Agenda
Public Policy Committee
June 2020

Via Zoom Meetings

(Vince Lombardi Rule: *"Early is on time. On time is late."*)

Public Policy Committee……Robert J. Buchanan, Chairperson

A. Opening Statements

(Each member's "good news," whether personal, business, or State Bar of Michigan-related.)

B. Reports

1. Approval of April 24, 2020 minutes
2. Public Policy Report

C. Court Rule Amendments

1. ADM File No. 2020-06: Proposed Amendments of MCR 2.403, 2.404, and 2.405

The proposed amendments were in large part produced by a workgroup convened by the State Court Administrative Office to review and offer recommendations about case evaluation.

Status:	07/01/20 Comment Period Expires.
Referrals:	03/20/20 Civil Procedure & Courts Committee; Alternative Dispute Resolution Section; Litigation Section; Negligence Section.
Comments:	Civil Procedure & Courts Committee.
Liaison:	Thomas G. Sinas

2. ADM File No. 2015-21: Proposed Amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204

The proposed amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202 and 7.204 would make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights). The amendments also would make the appeal period uniform (21 days) for all child protections cases.

Status:	07/01/20 Comment Period Expires.
Referrals:	03/20/20 Access to Justice Policy Committee; Appellate Practice Section; Children's Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Appellate Practice Section. Comment provided to the Supreme Court included in the materials.
Liaison:	Hon. Cynthia D. Stephens

3. ADM File Nos. 2018-33/2019-20/2019-38: Proposed Amendments of MCR 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and Proposed Addition of MCR 1.112

The proposed amendments were submitted by the State Appellate Defender Office and would address several issues. First, it would expand the prisoner mailbox rule to all legal filings (not just claims of appeal and postjudgment motions) made by a person incarcerated in prison or jail (not just prison, as under the current rule). This part of the proposal includes a new MCR 1.112, and elimination of specific prison mailbox provisions in MCR 6.310(C)(5), MCR 6.429(B)(5), MCR 6.431(A)(5), MCR 7.204(A)(2)(e), MCR 7.205(A)(3), and MCR 7.305(C)(5). One difficulty with this expansion is the fact that most jails do not have a mail log system like that in place in prisons. Second, the proposal would expand certain time frames for filing and deciding postjudgment motions in criminal cases, as reflected in the amendments of MCR 7.208 and MCR 7.211. Third, the proposal would reconfigure and expand the "Reissuance of Judgment" rule, as shown in the proposed amendments of MCR 6.428. Finally, the proposal (as shown in proposed amendments of MCR 6.425) would require a probation officer to give defendant's attorney notion and a reasonable opportunity to attend the presentence interview, require a probation agent to not only correct a report but certify that the correction has been made, and "ensure that no prior version of the report is used for classification, programming, or parole purposes." This portion of the proposal also would require the Michigan Department of Corrections to provide the prosecutor, defendant, or defense lawyer with a copy of the presentence investigation report, and further require the court to provide to the parties any documents presented for consideration at sentencing, including any PSIR considered before corrections were made.

Status: 07/01/20 Comment Period Expires.
Referrals: 03/20/20 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comment provided to the Supreme Court included in the materials.
Liaison: Kim Warren Eddie

4. ADM File No. 2019-27: Proposed Amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and Proposed Addition of MCR 6.126

The proposed amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and proposed addition of MCR 6.126 would clarify and simplify the rules regarding procedure in criminal appellate matters.

Status: 07/01/20 Comment Period Expires.
Referrals: 03/20/20 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comment provided to the Supreme Court included in the materials.
Liaison: Valerie R. Newman

5. ADM File No. 2019-29: Proposed Amendments of MCR 7.212 and 7.312

The proposed amendments of MCR 7.212 and 7.312 would allow practitioners to efficiently produce an appendix for all appellate purposes by making the appendix rule consistent within the Court of Appeals and Supreme Court.

Status: 07/01/20 Comment Period Expires.
Referrals: 03/20/20 Civil Procedure & Courts Committee; Appellate Practice Section.
Comments: Civil Procedure & Courts Committee; Appellate Practice Section.
Comment provided to the Supreme Court included in the materials.
Liaison: Mark A. Wisniewski

6. ADM File No. 2019-31: Proposed Amendment of MCR 7.216

The proposed amendment of MCR 7.216 would enable the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316).

Status: 07/01/20 Comment Period Expires.

Referrals: 03/20/20 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section.

Comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Comment provided to the Supreme Court included in the materials.

Liaison: E. Thomas McCarthy, Jr.

7. ADM File No. 2019-26: Proposed Amendment of MCR 7.314

The proposed amendment of MCR 7.314 would eliminate the oral argument time period and instead provide for an amount of time established by the Court in the order granting leave to appeal.

Status: 07/01/20 Comment Period Expires.

Referrals: 03/20/20 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Children's Law Section; Criminal Law Section; Family Law Section; Litigation Section; Negligence Law Section.

Comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

Liaison: Suzanne C. Larsen

8. ADM File No. 2020-03: Proposed Administrative Order Regarding Election-Related Litigation

This administrative order would provide requirements and procedural rules to promote the efficient and timely disposition of election-related litigation.

Status: 07/01/20 Comment Period Expires.

Referrals: 03/20/20 Civil Procedure & Courts Committee; Appellate Practice Section.

Comments: Civil Procedure & Courts Committee.

Liaison: Joseph J. Baumann

9. ADM File No. 2019-33: Proposed Administrative Order No. 2020-X

This proposed administrative order would establish a mandatory continuing judicial education program for the state's justices, judges, and quasi-judicial officers.

Status: 07/01/20 Comment Period Expires.

Referrals: 03/20/20 Civil Procedure & Courts Committee; Judicial Ethics Committee; Judicial Section.

Comments: Comments provided to the Supreme Court included in the materials.

Liaison: Thomas G. Sinas

D. Other

1. Request for Funding from the Coronavirus Relief Fund to provide Disaster Relief Legal Help for Michiganders

Comments: Access to Justice Policy Committee.

Liaison: Valerie R. Newman

Minutes
Public Policy Committee
April 23, 2020

Committee Members: Robert J. Buchanan, Kim Warren Eddie, Suzanne C. Larsen, Valerie R. Newman, Thomas G. Sinas, Hon. Cynthia D. Stephens, Mark A. Wisniewski
SBM Staff: Janet Welch, Peter Cunningham, Elizabeth Goebel, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Opening Statements

B. Reports

1. Approval of March 23, 2020 minutes
The minutes were unanimously approved.

2. Public Policy Report
Peter Cunningham and Marcia Hune offered a verbal report.

C. Legislation

1. HB 5296 (Hornberger) Family law; marriage and divorce; public disclosure of divorce filings; modify. Amends 1846 RS 84 (MCL 552.1 - 552.45) by adding sec. 6a.
The following entities offered comments: Access to Justice Policy Committee; Family Law Section.
The committee agreed unanimously that the legislation is *Keller* permissible in that it affects access to legal services.
The committee voted unanimously (6) to support the bill with the amendment that the word "public" be clarified to mean "non-party."

2. HB 5304 (Filler) Courts; judges; procedure for certain circuit court judges to sit as judges of the court of claims; establish. Amends secs. 6404, 6410 & 6413 of 1961 PA 236 (MCL 600.6404 et seq.).
The following entities offered comments: Civil Procedure & Courts Committee; Appellate Practice Section; Judicial Section.
The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts.
The committee voted unanimously (7) to support the legislation as drafted.

3. HB 5442 (Elder) Courts; district court; compensation for district court judges; increase. Amends sec. 8202 of 1961 PA 236 (MCL 600.8202).
The following entities offered comments: Judicial Section.
The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts.
The committee voted unanimously (6) to support the bill as drafted.

4. HB 5464 (Lightner) Criminal procedure; bail; requirements for the use of a pretrial risk assessment tool by a court making bail decision; create. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 6e to ch. V.
The following entities offered comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts.
The committee voted unanimously (7) to adopt the Access to Justice Policy Committee position to support the bill with amendments to: (1) add language specifying that pre-trial detention determinations should never be based on a pretrial risk assessment tool score alone, and (2) require PSA tools to be periodically peer reviewed and tested for bias.

5. SB 0724 (Lucido) Criminal procedure; indigent defense; appointment and compensation of defense attorneys for indigent defendants during certain stages of criminal cases; require. Amends sec. 11 of 2013 PA 93 (MCL 780.991).
The following entities offered comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The committee agreed unanimously that the legislation is *Keller* permissible in that it increases the availability of legal services to society.
The committee voted unanimously (7) to oppose the bill as drafted as it is overly broad and interferes with the existing Michigan assigned appellate counsel system that appoints counsel to indigent defendants.

6. SB 0790 (Runestad) Civil procedure; other; video recordings of court proceedings; provide for availability and review. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1429.
The following entities offered comments: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section; Family Law Section.
The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts.
The committee voted unanimously (6) to oppose the bill. Reasons include:

1. **transcripts of hearings are already accessible, and video recordings under this bill would not be official recordings.;**
2. **Bill was introduced prior to AO 2020-6, which provides procedures for remote court proceedings that are accessible online, and**
3. **This matter is more appropriately addressed by the Court.**

7. SB 0792 (Barrett) Retirement; judges; contributions to tax-deferred accounts instead of retiree health benefits for certain employees; provide for, and establish auto enrollment feature for defined contribution plan. Amends secs. 301 & 604 of 1992 PA 234 (MCL 38.2301 & 38.2604) & adds secs. 509a & 714a.
The following entities offered comments: Judicial Section.
The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts.
The committee voted unanimously (6) to support the bill to provide judges parity with other state employees for the level of matching contributions to their Defined Contribution plans.

D. <u>FY 2020-2021 Budget</u>
1. FY 2020-2021 Budget for the Judiciary as contained in **HB 5554** and **SB 0802**, and the Executive Budget Recommendation, pages B-45 through B-47.
The following entities offered comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee

The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (6) to support the FY 2020-2021 Budget for the Judiciary as contained in HB 5554 and SB 0802, and the Executive Budget Recommendation, pages B-45 through B-47.

2. FY 2020-2021 Budget for the Michigan Indigent Defense Commission as contained in **HB 5554** and **SB 0802**, and the Executive Budget Recommendation, pages B-55 through B-57.
The following entities offered comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee agreed unanimously that the legislation is *Keller* permissible in that it improves the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (6) to support the FY 2020-2021 Budget for the Michigan Indigent Defense Commission as contained in HB 5554 and SB 0802, and the Executive Budget Recommendation, pages B-55 through B-57.

E. <u>Consent Agenda</u>

1. M Crim JI 17.37
The Committee proposes an instruction, M Crim JI 17.37, where the prosecutor has charged an offense found in MCL 750.411t involving the crime of "hazing." The instruction is entirely new.

2. M Crim JI 35.1a
The Committee proposes an instruction, M Crim JI 35.1a, where the prosecutor has charged an offense found in MCL 750.540e involving the crime of malicious use of a telecommunications service. The instruction is entirely new.

3. M Crim JI 38.1, 38.4, 38.4a
The Committee proposes instructions M Crim JI 38.1, 38.4, and 38.4a where the prosecutor has charged an offense found in MCL 750.543f or 750.543m, which involve committing an act of terrorism, making a terrorist threat, or making a false report of terrorism. The instructions are entirely new.

SBM STATE BAR OF MICHIGAN

To: Board of Commissioners

From: Governmental Relations Division Staff

Date: June 5, 2020

Re: Governmental Relations Update

This memo includes updates on legislation and court rules on which the State Bar has taken positions.

Legislation

HB 5117, HB 5118, SB 0068 (Wrongful Imprisonment Compensation Claims) – SBM support based on support of identical bills from the previous legislative session (SB 895 and SB 896 of 2018).

These three bills passed both chambers unanimously and were signed by Governor Whitmer as Public Act 42 through 44 of 2020.

HB 4509 (Representation of Limited Liability Companies) – SBM opposes.

The bill was before the Senate Committee on Judiciary & Public Safety on January 30, 2020. The State Bar submitted written testimony detailing their opposition. The Michigan Poverty Law Program and Oakland County Bar Association also testified in opposition. The bill, which has previously passed the House, has not been reported from the Senate committee at this time.

