / immigration document / government identification document] from any person, even if the document was fraudulently obtained.

(v) facilitating or controlling access to [*identify controlled substance(s) per MCL 333.7104*] without a legitimate medical purpose.

These are examples of [force / fraud / coercion] and not an exhaustive list.

(5) "Debt bondage" includes, but is not limited to, a promise by [*name complainant or person who had control over complainant*] that [*name complainant*] would perform services to pay back a debt where the value of the services, or the nature of the services and the time that they are to be performed, is not spelled out or defined, or the value of the services is not applied to reduction of the debt. This is not an exhaustive list of the types of debt bondage.

[*This crime is a 10-year offense that may be increased by aggravating factors. If the prosecution has charged one of those factors, the jury must be instructed under M Crim JI 36.5.*]

[AMENDED] M Crim JI 36.4 Participating in a Forced Labor, Debt Bondage, or Commercial Sex Enterprise for Financial Gain

(1) The defendant is charged with the crime of participating in an enterprise involving forced labor, debt bondage, or commercial sex for financial gain. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant participated in an enterprise that engaged in forced labor or services, debt bondage, or commercial sexual activity.

(3) Second, that the defendant knew that the enterprise was engaged in forced labor or services, debt bondage, or commercial sexual activity.

(4) Third, that the defendant benefited financially or received anything of value from [his / her] participation in the enterprise.

(5) I will now define some of the legal terminology that was used in this instruction.

[*Provide appropriate definitions:*]

(a) An enterprise is an organization for conducting business and can be an individual person, a sole proprietorship, a partnership, a corporation, a limited liability company, a trust, a union, an association, a governmental unit, any other legal entity, or any legal or illegal association of persons.

(b) "Forced labor or services" are labor or services obtained or maintained by force, fraud, or coercion.

[*Provide any or all of the following definitions, according to the evidence:*]

(i) Force includes physical violence, restraint, or confinement, or threats of physical violence, restraint, or confinement.

(ii) Fraud includes false or deceptive offers of employment or marriage.

(iii) Coercion includes [*select any that apply*]:

(A) threats of harm or restraint to any person.

(B) using a [scheme / plan / pattern] intended to cause someone to think that [psychological harm / physical harm / harm to the person's reputation] would result from failing to perform an act.

(C) abusing or threatening to abuse the legal system by threatening to have the person [arrested / deported], regardless of whether the person could be [arrested / deported].

(D) [destroying / concealing / removing / confiscating] a [passport / immigration document / government identification document] from any person, even if the document was fraudulently obtained.

(E) facilitating or controlling access to [*identify controlled substance(s) per MCL 333.7104*] without a legitimate medical purpose.

These are examples of [force / fraud / coercion] and not an exhaustive list.

(c) "Debt bondage" includes, but is not limited to, a promise by [*name complainant or person who had control over complainant*] that [*name complainant*] would perform services to pay back a debt where the value of the services, or the nature of the services and the time that they are to be performed, is not spelled out or defined, or the value of the services is not applied to reduction of the debt. This is not an exhaustive list of the types of debt bondage.

(d) "Commercial sexual activity" means performing acts of sexual penetration or contact, child sexually abusive activity, or a sexually explicit performance.

[This crime is a 10-year offense that may be increased by aggravating factors. If the prosecution has charged one of those factors, the jury must be instructed under M Crim JI 36.5.]

[AMENDED] M Crim JI 36.4a Participating in a Forced Labor or Commercial Sex Enterprise for Financial Gain or for Anything of Value with a Minor

(1) The defendant is charged with the crime of participating in an enterprise involving forced labor or services or commercial sexual activity with a minor for financial gain or for anything of value. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant participated in an enterprise that engaged in forced labor or services or commercial sexual activity involving a person or persons less than 18 years old. It does not matter whether defendant knew the age of the person or persons.

(3) Second, that the defendant knew that the enterprise was engaged in forced labor or services or commercial sexual activity with this person or persons.

