

## PROPOSED AMENDMENTS TO RULE 8.119 OF THE MICHIGAN COURT RULES

### Issue

Should the Representative Assembly support amendments to Rule 8.119 of the Michigan Court Rules to provide that a protective order issued under MCR 2.302(C) governs the process for filing discovery materials under seal and make it clear that anyone can still petition the court to lift the sealing and see the documents that were filed under seal?

Rule 8.119 Court Records and Reports; Duties of Clerks

(A) – (H) – Unchanged

(I) Sealed Records.

(1) – (3) - Unchanged

~~(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.~~

(5) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with the clerk in connection with the action.

~~(5)~~(6) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.

(8) Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) without a motion to seal or require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and the State Court Administrator's Office. A protective order issued under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under this rule.

~~(6)~~(9) Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).

~~(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.~~

### **Synopsis**

The proposal comes from the Civil Procedure & Courts Committee, which discussed the proposed amendment at its June 2015 and January 2016 meetings. The amendments are recommended to allow parties to use protective orders to designate and file confidential materials under seal (without further motions) yet still maintain the public's right to access court records.

### **Background**

Protective orders issued under MCR 2.302(C) typically contain provisions which require that confidential materials attached to motions, briefs, etc. be filed under seal. In the past, court clerks would accept such filings, upon being shown a copy of the protective order. Recently, court clerks have changed this practice and will not accept sealed filings without an order to seal issued under MCR 8.119(I). This creates a problem as the court is now refusing to honor its own order and is requiring additional action by the parties.

The proponent of this proposal has encountered this problem in Oakland and Macomb Counties, where clerks have refused to accept sealed filings, as well as in Wayne County, where opposing counsel refused to stipulate to the entry of an order allowing filing under seal, saying that doing so violates MCR 8.119. She discussed the issue with other practitioners, particularly in the Business Courts, who report similar experiences.

MCR 8.119(I) discusses sealing court records. (I)(1) states, among other things, that records cannot be sealed without a motion and a finding of good cause. "Court records" are broadly defined in the rule to include anything that is filed with the clerk in an action. However, MCR 8.119(I)(1) and (I)(4) suggest that the rule doesn't always apply. (I)(1) starts with "except as otherwise provided by statute or court rule. . . ." (I)(4) provides, in part, that "Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C)." (I)(7) requires the submission of copies of orders to seal records to the clerk of the Supreme Court and to SCAO.

Under MCR 2.302(C)(8), the trial court may issue a protective order which provides "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Additionally, MCR 2.302(C)(9) authorizes a protective order which provides "that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

The committee argues that the more specific MCR 2.302(C) controls, and that if the trial court issues a protective order which provides that confidential materials are to be filed under seal, the terms of the protective order, not MCR 8.119 should govern. Since MCR 8.119 already has a provision that allows "any person" to file a motion to set aside an order

to seal records, the rights of the press (or anyone else) to demand access to sealed records is still preserved.

Adding to the confusion, MCR 7.211(C)(9) says: “Materials that are subject to a protective order entered under MCR 2.302(C) may be submitted for inclusion in the Court of Appeals file in sealed form if they are accompanied by a copy of the protective order. A party objecting to such sealed submissions may file an appropriate motion in the Court of Appeals.” This suggests the “traditional” practice of submitting materials under seal, accompanied by a copy of the protective order, rather than the “new” interpretation of filing a motion to seal every time one wants to file confidential records.

However, there is not a counterpart in the Supreme Court process. MCR 7.313(D) provides that “except as otherwise provided by statute or court rule, the procedure for sealing a Supreme Court file is governed by MCR 8.119(F). Materials that are subject to a motion to seal a file in whole or in part shall be held under seal pending the court's disposition of the motion.” This suggests that a party must file a motion to file exhibits under seal, even though they are subject to a protective order and were sealed in both the trial court and the court of appeals.

It had been the proponent’s experience that trial courts would accept filings under seal pursuant to a protective order (which will contain terms regarding filing under seal), and did not require separate motions. However, this practice seems to have changed, and courts now seem to be requiring motions for leave to file sealed materials. The result is a much more burdensome, and expensive, practice. By way of example, under the current application of sealed documents, if a party wishes to file a motion for summary disposition that references a confidential document, the party must first file a motion for leave to seal the document (and, if necessary, the brief), with a showing of good cause. That motion could then be opposed, creating an additional layer of litigation. If the motion is granted, the trial court is required to send a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office. The entire process would then be repeated if the opposing party wanted to attach confidential materials to its response brief. This could continue through the life of the case; essentially, every motion could require two additional motions (one from each party wishing to seal confidential records) and then two sets of additional orders to be submitted to and maintained by the Supreme Court and SCAO. This additional litigation and administration appears to be contrary to the Court Rules’ goal of the efficient administration of justice.

### **Opposition**

None known.

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

**STATE BAR OF MICHIGAN POSITION**  
**By vote of the Representative Assembly on April 30, 2016**

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(a) Yes

or

(b) No