HB 5169 (Affidavits of Merit) – SBM opposes.

The bill was before the House Committee on Judiciary on January 21, 2020. The State Bar provided written testimony detailing the Bar's position to all members of the House Judiciary Committee. Also testifying in opposition to the bill were Building Owners & Managers Association and the Michigan Association of Justice. Testifying in support were the American Council of Engineering Companies of Michigan and AIA Michigan. The bill has not been reported from the House Judiciary Committee.

Court Amendments

ADM File No. 2019-12 – Amendments of MCR 1.109, 3.206, 3.931, and 3.961 (Confidential Case Inventory Addendum)

The Case Inventory Addendum is a mandatory form filed at the outset of all domestic relations cases, juvenile delinquencies, and child protective proceedings. The rule amendments would make this form ta confidential pleading and exempt the form from service requirements. The rule amendments were proposed with immediate effect with a public hearing to follow.

On December 12, 2019, the Board voted unanimously to support the rule changes with the following amendments:

• The rules should be amended to clarify that tribal court cases should be listed in the Case Inventory Addendum and tribal courts should be included in the list of courts to be notified.
• MCR 3.931 and 3.961 should be amended to refer to MCR 3.920(1), which is the service rule for delinquency and child protective proceedings, rather than MCR 3.203, which is the service rule for domestic relations proceedings.

After a public administrative hearing, on March 11, 2020, the Court retained the amendments that had taken immediate effect when the rules were published for comment and adopted the amendments proposed by SBM that added tribal cases to the description of cases that must be listed on the Case Inventory Form and struck specific references to service requirements in Rule 3.203 from Rules 3.206, 3.931, and 3.961.

The additional rule amendments are effective immediately.

ADM File No. 2018-02 – Amendment of MCR 3.501 (Portion of Class Action Residual Funds Disbursed to Michigan Bar Foundation)

The Court published for comment an amendment to MCR 3.501 that requires 50% of unclaimed residual funds in a class action settlement be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan.

At its July 26, 2019 meeting, the Board voted to take no position on the rule proposal but recommended that if the Court were to support the policy, that the Court adopt a series of amendments to clarify the rule.

On March 4, 2020, the Court adopted amendments to MCR 3.501. Specifically, the Court adopted SBM amendments to section (6)(a) to create a definition of "Residual Funds" and to section (6)(b) to establish that the Rule is not intended to "limit the parties to a class action from proposing a settlement, or the court from entering a judgment or approving a settlement, that does not create Residual Funds."

The Court adopted the majority of SBM proposed amendments to subsection (6)(c), with notable additions and deletions set forth below:

Proposed Language	**Final Language (additions in bold, deletions in strike-through).**
Any order entering a judgement or approving a proposed settlement of a class action certified under this rule that may result in the existence of Residual Funds shall provide for the disbursement of any such Residual Funds. In matters where the claims process has been exhausted and Residual Funds remain, not less than fifty- percent (50%) of the Residual Funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan, unless the court otherwise determines to disburse all Residual Funds to a foundation or not for profit organization that has a direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of a certified class.	Any ~~order entering a~~ judgement ~~or~~ approving a proposed settlement of a class action certified under this rule that may result in the existence of Residual Funds shall provide for the disbursement of any such Residual Funds **upon the stipulation of the parties and subject to the approval of the court**. In matters where the claims process has been exhausted and Residual Funds remain, **unless the judgment provides otherwise,** ~~not less than fifty- percent (50%) of~~ the Residual Funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan~~, unless the court otherwise determines to disburse all Residual Funds to a foundation or not for profit organization that has a direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of a certified class.~~

The rule amendments took effect May 1, 2020. Justice Markman dissented from the Court's adoption for the rule amendments(for the full text of the dissent, click here).

ADM File No. 2018-34 – Amendment of MCR 6.425 (Appeals of Denials of Request for Counsel)

The amendment of MCR 6.425 clarifies that criminal defendants whose request for counsel due to indigency are denied are entitled to appeal that denial.

On January 24, 2020, the Board voted unanimously to support the proposed rule amendment, as the amendment would help ensure that defendants are notified of their right to appeal denials of requests for counsel.

The Court of Appeals proposed amended language to clarify the proper basis and form of the appeal. The Court of Appeal's proposed that the final sentence of Rule 6.424 (G)(1) (d) be amended as follows:

> An order denying a request for the appointment of appellate counsel~~A denial of counsel~~ must include a statement of reasons and must inform the defendant that the order denying the request may be appealed by filing an application for leave to appeal in the Court of Appeals in accordance with MCR 7.205.

On March 11, 2020 the Court held and public administrative hearing and adopted the rule amendments proposed by the Court of Appeals. The rule amendments took effect May 1, 2020.

ADM File No. 2014-46 – Amendments of MCR 6.508 (Consideration of previously-decided claims in new motion for relief from judgment)

The proposed amendment would allow a court to consider previously-decided claims in the context of a new claim for relief; consistent with footnote 17 in P*eople v Johnson*, 502 Mich 541 (2018) or where such previously-decided claims (in conjunction with a new claim) create a significant possibility of actual innocence.

On November 22, 2019, the Board unanimously voted to support MCR 6.508 with the following amendment (SBM-proposed language is highlighted in grey), as these amendments will allow courts to fully consider previously-decided claims alongside new motions for relief from judgment:

> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously-decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence.

On Wednesday, March 11, 2020 the Court held a public administrative hearing, and the Court adopted the rule as proposed by SBM. The rule amendments took effect May 1, 2020.

ADM File No. 2018-23 – Amendment of MCR 6.610 (Discovery in criminal misdemeanor cases)

In November 2018, based on a recommendation from the Michigan District Judges Association, the Court published for comment rule amendments that would allow for discovery in district court misdemeanor cases to the same extent it is available for criminal cases in circuit court. Numerous comments were submitted by the Court. SBM supported in principle allowing discovery in misdemeanor cases; however, SBM urged the Court to reconsider the rule amendment based on the numerous comments that had been submitted by the Court.

After a public administrative hearing, the Court published for comment two alternatives for district court discovery in misdemeanor cases. Alternative A would create a similar structure to Rule 16(b) of the Federal Rules of Criminal Procedure, in which a defendant's duty to provide certain discovery would only be triggered if defense counsel first requested discovery from the prosecution. Alternative B was proposed by the Prosecuting Attorney's Association of Michigan.

On September 25, 2019, the Board voted to support the rule amendment Alternative A as it would allow defendants access to discovery when needed, but not unnecessarily slow down misdemeanor cases in district court. The Board, however, expressed its concern that this "rule will place increased burdens on prosecutors and urge[d] additional funding to help prosecutors meet their new responsibilities of providing discovery in misdemeanor cases when requested by defendants." The Board also noted the expanded use electronic discovery may ease such burdens.

On March 4, 2020, the Court adopted Alternative A. The rule amendment took effect May 1, 2020.

ADM File No. 2018-35 – Amendment of MCR 8.108 (Preparation and filing of transcripts)

The proposed rule amendment sought to clarify the process for preparing and filing of transcripts including that a court reporter or court recorder shall file their transcripts with a court when produced for a party or for the court.

On January 24, 2020, the Board voted to support the proposed rule with the following recommendations and amendments:

1) Recommend that courts should only be required to order transcripts at the public expense when two conditions have been met: (a) the litigant has been granted a fee waiver under MCR 2.002 in the particular case; and (b) the court has determined that the litigant needs the transcript to further pursue the litigation pending before the court, including on appeal. In all other circumstances the court should retain discretion to determine whether to order a transcript at the public expense.

2) Amend subsection (F)(1) to require the filing of a transcript only when it has been ordered at the public's expense.

3) Amend (F)(3) to clarify that attorneys and litigants should be allowed to make copies from an unaltered downloaded file, rather than having to access the court's filing system any time they want a copy of an excerpt from a transcript.

After a public administrative hearing, the Court adopted the rule amendments as originally proposed. The rule amendments took effect May 1, 2020.

ADM File No. 2018-24 – Amendment of MCR 8.301 (Probate Registers)

The proposed amendment of MCR 8.301 would make the rule consistent with the statute (MCL 600.834) allowing only the probate registers and deputy probate registers to perform certain administrative tasks that would otherwise be performed by the probate judges.

On November 22, 2019, the Board voted to unanimously support the rule amendment, as the changes are appropriate and consistent with MCL 600.834.

On March 11, 2020, the Court held a public administrative hearing and adopted the proposed rule amendments. The rule amendments are effective May 1, 2020.

ADM File No. 2016-46 – Special Administrative Inquiry Regarding Questions Relating to Mental Health on the Michigan Bar Examination Application

On January 23, 2019, the Court issued a Special Administrative Inquiry soliciting input on "whether and in what form questions relating to an applicant's mental health history should be included on the Michigan Bar Examination application."

On April 12, 2019, the Board voted to recommend to the Court to replace Questions 54a and 54b on the current Affidavit of Personal History with the National Conference of Bar Examiners (NCBE) Questions 29 and 31 but expand the scope of time in Question 31 from 5 years to 10 years.

On March 18, 2020, the Court released the final amendment, removing current questions 54a and 54b and replacing them with NCBE Question 29:

> Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

The change in questions will take effect for the February 2021 Michigan Bar Examination.

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,
Chief Justice

ADM File No. 2020-06

David F. Viviano,
Chief Justice Pro Tem

Proposed Amendments of
Rules 2.403, 2.404, and 2.405
of the Michigan Court Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

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On order of the Court, this is to advise that the Court is considering amendments of Rules 2.403, 2.404 and 2.405 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.

(2) ~~Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:

(a) identify the ADR process to be used;

(b) describe its timing in relation to other discovery provisions; and,

(c) be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

(a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and,

(c) be completed no later than 60 days after the close of discovery.

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

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

(a)-(b) [Unchanged.]

(c) if the parties have not submitted an ADR plan under subsection (A)~~on the judge's own initiative~~.

(2) [Unchanged.]

(C)-(H) [Unchanged.]

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least 7~~14~~ days before the hearing, each party shall

(a)-(b) [Unchanged.]

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within 7~~14~~ days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional $150

penaltyAn offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within 714 days after the hearing, the panel will make an evaluation and submit the evaluation to the ADR clerk. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is

~~more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.~~

~~(4) In cases involving multiple parties, the following rules apply:~~

~~(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.~~

~~(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.~~

~~(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).~~

~~(5) If the verdict awards equitable relief, costs may be awarded if the court determines that~~

~~(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and~~

~~(b) it is fair to award costs under all of the circumstances.~~

~~(6) For the purpose of this rule, actual costs are~~

~~(a) those costs taxable in any civil action, and~~

~~(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626.~~

~~For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.~~

~~(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).~~

~~(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion~~

~~(i) for a new trial,~~

~~(ii) to set aside the judgment, or~~

~~(iii) for rehearing or reconsideration.~~

~~(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).~~

~~(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.~~

~~(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.~~

Rule 2.404 Selection of Case Evaluation Panels

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) [Unchanged.]

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants. Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) "Verdict" includes,

(a)-(b) [Unchanged.]

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) [Unchanged.]

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to:

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501.~~Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

Staff Comment: The proposed amendments were in large part produced by a workgroup convened by the State Court Administrative Office to review and offer recommendations about case evaluation.