(4) Third, that the defendant benefited financially or received anything of value from [his / her] participation in the enterprise.

(5) I will now define some of the legal terminology that was used in this instruction.

[*Provide appropriate definitions:*]

(a) An enterprise is an organization for conducting business and can be an individual person, a sole proprietorship, a partnership, a corporation, a limited liability company, a trust, a union, an association, a governmental unit, any other legal entity, or any legal or illegal association of persons.

(b) "Forced labor or services" are labor or services obtained or maintained by force, fraud, or coercion.

[*Provide any or all of the following definitions, according to the evidence:*]

(i) Force includes physical violence, restraint, or confinement, or threats of physical violence, restraint, or confinement.

(ii) Fraud includes false or deceptive offers of employment or marriage.

(iii) Coercion includes [*select any that apply*]:

(A) threats of harm or restraint to any person.

(B) using a [scheme / plan / pattern] intended to cause someone to think that [psychological harm / physical harm / harm to the person's reputation] would result from failing to perform an act.

(C) abusing or threatening to abuse the legal system by threatening to have the person [arrested / deported], regardless of whether the person could be [arrested / deported].

(D) [destroying / concealing / removing / confiscating] a [passport / immigration document / government identification document] from any person, even if the document was fraudulently obtained.

(E) facilitating or controlling access to [*identify controlled substance(s) per MCL 333.7104*] without a legitimate medical purpose.

These are examples of [force / fraud / coercion] and not an exhaustive list.

(c) "Commercial sexual activity" means performing acts of sexual penetration or contact, child sexually abusive activity, or a sexually explicit performance.

[AMENDED] M Crim JI 36.6 Using Minors for Commercial Sexual Activity or for Forced Labor or Services

(1) The defendant is charged with the crime of engaging a minor for [commercial sexual activity / forced labor or services]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select (2) according to the charged conduct:*]

(2) First, that the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*] for commercial sexual activity. Commercial sexual activity means performing acts of sexual penetration or contact, child sexually abusive activity, or a sexually explicit performance.

(2) First, that the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*] to perform forced labor or services. "Forced labor or services" are labor or services obtained or maintained by force, fraud, or coercion.

[*Provide any or all of the following definitions, as applicable:*]

(a) Force includes physical violence, restraint, or confinement, or threats of physical violence, restraint, or confinement.

(b) Fraud includes false or deceptive offers of employment or marriage.

(c) Coercion includes [*select any that apply*]:

(i) threats of harm or restraint to any person.

(ii) using a [scheme / plan / pattern] intended to cause someone to think that [psychological harm / physical harm / harm to the person's reputation] would result from failing to perform an act.

(iii) abusing or threatening to abuse the legal system by threatening to have the person [arrested / deported], regardless of whether the person could be [arrested / deported].

(iv) [destroying / concealing / removing / confiscating] a [passport / immigration document / government identification document] from any person, even if the document was fraudulently obtained.

(v) facilitating or controlling access to [*identify controlled substance(s) per MCL 333.7104*] without a legitimate medical purpose.

These are examples of [force / fraud / coercion], and not an exclusive list.

(3) Second, that when the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*] [for commercial sexual purposes / to perform forced labor or services], [*name complainant*] was less than 18 years old, regardless of whether the defendant knew [he / she] was less than 18 years old.

(4) Third, that when the defendant recruited, enticed, harbored, transported, provided, or obtained [*name complainant*], the defendant intended that [*name complainant*] would perform [commercial sexual activity / forced labor or

services], whether or not [commercial sexual activity / forced labor or service] was actually provided.

Public Policy Position
Model Criminal Jury Instructions 36.1, 36.3, 36.4, 36.4a, and 36.6

Support as Drafted

Explanation:
The Committee voted unanimously to support Model Criminal Jury Instructions 36.1, 36.3, 36.4, 36.4a, and 36.6, regarding Human Trafficking.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

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