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 amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Michigan Supreme Court

Case Evaluation Court Rules Review Committee

Report to the Michigan Supreme Court

December 2019

State Court Administrative Office
Michigan Hall of Justice
Lansing, MI 48909

Contents

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Case Evaluation Court Rules Review Committee
Report to the Michigan Supreme Court

Background

Michigan's case evaluation practice is governed by MCR 2.403. The selection of case evaluators is governed by MCR 2.404. Chiefly in response to growing criticism over the case evaluation process voiced by lawyers, the State Court Administrative Office (SCAO) commissioned a study in 2011 that, among other things, incorporated over 3,000 lawyers' and judges' survey responses and an assessment of the process' impact on docket management. The study found that case evaluation added several months to case disposition times, that a significant number of lawyers felt the process was less valuable than mediation, and that judges rated the process more favorably than lawyers reported.[1] A follow-up study conducted in 2018, in which evaluators returned to three of the original courts and received survey responses from over 1,000 lawyers and judges, reported similar findings, however noted that support for the case evaluation process—among both lawyers and judges—had eroded further.[2]

Also in 2018, the SCAO convened an "ADR Summit" to assess the development of alternative dispute resolution (ADR) services in the state and to interpret the most recent case evaluation study's findings. Among other recommendations regarding ADR practice in the state, a majority of attendees recommended that case evaluation should become voluntary and that the sanctions provisions should be removed.[3]

In light of this recommendation, in 2019, the SCAO convened the Case Evaluation Court Rules Review Committee to further assess the efficacy of the current case evaluation rules and to recommend to the Michigan Supreme Court any amendments the committee deemed appropriate.

Committee Procedure and Issue Identification

The committee met four times between April 3 and October 21, 2019. After reviewing the recent case evaluation study results, the committee identified a number of areas of concern with the case evaluation process. These included:

1. Lack of Credibility of the Process

Many committee members stated that the case evaluation process lacks credibility among lawyers. Reasons for the lack of credibility included:

- panelists' lack of subject matter expertise and court experience
- lawyers' focusing on "winning case evaluation" rather than working toward settlement

[1] The study appears here: courts.mi.gov/2011CaseEvaluationStudy
[2] The follow-up study appears here: courts.mi.gov/2018CaseEvaluationStudy
[3] The ADR Summit report appears here: courts.mi.gov/2018ADRSummitReport

- lawyers' lack of preparation for the hearing
- game-playing with the timing of submitting the case evaluation summaries
- the brevity of the process (in taking only 10-15 minutes in some jurisdictions)
- the cost of the process (summary-writing, chiefly)
- clients being locked out of the process and not understanding why they are not seeing the judge

2. Unclear Purpose of the Process

The committee noted that the purpose of case evaluation—whether to provide an actual value of claims and defenses, or to provide a reasonable settlement figure—has never been addressed in the court rule. Noting that in the former case, a very low or even zero valuation would not likely result in settlements, some committee members suggested that if the rule is retained, the stated purpose should be to provide a figure that parties could reasonably accept as a settlement. Other members believed the purpose may be case-dependent in that some parties may wish a "true" value of the case, while others may prefer a suggested settlement value.

3. Excessive Written Summaries

Despite court rule limitations on the size of the summaries under MCR 2.403(I)(3), committee members reported that summaries are too long, particularly when accompanied by limitless exhibits, and frequently arrive too late to be effective. The penalty for late filing ($150) was viewed as too low to address the issue, prompting the committee to discuss whether to recommend reducing the due date to seven days prior to the hearing, and increasing the penalty for late filing.

4. Lack of Diversity

Committee members remarked that women and people of color remain poorly represented on case evaluation panels.

5. Unfairness and Inappropriateness of Sanctions

One purpose of sanctions was said to be "to make unreasonable people reasonable," but sanctions were also said to unfairly penalize plaintiffs who may have a single case, in contrast to an insurance company that as a part of doing business could absorb sanctions across a large portfolio of cases.

6. Mandatory Participation

The committee noted that some states have similar processes, but more resemble non-binding arbitration and have caps on the dollar values of claims being evaluated, e.g., $100,000, and do not have sanctions provisions.

7. Ineffective in Prompting Early Settlement

The committee noted that because case evaluation occurs late in the litigation life cycle, attorneys have no incentive to seriously assess a case and make settlement proposals prior to the case evaluation hearing. Members reported that typically less than 20 percent of awards are accepted by all parties within the 28 day acceptance/rejection window. Other members cited that the award nevertheless contributes to subsequent settlement negotiations and that judges use the award amount in promoting settlement during pretrial conferences.

A number of committee members noted that mediation is significantly more effective than case evaluation because in many cases, and particularly pre-filing, parties voluntarily choose to use mediation and also choose their mediator.

One suggestion was to require case evaluation in non-complex cases, as a means to get lawyers to look at their case, meanwhile making case evaluation optional in complex cases.

8. Hybrid Mediator/Case Evaluator Role

Examples of mediators assuming the role of case evaluators were noted. Some committee members questioned the authority for this, while one member said it offered broader flexibility than case evaluation alone, in that the mediator could consider liens, structured settlements, and trusts. The committee noted that the role of "evaluative mediator" already exists in MCR 3.216 (Domestic Relations Mediation) and could be recommended for inclusion in MCR 2.411 (General Civil Mediation).

9. Attributes of an Effective ADR System

The committee then identified what it considered to be attributes of an effective ADR system. These included the notions that:

- parties should have a choice of ADR processes
- judges should become involved in cases earlier, as in the business court cases (includes triaging the case for appropriate ADR processes and timing)
- the job of a case evaluator should be clarified such that panelists should not be participating as "advocates" for plaintiffs or defendants
- emphasis should be on "smarter" processes, not necessarily "faster," for example, stage discovery, attempt mediation of discovery disputes, then conduct depositions, then conduct a final mediation

Recognizing that some attorneys still find the case evaluation process helpful, and to take into account the growing use of mediation and availability of other ADR process, the emerging vision for rule amendments would maximize party choice in the selection of an ADR process by allowing parties to waive participation in case evaluation by having a stipulated order to participate in an alternative ADR process. The stipulation would identify what ADR process they will use, who the intended neutral is, and when the process will take place. Case evaluation would remain the

default ADR process in cases in which parties that either wish to use it or where parties fail to obtain a stipulated order to use another process.

The committee also concluded that sanctions provisions should be removed for a variety of reasons, including that they were viewed as primarily working against plaintiffs, force settlements that are not based on the merits of claims and defenses, and are no longer needed. This led to a similar conclusion in the committee's consideration of MCR 2.405 (Offers to Stipulate to Entry of Judgment), that the sanctions provisions are not helpful in resolving cases and are no longer necessary.

Following the committee's drafting amendments to MCR 2.403, 2.405, and 2.411, the proposals were sent to a variety of judicial associations and State Bar of Michigan sections for informal comment. The comments received were considered at the committee's final meeting on October 21, 2019.

Committee Discussions

Reflecting on both the evaluation studies and the concerns identified above, except where noted, the committee agreed on the following points:

1. Some form of mandatory or automatic ADR is needed.

2. Case evaluation should only be ordered if parties have not stipulated to their preferred ADR process in their early discovery plan. Case evaluation sanctions should be removed. "Sanctions" is the tail wagging the dog: it prompts settlements, but not based on the merits of the case. [One committee member opposed this notion and would retain the rule and sanctions as they presently appear.]

3. Having a variety of ADR processes available beyond just case evaluation is helpful.

4. Any new case evaluation proposals should be integrated with the new authority for parties to submit a "discovery plan" to the court under MCR 2.401.

5. Litigants should have more control over identifying processes that lead to a resolution of their case.

6. The right to trial should be preserved.

7. The rights of parties to opt out of ADR altogether should be preserved if that is what they put in their early discovery plan. Parties should determine if ADR is appropriate in their plan. [One committee member opposed this notion and would retain the rule and sanctions as they presently appear.]
8. If parties cite the prohibitive cost of ADR in their discovery plan, they should not be forced to use it.

9. Case evaluation outcomes could include providing: a high/low valuation; an actual value; or a settlement value.

10. "Gamesmanship" in the process should be eliminated.

11. MCR 2.405 (Offer of Judgment) should be updated to reflect the removal of sanctions in MCR 2.403.

12. The "evaluative mediation" process should be adopted in MCR 2.411.

13. Increase the competency of case evaluation panel members.

14. Case evaluation summaries and attachments should be due 7 days before the hearing.

15. Request the ADR Section to develop a recruitment system for case evaluators.

The committee lacked consensus on the following topics:

1. Increasing late fee. Some members felt the cost would simply be passed along to the client.

2. Summary and exhibits should not exceed 25 pages. Some members felt that critical documents may exceed 25 pages.

3. Providing documents at the time of the hearing should be prohibited. Some members felt that critical documents becoming available just prior to the hearing should be considered. If not considered, it is near certain that the award will be rejected.

Case Evaluator Qualifications

The committee considered a number of options in response to complaints about the lack of qualifications of case evaluation panelists, including:

1. Having a three-, two-, or one-member panel as in arbitration. Parties could pick one panelist from a list, then the other party picks, and the two panelists then pick a third.

2. Creating a web-based clearinghouse of case evaluators that permits ratings and reviews (e.g., to identify who is fast, inexpensive, and accurate). Otherwise, provide a means for parties to endorse effective evaluators.

3. Provide case evaluation training, for example, a mandatory 8-hour training course by subject matter categories to achieve a higher level of subject matter competence.

4. Develop semi-pro circuit rider panels that go from area to area.

5. Provide a statewide list of case evaluators.

6. Provide public funding of case evaluation.

7. Create a video on how to conduct case evaluation.

The single qualification-related item the committee did recommend was to expand the period of time in which the experience of neutral case evaluator applications could be considered. The increasing difficulty in identifying neutral case evaluators over a period of just five years prompted committee members to recommend that an applicant's experience up to 15 years may be considered, as well as other ADR experience as a neutral, such as serving as a mediator.

Otherwise, the committee concluded that if case evaluation is made optional and the sanctions provisions are removed, it is uncertain how large a problem "credibility of the panels" will be in the future.

Rule Proposals and Discussion

The committee (with one dissenting member) recommends the following rule proposals for adoption by the Michigan Supreme Court. A discussion of the proposals follow each rule.

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.

(2) In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:

(a) identify the ADR process to be used;

(b) describe its timing in relation to other discovery provisions; and,

(c) be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

(a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and,

(c) be completed no later than 60 days after the close of discovery.

~~Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~

~~(3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.~~

(~~3~~4) Cases filed in district court may be submitted to case evaluation under this rule. The time periods set forth in subrules (B)(1), (G)(1), (L)(1) and (L)(2) may be shortened at the discretion of the district judge to whom the case is assigned.

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

(a)-(b) [Unchanged.]

(c) ~~on the judge's own initiative~~ if parties have not submitted an ADR plan under subsection (A).

(2) [Unchanged.]

(C)-(H) Unchanged.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least ~~14~~ 7 days before the hearing, each party shall

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107, and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within ~~14~~ 7 days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional $150 penalty. ~~An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.~~

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within ~~14~~ 7 days after the hearing, the panel will make an evaluation and notify the attorney for each party of the panel's evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) Unchanged.

(L)-(N) Unchanged.

~~(O) Rejecting Party's Liability for Costs.~~

~~(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.~~

~~(2) For the purpose of this rule "verdict" includes,~~

~~(a) a jury verdict,~~

~~(b) a judgment by the court after a nonjury trial,~~

~~(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.~~

~~(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.~~

~~(4) In cases involving multiple parties, the following rules apply:~~

~~(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.~~

~~(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant~~

may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1) (2).

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR2.626.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

(i) for a new trial,

(ii) to set aside the judgment, or

(iii) for rehearing or reconsideration.

(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or

~~alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).~~

~~(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.~~

~~(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.~~

Discussion:

The committee first considered whether to simply recommend that case evaluation be abandoned altogether. Citing the above-mentioned studies' findings that some lawyers still found the process to be worthwhile, the committee turned to whether the rule could simply be fixed to address the problems with the process. After lengthy discussion about the interrelationship of the numerous criticisms of the process noted above, and particularly in the recruitment, training, payment of, and retention of a diverse group of quality case evaluators, committee members concluded that the process could not be "fixed," and that a better means of addressing criticisms was to afford parties the option of selecting a process they deemed better and more appropriate for their case than case evaluation.

The resulting proposals retain the central notion of MCR 2.403 that courts may consider case evaluation to be their default ADR process. Only in circumstances where a judge issues an order approving the parties' stipulation to use a different ADR process may parties be exempted from participation in case evaluation. If parties do not file a stipulation, or if the stipulation is not approved by court order, they may be ordered to participate in case evaluation.

The committee also concluded that, in light of the adoption of amendments to MCR 2.401(C) (effective January 1, 2020) regarding the filing of discovery plans with the court, a single stipulated plan incorporating both discovery and ADR should be permitted to (a) make sure that discovery and ADR are considered together; and (b) to reduce the number of steps and parties must take to obtain an order addressing both discovery and ADR.

If parties do not file a discovery plan under MCR 2.401(C) the parties could file a separate stipulation to use an ADR process other than case evaluation. The stipulation must be received early in the case--within 120 days--and must identify which ADR process will be used, and when it will take place. Nothing in the proposals precludes a court from requiring additional information about the selection or timing of the ADR process as currently permitted under MCR 2.410(C).

Requiring an order following receipt of an ADR plan identifying the ADR process and timing was thought necessary to preclude parties' simply averring that they will participate in some unidentified process at an indeterminate time, leaving courts without a means of effectively managing the case toward disposition.

With one member dissenting, the committee voiced strong support for eliminating the "sanctions" provisions of the rule. The reasons included:

1. Sanctions were thought to primarily penalize plaintiffs who had a single case, thus assuming a far higher level of risk of a negative outcome at trial than an insurance carrier who could spread the risk (meaning costs) among hundreds of other cases.

2. Sanctions for failure to accept an award that a lawyer believed was provided by a panel not competent to completely assess the merits of the case were viewed as unjust, and thus basing the disposition of the case not on the true merits of the claims and defenses, but rather on the fear that sanctions may attach.

3. Lack of any evidence, empirical or otherwise, that sanctions provided meaningful value to parties or the court.

4. Some judges use the threat of sanctions to "strong-arm" settlements during pre-trial conferences.

The committee believed that this approach would best address these concerns, chiefly in maximizing parties' opportunities to select the ADR process and ADR provider that best suits a given case, and permitting parties to try or settle cases on the merits of the claims and defenses without the threat of sanctions.

The dissenting view reflected concerns that (a) the proposed changes to MCR 2.403 do not balance the need for flexibility with the realities of a high volume docket, like Wayne County's, in which the vast majority of civil cases are no-fault "PIP" and auto negligence cases; and (b) the proposed amendments lack the specificity, structure, and enforceability mechanisms inherent in case evaluation, and this would be detrimental to effective docket management.

Alternative provisions offered included:

1. Retaining case evaluation as the default process for PIP and auto negligence cases unless a motion is filed within 28 days of the filing of the first responsive pleading and entry of an order by the court.

2. The order for an alternative ADR process should include details such as the name of the ADR provider; date the ADR process is scheduled to take place; guidelines for the ADR process; and, date by which ADR must be completed.

3. Rather than eliminate sanctions provisions, give judges the discretion to refuse to award sanctions in the interest of justice.

4. Make the proposed "interest of justice" standards in MCR 2.405 applicable to case evaluation.

In addressing the alternative proposals, the committee believed that addressing a single case type in a single court should be locally managed and should not guide the drafting of rules affecting courts throughout the state. Additionally, the committee noted that since waiver of case evaluation would require an ADR plan's approval by Order, a court simply could deny issuance of an order. This would still permit the parties to pursue other ADR options pre-case evaluation. Further, members suggested that the new discovery rule amendments, effective January 1, 2020, with provisions for early disclosures, are likely to improve courts' management of civil lawsuits, including auto negligence actions.

Regarding the specificity of parties' ADR plans, committee members expressed that early in the litigation parties may not be able to identify which ADR provider may best suit the case, the date of the provider's availability months away, or even which ADR process, whether non-binding arbitration, mediation, neutral evaluation, etc., may be most appropriate. Additionally, these items could be locally addressed in guidance the court provides in terms of its expectations in drafting discovery plans.

Regarding sanctions, the committee maintained its earlier recommendation to remove the provisions from MCR 2.403 and 2.405.

Under subrule (K)(1), the reduction of the time to notify attorneys of the award from 14 to 7 days is intended to reflect the current practice in which parties are most typically provided with the award at the hearing. The committee also considered reducing the time to accept or reject the award from 28 days to 14 days under subrule (L)(1), taking into account how technology permits quicker correspondence, a number of members cited circumstances where owing to the need to secure various levels of authority through local, regional, and national offices, 14 days would be too tight a deadline for clients to meet. The proposal was not adopted.

Rule 2.404 Selection of Case Evaluation Panels

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) separate lists for various types of cases, and,

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants.

Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution

provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

Discussion:

One issue brought to the committee concerned primarily larger courts' decreasing ability to identify "neutral" case evaluators for purposes of assignment on specialty sublists. While MCR 2.404 (B)(2)(d) currently requires that applicants demonstrate "…an active practice in the practice area for which the case evaluator is listed for at least the last 3 years," committee members shared their observation that lawyers more frequently switch between plaintiff and defendant representation and law practice areas than in the past. Accordingly, as to neutrals only, the proposed amendment would permit assessing an applicant's representation of both plaintiffs and defendants for a period of up to 15 years.

Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) "Verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) Unchanged.

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501.

~~(E) Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

Discussion:

The "offer of judgment" rule, MCR 2.405, came to the committee's attention chiefly as a result of its conclusion that with case evaluation made optional for persons selecting other ADR processes, and the removal of sanctions, far greater use would be made of the offer of judgment. This prompted a more in-depth review of current practice under this rule.

The committee concluded that owing to the implications of recommended amendments to MCR 2.403, current MCR 2.405(E), regarding the relationship between case evaluation and the offer of judgment, is unnecessary.

Additionally, several proposed amendments were suggested by holdings in appellate cases as well as recurring problems in practice under this rule raised by committee members.

The committee recommends amending the definition of "verdict" under MCR 2.405(A)(4)(c) to include a motion entering judgment on an arbitration award. This provision adopts the holding of *Simcor Construction, Inc v Trupp* (322 Mich App 508, 2018), in which the court held that a "judgment" includes one issued following a motion to enter a judgment on an arbitration award.

Committee members noted that MCR 2.405(A)(6) is unclear as to the date at which costs and fees may become taxable, and reasoned that to maximize the rule's effectiveness, the date should be tied to the date of the rejection of the prevailing party's last offer or counter offer.

Committee members also noted that several appellate cases have considered refusing to award costs "in the interest of justice" under MCR 2.405(D)(3). The proposed examples of exceptions are drawn from *31341 Van Born Rd, LLC v McPherson Oil Company* (unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019, (Docket No. 342740), which are in turn derived from *Luidens v 63rd Dist Court*, 219 Mich App 24, 1996. The committee believed it important for the rule to reflect these cases' holdings that *de minimis* offers should not serve as the basis for determining costs, nor should costs be assessed in cases of first impression or public interest.

Finally, the committee considered whether this rule should apply in class action lawsuits, particularly where an individual plaintiff may have just hundreds of dollars at stake, and the defendant is a large corporate entity. The committee concluded that the rule could operate so inequitably as to plaintiffs that an exception should be made for this case type.

Rule 2.411 Mediation

(A)-(H) [Unchanged.]

(I) Evaluative Mediation.

(1) This subrule applies if the parties requested evaluative mediation, or if they do so at the conclusion of mediation and the mediator is willing to provide an evaluation.

(2) If a settlement is not reached during mediation, the mediator, within a reasonable period after the conclusion of mediation shall prepare a written recommendation for settlement purposes only. The mediator's recommendation shall be submitted to the parties of record only and may not be submitted or made available to the court.

(3) If both parties accept the mediator's recommendation in full, within 21 days the attorneys shall prepare and submit to the court the appropriate documents to conclude the case.

(4) If the mediator's recommendation is not accepted in full by both parties and the parties are unable to reach an agreement as to the remaining contested issues, the mediator shall report to the court under subrule (C)(3), and the case shall proceed toward trial.

(5) A court may not impose sanctions against either party for rejecting the mediator's recommendation. The court may not inquire, and neither the parties nor the mediator may inform the court, of the identity of the party or parties who rejected the mediator's recommendation.

(6) The mediator's recommendation may not be read by the court and may not be admitted into evidence or relied upon by the court as evidence of any of the information contained in it without the consent of both parties. The court shall not request the parties' consent to read the mediator's recommendation.

Discussion:

Committee members suggested that MCR 2.411 should reflect the increasingly common practice of mediators being asked to provide a valuation at some point in the mediation process. Some members observed that a variety of "evaluative" ADR processes already exist, as appearing in the SCAO's "Michigan Judges Guide to ADR Practice and Procedure," and that recently adopted MCR 2.411(H), effective January 1, 2020 already permits "discovery mediators" who may also be experts. Concluding that the court rule should nevertheless comport with common practice, the proposal outlines an evaluative mediation process and is modeled on the "evaluative mediation" provision already appearing in MCR 3.216(I) regarding domestic relations mediation.

-- SCAO –

Public Policy Position
ADM File No. 2020-06

Support with Amendments

Explanation

The committee supports ADM File No. 2020-06 with amendments. Litigants should be given the option to stipulate to alternative dispute resolution, rather than case evaluation. The case evaluation process, however, is still beneficial for some cases and should be retained because it provides clients with an objective assessment of their cases and encourages them to think critically about the evaluation assessment. The benefit of the process is lost if the possibility of sanctions is removed, as currently proposed in ADM 2020-06.

While committee members expressed concern that case evaluation sanctions may act as a "hammer" on plaintiffs, particularly those involved in personal injury and malpractice cases,[1] the committee determined that judges should have discretion in determining whether to impose sanctions on a case-by-case basis. The committee supports retaining the 28-day time period to accept or reject a case evaluation.

In addition, the committee strongly supported the proposed amendments to MCR 2.411, which puts the evaluative ADR process that is currently used into the court rule.

Against this background, the committee supports the rule propose with the following amendments:

1. As currently proposed, MCR 2.403 eliminates sanctions in case evaluations. The committee recommends that the rule retain sanctions in case evaluations but allow judges to waive sanctions where appropriate in the interest of justice, as follows:

> The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to:
>
> (i) cases involving awards that are token or de minimis in the context of the case;
> (ii) cases involving an issue of first impression or an issue of public interest; or
> (iii) cases in which, under the circumstances, it would be unfair to impose sanctions on a party.

[1] For plaintiffs without significant financial resources, the threat of sanctions can play an outsized role in their decision whether to accept the valuation compared to defendants, who are often insurance companies with significantly more financial resources.

2. If sanctions remain available in case evaluation, then MCR 2.405(E) should be retained. A different version of this subsection was part of the original Michigan Court Rules in 1985, which said, in a case in which both case evaluation (then mediation) and offer of judgment had been used, the cost provisions of the rule under which the later rejection occurred will be used. The practical effect was that a party who was unhappy with a case evaluation award could potentially submit an offer of judgment and eliminate the potential for sanctions from case evaluation. The amendment in 1989 put an ended that scenario by stating that costs may not be awarded under the offer of judgment rule in a case that has been submitted to case evaluation unless the award was not unanimous. For those same reasons, if sanctions remain available in case evaluation, then subsection E of the offer of judgment rule (Rule 2.405) should be retained.

3. Clarify proposed Rule 2.403(A) to allow district courts to retain discretion in deciding whether to allow parties to stipulate out of the case evaluation process.

Position Vote:
Voted For position: 14
Voted against position: 4
Abstained from vote: 2
Did not vote (due to absence): 6

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

ADM File No. 2015-21

Proposed Amendments of Rules 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.971, 3.972, 3.973. 3.977, 3.993, 7.202, and 7.204 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 public hearings are posted at Administrative Matters & Court Rules 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 3.971 Pleas of Admission or No Contest

(A) [Unchanged.]

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(7) [Unchanged.]

(8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from an~~the~~ order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR 7.204~~3.993(A)(1), 3.993(A)(2),~~ or a delayed appeal under MCR 3.993(C).

(C)-(D) [Unchanged.]

Rule 3.972 Trial

(A)-(E) [Unchanged.]

(F) Respondent's Rights Following Trial and Possible Disposition. If the trial results in a verdict that one or more statutory grounds for jurisdiction has been proven, the court shall advise the respondent orally or in writing that:

(1)-(2) [Unchanged.]

(3) the respondent may be barred from challenging the assumption of jurisdiction if they do not timely file an appeal under MCR 7.204~~3.993(A)(1), 3.993(A)(2),~~ or a delayed appeal under MCR 3.993(C).

(G) [Unchanged.]

Rule 3.973 Dispositional Hearing

(A)-(F) [Unchanged.]

(G) Respondent's Rights Upon Entry of Dispositional Order. When the court enters an initial order of disposition following adjudication the court shall advise the respondent orally or in writing:

(1)-(3) [Unchanged.]

(4) the respondent may be barred from challenging the assumption of jurisdiction or the removal of the minor from a parent's care and custody in an appeal from the order terminating parental rights if they do not timely file an appeal under MCR 7.204~~3.993(A)(1), 3.993(A)(2),~~ or a delayed appeal under MCR 3.993(C).

(H)-(J) [Unchanged.]

Rule 3.977 Termination of Parental Rights

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) [Unchanged.]

(2) Appointment of Appellate Counsel~~Attorney~~. Request and appointment of appellate counsel is governed by MCR 3.993.

~~(a) If a request is timely filed and the court finds that the respondent is~~

~~financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.~~

~~(b) In a case involving the termination of parental rights, the order described in (J)(2) and (3) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.~~

~~(3) Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order the complete transcripts of all proceedings prepared at public expense.~~

(K) [Unchanged.]

Rule 3.993 Appeals

(A)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) A request for appointment of appellate counsel must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2) If a request for appointment of appellate counsel is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(3) The order described in subrule (D)(2) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(E) Transcripts. If the court appoints appellate counsel for respondent, the court must order the complete transcripts of all proceedings prepared at public expense.

Rule 7.202 Definitions

For purposes of this subchapter:

(1)-(4) [Unchanged.]

(5) "custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, or a child protective proceeding, or delinquency case in which a dispositional order removing the minor from the minor's home is an issue~~case in which the family division of circuit court has entered an order terminating parental rights or an order of disposition removing a child from the child's home~~;

(6) [Unchanged.]

Rule 7.204 Filing Appeal of Right; Appearance

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) Except where another time is provided by law or court rule, an appeal of right in any civil case must be taken within 21 days. The period runs from the

entry of:~~An appeal of right in a civil action must be taken within~~

(a) ~~21 days after entry of~~ the judgment or order appealed from;

(b) ~~21 days after the entry of~~ an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the ~~initial 21-day~~ appeal period provided by (a), (c), or (d) of this subrule~~or within further time the trial court has allowed for good cause during that 21-day period~~;

(c) an order appointing counsel~~14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period~~; or

(d) an order denying a timely request for appointment of counsel in a civil case in which an indigent party is entitled to appointed counsel. The request is considered timely if received by the trial court within the time for claiming an appeal as provided by (a) or (b) of this subrule~~another time provided by law~~.

~~If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion.~~

(2)-(3) [Unchanged.]

(B)-(H) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202 and 7.204 would make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights).

The amendments also would make the appeal period uniform (21 days) for all child protections cases.

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 amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-21. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2015-21

SUPPORT

Explanation

The committee voted to:

- **Support** amendments to MCR 3.971, 972, 973, 977 and 993. These are primarily technical changes updating citations and reordering sections but include no substantive changes to current language.
- **Support** the amendment to MCR 7.202(5), which makes it clear that all appeals from child protection cases (not just termination of parental rights appeals) are entitled to priority on the appellate calendar (for "custody cases") as provided by MCR 7.213(C).
- **Support** the amendment to MCR 7.204 to provide that a child protective proceeding appeal of right must be brought in 21 days rather than 14. This is consistent with the appeal period of other civil and custody proceedings. These proceedings affect constitutional rights and additional time to ensure that parents meet the appeal deadline provides additional protection.
- **Support** the ongoing work of the SCAO work group that is continuing to review the child protection court rules to ensure full compliance with the holding in *In re Ferranti*. The committee encourages the work group to consider whether in light of the holding that a child protection proceeding is one action, a parent ought to have a right to appeal a jurisdictional finding at the same time a parent appeals a decision terminating parental rights. In addition, the committee urges the work group to review the language in MCR 7.202 giving docket priority to termination cases and to consider further modifications that reflect the differences between parental rights cases brought by the State and child custody cases between two fit parents.

Additional background, context, and explanation for the committee's support of and recommendations for the proposed court rule amendments is provided as follows:

Background: The proposed court rule is part of a larger package of court rule amendments designed to bring Michigan court rules into conformity with In *Re Ferranti, SC 157907-8*- a groundbreaking child protective services case that overturned *In Re Hatcher*, 443 Mich 426 (1993). *In Re Hatcher* was overturned in part regarding its holding that it is a collateral attack to appeal subject matter jurisdiction orders in child protection proceedings.

In Re Hatcher, advised that parents could not seek review of jurisdiction on appeal of a termination of parental rights essentially treating such an appeal as a collateral attack and/or an adjudication error. *In Re Hatcher* treated the child protective proceedings as two separate proceedings-the adjudication phase assuming subject matter jurisdiction and the final phase either reunifying the child or terminating their parental rights. The proposed court rule amendments provide several significant proposed amendments to reflect the overturn of *In Re Hatcher*- order.

Context: At its onset, *In Re Ferranti* affirmed that parents have a fundamental right to care, control and custody of their children under the fourteenth amendment of the constitution. *Troxel v Granville, 500 US 57 (2000*). Furthermore, *Ferranti* determined that an assumption of subject matter jurisdiction is a matter of constitutional significance as the State assumes the care, control and custody of the minor. *Id.* Significantly the *Ferranti* Court further went on to state that assumption of subject matter jurisdiction is part of a one continuous proceeding before the juvenile court that will either result in re-unification or termination of a parental rights. This ruling therefore allows appellants in termination case to appeal both the assumption of subject matter jurisdiction as well as the termination of parental rights. *Ferranti* explicitly overrules *In Re Hatcher* in that regard. *In Re Hatcher* had erroneously determined that the subject matter proceedings and the final termination hearing were separate matters; arguing therefore that jurisdiction court not be attacked upon appeal as it was a collateral matter.

In addition to these significant procedural and constitutional issues, *In Re Ferranti* ruled that any waiver of rights at the initial jurisdictional hearing must be knowing and voluntary. There must be an advice of rights as well as the right of counsel before an acceptable plea is made. This is a significant ruling as many parents consented to subject matter jurisdiction without understanding the gravity of their plea; moreover, previously under *Hatcher,* those same parents were then denied the right to appeal the constitutional ramifications of the plea as it was seen as attacking a collateral order.

Explanation: As a result, *In re Ferranti* has significant, dramatic and real-world implications for the practice of law in juvenile court proceedings. Unfortunately, the proposed rule amendments are not consistent with the ruling in *Ferranti*. The proposed rule does not treat child protective services cases as "a single continual proceeding" (slip opinion at p.15) or recognize that the *Hatcher* court made a "foundational mistake" when it analyzed the proceedings as if the dispositional phase were a second proceeding independent from the adjudication phase of the proceeding. The proposed rules continue the *Hatcher* mistake by waiving certain rights of appeals if the parent's waivers are now made voluntary and knowing. This is an unfortunate conflation of two separate conceptual rulings made by the *Ferranti* court: (1) the importance of the ability to appeal any issue that arises throughout litigation within a continuous case, and (2) the separate and equally important issue of protecting the due process issues that also arise within that continuous proceeding.

It is important to note that the proposed rules address the critical due process issues—by clearly requiring that the trial court advise parents of their rights in the plea and adjudication process [MCR 3.971(B)] and by explicitly stating that a failure to advise parents of their rights permits the parent to challenge the jurisdictional decision on a later appeal from an order terminating that parent's rights [MCR 3.972(G)]. However, the rules do not correct the "foundational mistake" of *Hatcher*. Instead, the rules replicate that error—by stating that a respondent's failure to appeal the initial adjudication order may act as a bar from challenging the assumption of jurisdiction in an appeal from an order terminating parental rights [MCR 3.971(B)(8)].

Finally, the committee notes that the proposed amendments to MCR 7.202 and 204 create consistency between parental termination cases and child custody cases by changing the appeal period and docket priority for termination cases. While the committee appreciates the interest in consistency, child protection cases are unlike custody proceedings because they impact constitutional rights *vis a vis* the State's interests versus the parents' fundamental right to parent. Custody cases, in contrast are a state's adjudication of rights between two fit parents both with the fundamental right to parent. Simply put, child protective cases remove the fundamental right to parent from the biological parent whereas

custody cases simply apportion that right between two equal non state actors with the same right. The conflation of the two types of cases is dangerous to an understanding of the vast deprivation of rights inherent in child protection proceedings.

Position Vote:
Voted for position: 24
Voted against position: 0
Abstained from vote: 2
Did not vote (due to absence): 1

Contact Persons:
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May 15, 2020

To: Michigan Supreme Court
From: Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)

RE: ADM File No. 2015-21 (MCR 7.202 and 7.204)
ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)
ADM File No. 2019-27 (MCR 7.205)
ADM File No. 2019-29 (MCR 7.212 and 7.312)
ADM File No. 2019-31 (MCR 7.216)

MCFLAA met via video conference on May 4, 2020 to discuss the appellate rule proposals as they relate to family law appeals.

ADM File No. 2015-21 (MCR 7.202 and 7.204)

The definition of a "custody case" in MCR 7.202(5) is expanded to include a delinquency proceeding where there is a dispositional order removing the minor from his/her home. This would give appeals from delinquency dispositions the same heightened priority as other appeals affecting custody or placement of children. We support the change. When delinquency appeals are not given priority, the minor ages out of the system before the appeal can be heard and decided.

Inexplicably, the proposal amends MCR 7.204(A)(1)(b) to eliminate the ability of the trial court to "for good cause" extend the time to file a post-judgment motion for new trial, rehearing, reconsideration, or other relief beyond the initial 21 days and still preserve the right to file a timely appeal from the order deciding that post-judgment motion. No explanation is given for how this change serves the purpose of making uniform the priority given to child custody, child protection, and delinquency appeals. The other proposal affecting MCR 7.204(A)(1) contained in ADM File Nos. 2018-33, 2019-20, and 2019-38 leaves this subsection unchanged. The inconsistency between this proposal and the proposal below needs to be explained and resolved. We believe the trial court is in the best position to determine if there should be a "good cause" extension.

ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)

Unlike ADM File No. 2015-21, this proposal leaves unchanged the ability of the trial court to extend the time for filing a post-judgment motion for new trial, reconsideration, etc., while preserving the ability to file a timely claim of

MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS
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appeal from the order deciding that motion. This inconsistency should be resolved. We support retaining the trial court's authority to determine if there is good cause to extend the time to file a timely post-judgment motion without losing the right to appeal after than motion is decided.

This proposal amends MCR 7.211(C)(1) to eliminate the requirement that a motion to remand be filed within the time for filing appellant's brief. It also stays further proceedings in the COA upon ***filing*** a motion to remand. The current rule stays COA proceedings only if the motion is granted. We support the change.

ADM File No. 2019-27 (MCR 7.205)

According to the staff comment, the purpose of this proposal is to clarify and simplify rules regarding criminal appellate matters. However, its scope is broader and affects all appeals, including civil and family.

The "Late Appeal" provisions are rewritten, renamed "Delayed Application for Leave to Appeal" and relocated from MCR 7.205(G) to MCR 7.205(A)(4). Proposed MCR 7.205(A)(4)(b) could be interpreted to reduce the time for filing a delayed appeal although there is no indication that was the intent of the drafters. Current MCR 7.205(G)(5) requires that a late application be filed within 21 days after a dismissal order for lack of jurisdiction ***only if*** the 6-month late appeal jurisdiction window has expired. Proposed MCR 7.205(A)(4)(b) could be read to require filing a delayed application with 21 days after a dismissal order for lack of jurisdiction even if the 6-month delayed appeal window ***has not*** expired.

If interpreted to limit the delayed application period to 21 days after dismissal in all cases, even if the 6-month window has not expired, this presents potentially serious problems. If the dismissal order is issued shortly after the claim of appeal is filed, as often happens, the trial court transcripts and other information needed to prepare the delayed application may not yet be available to appellant's counsel. The 21-day period to file a delayed application would also rule out the option of an appeal to the Michigan Supreme Court on the jurisdictional issue and receiving a ruling from that Court before facing the deadline to file a delayed leave application in the Court of Appeals.

To avoid confusion, proposed MCR 7.205(A)(4)(b) could be rewritten to state:

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order denying reconsideration of the dismissal order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

ADM File No. 2019-29 (MCR 7.212 and 7.312)

This proposal changes the appendix rule in the Court of Appeals and Supreme Court. Proposed MCR 7.212(J)(2) governing the form of the appendix requires that each separate document in the appendix "must be preceded by a title page that identifies the appendix number or letter and the title of the document." While this may be useful for an appendix filed on paper, we do not see the need for this provision for an electronically filed appendix.

An electronically filed appendix must be bookmarked. The bookmark is a more efficient way to quickly move to any document in the appendix. Clicking on the bookmark should take you to the first page of that document, not a cover sheet that provides no additional useful information. Adding the cover page will also require more attorney or staff time (many appellate attorneys do not have staff and perform these tasks themselves) without a corresponding benefit to the court or court staff. It would unnecessarily drive up the cost of appeals, particularly for low and middle-income clients. This requirement should be deleted from the proposal.

Proposed MCR 7.212(J)(2)(b)(i) eliminates the page limit per appendix volume. It allows any number of pages in a volume so long as the file size is not too large for electronic filing. This is a welcome change we support.

Proposed MCR 7.212(J)(2)(b)(ii) and (iii) contain what we believe to be functionally redundant bookmark/TOC linking requirements. Subsection (ii) appropriately requires that the appendix be text searchable and that each document in the appendix be bookmarked. Although not part of the rule, we are instructed in the efiling guidelines to file our documents with the initial view including the bookmarks panel. That makes bookmarks the most visible and easiest way for judges, court staff, and opposing counsel to navigate to the various documents in the appendix.

Subsection (iii) is functionally redundant and unnecessary. It adds little to the ability of the reader to navigate through the appendix while driving up the cost of an appeal by requiring counsel to provide links to each document to the appendix table of contents. The TOC is visible from only one point in the appendix. The bookmarks panel is visible at all times, making it the preferred navigation option. We believe subsection (iii) should be eliminated from the proposal.

Proposed MCR 7.212(J)(3)(c) requires relevant pages of the transcript cited in support of the argument be included in the appendix. Submitting entire transcripts is discouraged.

In practice, it is prohibitively expensive for counsel to devote the hours needed to extract from the transcript those pages cited in support of the argument. Submitting the entire transcript is often a necessity for cost reasons.

If a complete transcript is submitted, this proposal requires that an index of the transcript be included. We see relatively few transcripts of trial court proceedings that include an index. Appellate counsel usually received transcripts from reporters via email in PDF format. Using Acrobat or its equivalents, it is not possible to create a printable index for a transcript received as a PDF. Until court reporters are required to include an index with each transcript they file, we oppose this proposal.

The proposal prohibits including in the appendix what are known as mini-scripts containing more than one page of transcript per document page. Court and deposition transcripts ordered by trial counsel during trial court proceedings are often received in mini-script format with up to four transcript pages per document page. Acrobat and equivalent software do not provide an obvious way to convert a mini-script transcript to a full-page transcript. The only option is to contact the reporter and request a full-page transcript. Depending on the length of time trial proceedings were pending, the transcripts may have been prepared a year or two earlier. The additional time and expense involved in tracking down the original reporter and requesting and paying for a full-page transcript adds delay and cost to the appellate process.

We agree that full-page transcripts should be included in the appendix when available. However, we oppose a ban on including mini-script transcripts when that is the only format reasonably available.

ADM File No. 2019-31 (MCR 7.216)

This proposal would add MCR 7.216(C)(3) to the Vexatious Proceedings rule. The current rule focuses on whether "an appeal or any of the proceedings in an appeal" are vexatious. The proposal would allow the court to also designate a party as a "vexatious litigator" and prohibit a party from continuing or instituting appeals without first obtaining leave from the court.

We oppose this proposal. The current rule allow sanctions for vexatious proceedings is sufficient to deter improper filings. A new rule is not needed. Because the proposal focuses on the party rather than the merits of the litigation, it could have an unwanted chilling effect on appeals presenting novel or politically unpopular issues. Keeping the focus on the merits of the litigation rather than the litigator is a better approach.

If it can be demonstrated that the existing rule is inadequate and a new rule addressing parties is needed, the rule must be more narrowly tailored. It should include clearly written standards defining the conduct making a party a vexatious litigator.

Yours truly,

Anne Argiroff	Scott Bassett	Judith Curtis	Kevin Gentry	Trish Oleksa Haas
Farmington Hills	Portage	Grosse Pointe	Howell	Grosse Pointe

Michigan Coalition of Family Law Appellate Attorneys

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

ADM File No. 2018-33
ADM File No. 2019-20
ADM File No. 2019-38

Proposed Amendments of Rules 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and Proposed Addition of Rule 1.112 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 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and a proposed addition of Rule 1.112 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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.]

[NEW] Rule 1.112 Filings by Incarcerated Individuals

If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed filed on the date of deposit in the institution's outgoing mail. Timely filing may be shown by a receipt of mailing or sworn statement setting forth the date of deposit and that postage has been prepaid.

Rule 6.310 Withdrawal or Vacation of Plea

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1)-(4) [Unchanged.]

~~(5) If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.~~

(D)-(E) [Unchanged.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A) Presentence Report; Contents.

(1) [Unchanged.]

(2) On request, the probation officer must give the defendant's attorney notice and a reasonable opportunity to attend the presentence interview.

(2) [Renumbered (3) but otherwise unchanged.]

~~(3) Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.~~

(B) [Unchanged.]

~~(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).~~

(D) [Renumbered (C) but otherwise unchanged.]

(~~E~~D) Sentencing Procedure.

(1) [Unchanged.]

(2) ~~Resolution of~~ Challenges and Corrections.

(a) If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge, ~~or~~ determines that it will not take the challenged information into account in sentencing, or otherwise determines that the report should be corrected, it must order~~direct~~ the probation officer to ~~(i)~~ correct the report. ~~or delete the challenged information in the report, whichever is appropriate, and~~ If ordered to correct the report, the probation officer must~~(ii)~~ provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections, certify that the report has been corrected, and ensure that no prior version of the report is used for classification, programming, or parole purposes.

(b) [Unchanged.]

(3) [Unchanged.]

(E) Presentence Report; Retention and Disclosure after Sentencing. Regardless of the sentence imposed, the Department of Corrections must retain the presentence report reflecting any corrections ordered under subrule (D)(2). On written request or order of the court, the Department of Corrections must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with a copy of the report. On written request, the court must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with copies of any documents that were presented for consideration at sentencing, including the court's initial copy of the presentence report if corrections were made after sentencing. If the court exempts or orders the exemption of any information from disclosure, it must follow the exemption requirements of subrule (B).

(F)-(G) [Unchanged.]

Rule 6.428 Restoration of Appellate Rights~~Reissuance of Judgment~~.

If the defendant ~~did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect~~

~~a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right~~, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel~~of right~~.

Rule 6.429 Correction and Appeal of Sentence

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(4) [Unchanged.]

~~(5) If a motion to correct an invalid sentence is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a judgment of conviction and sentence is entered on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to correct an invalid sentence in a Michigan court.~~

(C) [Unchanged.]

Rule 6.431 New Trial

(A) Time for Making Motion.

(1)-(4) [Unchanged.]

~~(5) If a motion for new trial is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and~~

~~state that first-class postage has been prepaid. The exception applies to cases in which the trial court rendered its decision on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks a new trial in a Michigan court.~~

(B)-(D) [Unchanged.]

Rule 7.204 Filing Appeal of Right; Appearance

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a)-(d) [Unchanged.]

~~(e) If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to claims of appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42- day period.

(3) [Unchanged.]

(B)-(H) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements: An application for leave to appeal must be filed within

(1)-(2) [Unchanged.]

~~(3) If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205(G), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

(B)-(H) [Unchanged.]

Rule 7.208 Authority of Court or Tribunal Appealed From

(A) [Unchanged.]

(B) Postjudgment Motions in Criminal Cases.

(1) Within~~No later than 56 days after the commencement of~~ the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence.

(2) [Unchanged.]

(3) The trial court shall hear and decide the motion within 56~~28~~ days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4)-(6) [Unchanged.]

(C)-(J) [Unchanged.]

Rule 7.211 Motions in Court of Appeals

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) Motion to Remand.

(a) ~~Within the time provided for filing the appellant's brief, t~~The appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show:

(i)-(ii) [Unchanged.]

A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.

(b)-(c) [Unchanged.]

(d) If a motion to remand is filed~~granted~~, further proceedings in the Court of Appeals are stayed until the motion is denied or the trial court proceedings are completed~~completion of the proceedings in the trial court pursuant to the remand~~, unless the Court of Appeals orders otherwise.

(e)-(f) [Unchanged]

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

Rule 7.305 Application for Leave to Appeal

(A)-(B) [Unchanged.]

(C) When to File.

(1)-(4) [Unchanged.]

~~(5) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrules (C)(1) or (2), and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage was prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.~~

(6)-(8) [Renumbered (5)-(7) but otherwise unchanged.]

(D)-(I) [Unchanged.

Staff comment: The proposed amendments were submitted by the State Appellate Defender Office and would address several issues.

First, it would expand the prisoner mailbox rule to all legal filings (not just claims of appeal and postjudgment motions) made by a person incarcerated in prison or jail (not just prison, as under the current rule). This part of the proposal includes a new MCR 1.112, and elimination of specific prison mailbox provisions in MCR 6.310(C)(5), MCR 6.429(B)(5), MCR 6.431(A)(5), MCR 7.204(A)(2)(e), MCR 7.205(A)(3), and MCR 7.305(C)(5). One difficulty with this expansion is the fact that most jails do not have a mail log system like that in place in prisons. Second, the proposal would expand certain time frames for filing and deciding postjudgment motions in criminal cases, as reflected in the amendments of MCR 7.208 and MCR 7.211. Third, the proposal would reconfigure and expand the "Reissuance of Judgment" rule, as shown in the proposed amendments of MCR 6.428. Finally, the proposal (as shown in proposed amendments of MCR 6.425) would require a probation officer to give defendant's attorney notion and a reasonable opportunity to attend the presentence interview, require a probation agent to not only correct a report but certify that the correction has been made, and "ensure that no prior version of the report is used for classification, programming, or parole purposes." This portion of the proposal also would require the Michigan Department of Corrections to provide the prosecutor, defendant, or defense lawyer with a copy of the presentence investigation report, and further require the court to provide to the parties any documents presented for consideration at sentencing, including any PSIR considered before corrections were made.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an 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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File Nos. 2018-33/2019-20/2019-38. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2018-33/2019-20/2019-38

Support

Explanation

The committee supports the proposed amendments expressed in ADM File Nos. 2018-33/2019-20/2019-38: Proposed Amendments of MCR 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and Proposed Addition of MCR 1.112. The committee supports the proposed rule amendments because they would help ensure that pre-sentence reports are as accurate as possible before such reports are used for sentencing and probation determinations, in particular. Allowing defense attorneys the opportunity to be present at the initial interview stage helps protect defendant rights and adds an additional level of scrutiny and oversight to the pre-sentencing process.

Position Vote:

Voted For position: 14
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 5

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2018-33/2019-20/2019-38

Support

Position Vote:
Voted For position: 18
Voted against position: 3
Abstained from vote: 2
Did not vote (absent): 3

Contact Person: Christina Hines
Email: cbhines89@gmail.com

May 15, 2020

To: Michigan Supreme Court
From: Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)

RE: ADM File No. 2015-21 (MCR 7.202 and 7.204)
ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)
ADM File No. 2019-27 (MCR 7.205)
ADM File No. 2019-29 (MCR 7.212 and 7.312)
ADM File No. 2019-31 (MCR 7.216)

MCFLAA met via video conference on May 4, 2020 to discuss the appellate rule proposals as they relate to family law appeals.

ADM File No. 2015-21 (MCR 7.202 and 7.204)

The definition of a "custody case" in MCR 7.202(5) is expanded to include a delinquency proceeding where there is a dispositional order removing the minor from his/her home. This would give appeals from delinquency dispositions the same heightened priority as other appeals affecting custody or placement of children. We support the change. When delinquency appeals are not given priority, the minor ages out of the system before the appeal can be heard and decided.

Inexplicably, the proposal amends MCR 7.204(A)(1)(b) to eliminate the ability of the trial court to "for good cause" extend the time to file a post-judgment motion for new trial, rehearing, reconsideration, or other relief beyond the initial 21 days and still preserve the right to file a timely appeal from the order deciding that post-judgment motion. No explanation is given for how this change serves the purpose of making uniform the priority given to child custody, child protection, and delinquency appeals. The other proposal affecting MCR 7.204(A)(1) contained in ADM File Nos. 2018-33, 2019-20, and 2019-38 leaves this subsection unchanged. The inconsistency between this proposal and the proposal below needs to be explained and resolved. We believe the trial court is in the best position to determine if there should be a "good cause" extension.

ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)

Unlike ADM File No. 2015-21, this proposal leaves unchanged the ability of the trial court to extend the time for filing a post-judgment motion for new trial, reconsideration, etc., while preserving the ability to file a timely claim of

MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS
michcflaa@gmail.com

appeal from the order deciding that motion. This inconsistency should be resolved. We support retaining the trial court's authority to determine if there is good cause to extend the time to file a timely post-judgment motion without losing the right to appeal after than motion is decided.

This proposal amends MCR 7.211(C)(1) to eliminate the requirement that a motion to remand be filed within the time for filing appellant's brief. It also stays further proceedings in the COA upon ***filing*** a motion to remand. The current rule stays COA proceedings only if the motion is granted. We support the change.

ADM File No. 2019-27 (MCR 7.205)

According to the staff comment, the purpose of this proposal is to clarify and simplify rules regarding criminal appellate matters. However, its scope is broader and affects all appeals, including civil and family.

The "Late Appeal" provisions are rewritten, renamed "Delayed Application for Leave to Appeal" and relocated from MCR 7.205(G) to MCR 7.205(A)(4). Proposed MCR 7.205(A)(4)(b) could be interpreted to reduce the time for filing a delayed appeal although there is no indication that was the intent of the drafters. Current MCR 7.205(G)(5) requires that a late application be filed within 21 days after a dismissal order for lack of jurisdiction ***only if*** the 6-month late appeal jurisdiction window has expired. Proposed MCR 7.205(A)(4)(b) could be read to require filing a delayed application with 21 days after a dismissal order for lack of jurisdiction even if the 6-month delayed appeal window ***has not*** expired.

If interpreted to limit the delayed application period to 21 days after dismissal in all cases, even if the 6-month window has not expired, this presents potentially serious problems. If the dismissal order is issued shortly after the claim of appeal is filed, as often happens, the trial court transcripts and other information needed to prepare the delayed application may not yet be available to appellant's counsel. The 21-day period to file a delayed application would also rule out the option of an appeal to the Michigan Supreme Court on the jurisdictional issue and receiving a ruling from that Court before facing the deadline to file a delayed leave application in the Court of Appeals.

To avoid confusion, proposed MCR 7.205(A)(4)(b) could be rewritten to state:

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order denying reconsideration of the dismissal order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

ADM File No. 2019-29 (MCR 7.212 and 7.312)

This proposal changes the appendix rule in the Court of Appeals and Supreme Court. Proposed MCR 7.212(J)(2) governing the form of the appendix requires that each separate document in the appendix "must be preceded by a title page that identifies the appendix number or letter and the title of the document." While this may be useful for an appendix filed on paper, we do not see the need for this provision for an electronically filed appendix.

An electronically filed appendix must be bookmarked. The bookmark is a more efficient way to quickly move to any document in the appendix. Clicking on the bookmark should take you to the first page of that document, not a cover sheet that provides no additional useful information. Adding the cover page will also require more attorney or staff time (many appellate attorneys do not have staff and perform these tasks themselves) without a corresponding benefit to the court or court staff. It would unnecessarily drive up the cost of appeals, particularly for low and middle-income clients. This requirement should be deleted from the proposal.

Proposed MCR 7.212(J)(2)(b)(i) eliminates the page limit per appendix volume. It allows any number of pages in a volume so long as the file size is not too large for electronic filing. This is a welcome change we support.

Proposed MCR 7.212(J)(2)(b)(ii) and (iii) contain what we believe to be functionally redundant bookmark/TOC linking requirements. Subsection (ii) appropriately requires that the appendix be text searchable and that each document in the appendix be bookmarked. Although not part of the rule, we are instructed in the efiling guidelines to file our documents with the initial view including the bookmarks panel. That makes bookmarks the most visible and easiest way for judges, court staff, and opposing counsel to navigate to the various documents in the appendix.

Subsection (iii) is functionally redundant and unnecessary. It adds little to the ability of the reader to navigate through the appendix while driving up the cost of an appeal by requiring counsel to provide links to each document to the appendix table of contents. The TOC is visible from only one point in the appendix. The bookmarks panel is visible at all times, making it the preferred navigation option. We believe subsection (iii) should be eliminated from the proposal.

Proposed MCR 7.212(J)(3)(c) requires relevant pages of the transcript cited in support of the argument be included in the appendix. Submitting entire transcripts is discouraged.

In practice, it is prohibitively expensive for counsel to devote the hours needed to extract from the transcript those pages cited in support of the argument. Submitting the entire transcript is often a necessity for cost reasons.

If a complete transcript is submitted, this proposal requires that an index of the transcript be included. We see relatively few transcripts of trial court proceedings that include an index. Appellate counsel usually received transcripts from reporters via email in PDF format. Using Acrobat or its equivalents, it is not possible to create a printable index for a transcript received as a PDF. Until court reporters are required to include an index with each transcript they file, we oppose this proposal.

The proposal prohibits including in the appendix what are known as mini-scripts containing more than one page of transcript per document page. Court and deposition transcripts ordered by trial counsel during trial court proceedings are often received in mini-script format with up to four transcript pages per document page. Acrobat and equivalent software do not provide an obvious way to convert a mini-script transcript to a full-page transcript. The only option is to contact the reporter and request a full-page transcript. Depending on the length of time trial proceedings were pending, the transcripts may have been prepared a year or two earlier. The additional time and expense involved in tracking down the original reporter and requesting and paying for a full-page transcript adds delay and cost to the appellate process.

We agree that full-page transcripts should be included in the appendix when available. However, we oppose a ban on including mini-script transcripts when that is the only format reasonably available.

ADM File No. 2019-31 (MCR 7.216)

This proposal would add MCR 7.216(C)(3) to the Vexatious Proceedings rule. The current rule focuses on whether "an appeal or any of the proceedings in an appeal" are vexatious. The proposal would allow the court to also designate a party as a "vexatious litigator" and prohibit a party from continuing or instituting appeals without first obtaining leave from the court.

We oppose this proposal. The current rule allow sanctions for vexatious proceedings is sufficient to deter improper filings. A new rule is not needed. Because the proposal focuses on the party rather than the merits of the litigation, it could have an unwanted chilling effect on appeals presenting novel or politically unpopular issues. Keeping the focus on the merits of the litigation rather than the litigator is a better approach.

If it can be demonstrated that the existing rule is inadequate and a new rule addressing parties is needed, the rule must be more narrowly tailored. It should include clearly written standards defining the conduct making a party a vexatious litigator.

Yours truly,

Anne Argiroff	Scott Bassett	Judith Curtis	Kevin Gentry	Trish Oleksa Haas
Farmington Hills	Portage	Grosse Pointe	Howell	Grosse Pointe

Michigan Coalition of Family Law Appellate Attorneys

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

ADM File No. 2019-27

Proposed Amendments of Rules 6.310, 6.429, 6.431, 6.509, and 7.205 and Proposed Addition of Rule 6.126 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.310, 6.429, 6.431, 6.509, and 7.205 and a proposed addition of Rule 6.126 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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.]

[NEW] Rule 6.126 Decision on Admissibility of Evidence

Where the court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the court reconsider whether pretrial release is appropriate.

Rule 6.310 Withdrawal or Vacation of Plea

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1) The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and

(b)(i)-(iii)~~6 months after sentence or within the time provided by subrule (C)(2)~~.

~~(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:~~

~~(a) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(c) the motion to withdraw the plea is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(3)-(5) [Renumbered (2)-(4) but otherwise unchanged.]

(D)-(E) [Unchanged.]

Rule 6.429 Correction and Appeal of Sentence

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii).~~:~~

~~(a) within 6 months of entry of the judgment of conviction and sentence, or,~~

~~(b) if 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion to correct an invalid sentence if:~~

~~(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(ii) The defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(iii) The motion to correct invalid sentence is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order or denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(4)-(5) [Unchanged.]

(C) [Unchanged.]

Rule 6.431 New Trial

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii).~~:~~

~~(a) within 6 months of entry of the judgment of conviction and sentence, or~~

~~(b) If 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion for new trial if:~~

~~(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(ii) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(iii) the motion for a new trial is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(4)-(5) [Unchanged.]

(B)-(D) [Unchanged.]

Rule 6.509 Appeal

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205(A)(1). The 6-month time limit provided by MCR 7.205(A~~G~~)(4~~3~~)(a), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B)-(D) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements. The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B). The provisions of MCR 1.108 regarding computation of time apply. For purposes of this subrule, "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions. ~~An application for leave to appeal must be filed within~~

(1) Except as otherwise provided in this rule, an application for leave to appeal must be filed within:

(a) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(b2) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

(2) In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:

(a) 6 months after entry of the judgment or order; or

(b) 42 days after:

(i) an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(ii) the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(iii) the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed;

(iv) an order deciding a timely filed motion to withdraw plea under MCR 6.310(C), motion for directed verdict under MCR 6.419(C), motion to correct an invalid sentence under MCR 6.429(B), or motion for new trial under MCR 6.431(A); or

(v) an order deciding a timely filed motion for reconsideration of an order described in subrule (A)(2)(b)(iv).

A defendant relying on subrule (A)(2)(b) must provide a statement, supported by relevant documentation, explaining how the application meets the requirements of the subrule.

~~For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.~~

(3) In an appeal from an order terminating parental rights, an application for leave to appeal must be filed within 63 days, as provided by MCR 3.993(C)(2).~~If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205(G), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

(4) Delayed Application for Leave to Appeal.

(a) For appeals governed by subrule (A)(1), when an application is not filed within the time provided by that subrule, a delayed application for leave to appeal may be filed within 6 months of the entry of a judgment or order described in that subrule.

(b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within 21 days of the entry of the dismissal order or an order denying reconsideration of that order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

A delayed application under this rule must contain a statement of facts explaining the reasons for delay. The appellee may challenge the claimed reasons in the answer. The court may consider the length of and the reasons for delay in deciding whether to grant the delayed application.

(5) In a criminal case, if an inmate in the custody of the Michigan Department of Corrections, or in the custody of another state or federal penal institution, submits an application or delayed application for leave to appeal as a pro per

party that is received by the court after the expiration of the periods set forth in this rule, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution where the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid.

(6) In a criminal case, except as provided in subrule (4)(b), the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(B)-(D) [Unchanged.]

(E) Decision.

(1) [Unchanged.]

(2) The court may grant or deny the application,; enter a final decision,; grant other relief,; or request additional material from the record~~; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The clerk shall enter the court's order and mail copies to the parties~~.

(3)-(4) [Unchanged.]

(F) Expedited Decision~~Emergency Appeal~~. When a party requires a decision on an application by a date certain, the party may file a motion for immediate consideration of the application as provided in MCR 7.211(C)(6). When a motion for immediate consideration is filed, the time for submission of the application and motion is governed by MCR 7.211(C)(6). In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

~~(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.~~

~~(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the~~

application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

(3) Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the trial court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

(G) Late Appeal.

(1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrules (G)(4)and (G)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than 6 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed

in that rule, then the 6 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 6 months are counted from the entry of the order deciding the motion.

(4) The limitation provided in subrule (G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(C), MCR 6.429(B), and MCR 6.431(A), or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel or for substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel, or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

A motion for rehearing or reconsideration of a motion mentioned in subrule (G)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (G)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (G)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court,

~~tribunal, or agency, or other documentation showing that the application is filed within the time allowed.~~

~~(5) Notwithstanding the 6-month limitation period otherwise provided in subrule (G)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before the expiration of the 6-month limitation period, or at any time after the 6-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.~~

~~(6) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).~~

~~(H) Certified Concise Statement.~~

~~(1) When the Court of Appeals requires a certified concise statement of proceedings and facts, the appellant shall, within 7 days after the order requiring the certified concise statement is certified, serve on all other parties a copy of a proposed concise statement of proceedings and facts, describing the course of proceedings and the facts pertinent to the issues raised in the application, and notice of hearing with the date, time, and place for settlement of the concise statement.~~

~~(2) Hearing on the proposed concise statement must be within 14 days after the proposed concise statement and notice is served on the other parties.~~

~~(3) Objections to the proposed concise statement must be filed in writing with the trial court and served on the appellant and any other appellee before the time set for settlement.~~

~~(4) The trial court shall promptly settle objections to the proposed concise statement and may correct it or add matters of record necessary to present the issues properly. When a court's discretionary act is being reviewed, the trial court may add to the statement its reasons for the act. Within 7 days after the~~

~~settlement hearing, the trial court shall certify the proposed or a corrected concise statement of proceedings and facts as fairly presenting the factual basis for the questions to be reviewed as directed by the Court of Appeals. Immediately after certification, the trial court shall send the certified concise statement to the Court of Appeals clerk and serve a copy on each party.~~

Staff comment: The proposed amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and proposed addition of MCR 6.126 would clarify and simplify the rules regarding procedure in criminal appellate matters.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an 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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2019-27

Support

Explanation

The committee voted unanimously to support the proposed amendments to MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and proposed addition of MCR 6.126, because they streamline and clarify the process for filing applications for leave to appeal in the Court of Appeals, especially in criminal cases.

The committee notes that the existing text of MCR 7.205 is particularly confusing and out of line with practice. The committee supports amendments to the rule that would largely align it with existing practice and expectations and would eliminate a significant amount of unnecessary language – changes that would result in a more straightforward set of standards for appeals by application.

The proposed rules would improve MCR 7.205 by:

- Moving MCR 7.205(F)(3) to the criminal procedure chapter on the premise that it is a more intuitive location as this rule provides guidance for trial practice .
- Eliminating redundant language that simply restates the timing provisions of MCR 7.205(G)(4).
- Cross referencing the revised timing provisions that would now be found in MCR 7.205(A)(2).
- Placing all timing provisions in a single location within one rule.

Position Vote:

Voted for position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 6

Contact Persons:

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

Public Policy Position
ADM File No. 2019-27

Support

Explanation
The committee voted in favor of supporting the proposed amendments to MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and the proposed addition of MCR 6.126 because they would increase the uniformity of the rules governing post appellate procedure.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 7

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2019-27

Support

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 3

Contact Person: Christina Hines
Email: cbhines89@gmail.com

May 15, 2020

To: Michigan Supreme Court
From: Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)

RE: ADM File No. 2015-21 (MCR 7.202 and 7.204)
ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)
ADM File No. 2019-27 (MCR 7.205)
ADM File No. 2019-29 (MCR 7.212 and 7.312)
ADM File No. 2019-31 (MCR 7.216)

MCFLAA met via video conference on May 4, 2020 to discuss the appellate rule proposals as they relate to family law appeals.

ADM File No. 2015-21 (MCR 7.202 and 7.204)

The definition of a "custody case" in MCR 7.202(5) is expanded to include a delinquency proceeding where there is a dispositional order removing the minor from his/her home. This would give appeals from delinquency dispositions the same heightened priority as other appeals affecting custody or placement of children. We support the change. When delinquency appeals are not given priority, the minor ages out of the system before the appeal can be heard and decided.

Inexplicably, the proposal amends MCR 7.204(A)(1)(b) to eliminate the ability of the trial court to "for good cause" extend the time to file a post-judgment motion for new trial, rehearing, reconsideration, or other relief beyond the initial 21 days and still preserve the right to file a timely appeal from the order deciding that post-judgment motion. No explanation is given for how this change serves the purpose of making uniform the priority given to child custody, child protection, and delinquency appeals. The other proposal affecting MCR 7.204(A)(1) contained in ADM File Nos. 2018-33, 2019-20, and 2019-38 leaves this subsection unchanged. The inconsistency between this proposal and the proposal below needs to be explained and resolved. We believe the trial court is in the best position to determine if there should be a "good cause" extension.

ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)

Unlike ADM File No. 2015-21, this proposal leaves unchanged the ability of the trial court to extend the time for filing a post-judgment motion for new trial, reconsideration, etc., while preserving the ability to file a timely claim of

MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS
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appeal from the order deciding that motion. This inconsistency should be resolved. We support retaining the trial court's authority to determine if there is good cause to extend the time to file a timely post-judgment motion without losing the right to appeal after than motion is decided.

This proposal amends MCR 7.211(C)(1) to eliminate the requirement that a motion to remand be filed within the time for filing appellant's brief. It also stays further proceedings in the COA upon ***filing*** a motion to remand. The current rule stays COA proceedings only if the motion is granted. We support the change.

ADM File No. 2019-27 (MCR 7.205)

According to the staff comment, the purpose of this proposal is to clarify and simplify rules regarding criminal appellate matters. However, its scope is broader and affects all appeals, including civil and family.

The "Late Appeal" provisions are rewritten, renamed "Delayed Application for Leave to Appeal" and relocated from MCR 7.205(G) to MCR 7.205(A)(4). Proposed MCR 7.205(A)(4)(b) could be interpreted to reduce the time for filing a delayed appeal although there is no indication that was the intent of the drafters. Current MCR 7.205(G)(5) requires that a late application be filed within 21 days after a dismissal order for lack of jurisdiction ***only if*** the 6-month late appeal jurisdiction window has expired. Proposed MCR 7.205(A)(4)(b) could be read to require filing a delayed application with 21 days after a dismissal order for lack of jurisdiction even if the 6-month delayed appeal window ***has not*** expired.

If interpreted to limit the delayed application period to 21 days after dismissal in all cases, even if the 6-month window has not expired, this presents potentially serious problems. If the dismissal order is issued shortly after the claim of appeal is filed, as often happens, the trial court transcripts and other information needed to prepare the delayed application may not yet be available to appellant's counsel. The 21-day period to file a delayed application would also rule out the option of an appeal to the Michigan Supreme Court on the jurisdictional issue and receiving a ruling from that Court before facing the deadline to file a delayed leave application in the Court of Appeals.

To avoid confusion, proposed MCR 7.205(A)(4)(b) could be rewritten to state:

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order denying reconsideration of the dismissal order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

ADM File No. 2019-29 (MCR 7.212 and 7.312)

This proposal changes the appendix rule in the Court of Appeals and Supreme Court. Proposed MCR 7.212(J)(2) governing the form of the appendix requires that each separate document in the appendix "must be preceded by a title page that identifies the appendix number or letter and the title of the document." While this may be useful for an appendix filed on paper, we do not see the need for this provision for an electronically filed appendix.

An electronically filed appendix must be bookmarked. The bookmark is a more efficient way to quickly move to any document in the appendix. Clicking on the bookmark should take you to the first page of that document, not a cover sheet that provides no additional useful information. Adding the cover page will also require more attorney or staff time (many appellate attorneys do not have staff and perform these tasks themselves) without a corresponding benefit to the court or court staff. It would unnecessarily drive up the cost of appeals, particularly for low and middle-income clients. This requirement should be deleted from the proposal.

Proposed MCR 7.212(J)(2)(b)(i) eliminates the page limit per appendix volume. It allows any number of pages in a volume so long as the file size is not too large for electronic filing. This is a welcome change we support.

Proposed MCR 7.212(J)(2)(b)(ii) and (iii) contain what we believe to be functionally redundant bookmark/TOC linking requirements. Subsection (ii) appropriately requires that the appendix be text searchable and that each document in the appendix be bookmarked. Although not part of the rule, we are instructed in the efiling guidelines to file our documents with the initial view including the bookmarks panel. That makes bookmarks the most visible and easiest way for judges, court staff, and opposing counsel to navigate to the various documents in the appendix.

Subsection (iii) is functionally redundant and unnecessary. It adds little to the ability of the reader to navigate through the appendix while driving up the cost of an appeal by requiring counsel to provide links to each document to the appendix table of contents. The TOC is visible from only one point in the appendix. The bookmarks panel is visible at all times, making it the preferred navigation option. We believe subsection (iii) should be eliminated from the proposal.

Proposed MCR 7.212(J)(3)(c) requires relevant pages of the transcript cited in support of the argument be included in the appendix. Submitting entire transcripts is discouraged.

In practice, it is prohibitively expensive for counsel to devote the hours needed to extract from the transcript those pages cited in support of the argument. Submitting the entire transcript is often a necessity for cost reasons.

If a complete transcript is submitted, this proposal requires that an index of the transcript be included. We see relatively few transcripts of trial court proceedings that include an index. Appellate counsel usually received transcripts from reporters via email in PDF format. Using Acrobat or its equivalents, it is not possible to create a printable index for a transcript received as a PDF. Until court reporters are required to include an index with each transcript they file, we oppose this proposal.

The proposal prohibits including in the appendix what are known as mini-scripts containing more than one page of transcript per document page. Court and deposition transcripts ordered by trial counsel during trial court proceedings are often received in mini-script format with up to four transcript pages per document page. Acrobat and equivalent software do not provide an obvious way to convert a mini-script transcript to a full-page transcript. The only option is to contact the reporter and request a full-page transcript. Depending on the length of time trial proceedings were pending, the transcripts may have been prepared a year or two earlier. The additional time and expense involved in tracking down the original reporter and requesting and paying for a full-page transcript adds delay and cost to the appellate process.

We agree that full-page transcripts should be included in the appendix when available. However, we oppose a ban on including mini-script transcripts when that is the only format reasonably available.

ADM File No. 2019-31 (MCR 7.216)

This proposal would add MCR 7.216(C)(3) to the Vexatious Proceedings rule. The current rule focuses on whether "an appeal or any of the proceedings in an appeal" are vexatious. The proposal would allow the court to also designate a party as a "vexatious litigator" and prohibit a party from continuing or instituting appeals without first obtaining leave from the court.

We oppose this proposal. The current rule allow sanctions for vexatious proceedings is sufficient to deter improper filings. A new rule is not needed. Because the proposal focuses on the party rather than the merits of the litigation, it could have an unwanted chilling effect on appeals presenting novel or politically unpopular issues. Keeping the focus on the merits of the litigation rather than the litigator is a better approach.

If it can be demonstrated that the existing rule is inadequate and a new rule addressing parties is needed, the rule must be more narrowly tailored. It should include clearly written standards defining the conduct making a party a vexatious litigator.

Yours truly,

Anne Argiroff	Scott Bassett	Judith Curtis	Kevin Gentry	Trish Oleksa Haas
Farmington Hills	Portage	Grosse Pointe	Howell	Grosse Pointe

Michigan Coalition of Family Law Appellate Attorneys

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,
Chief Justice

ADM File No. 2019-29

David F. Viviano,
Chief Justice Pro Tem

Proposed Amendments of
Rules 7.212 and 7.312 of
the Michigan Court Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

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On order of the Court, this is to advise that the Court is considering amendments of Rules 7.212 and 7.312 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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 7.212 Briefs

(A)-(I) [Unchanged.]

(J) Appendix.

(1) ~~In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceedings under chapter XIIA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(5) of this rule, the appellant shall file and serve an appendix. The appellant's appendix shall contain a table of contents and copies of the following documents if they exist:~~Requirements. Except as provided in subrules (1)(a)-(f) of this rule, the appellant must file an individual or joint appendix with the appellant's brief. An appellee may file an appendix with the appellee's brief if the appellant's appendix does not contain all the information set forth in subrule (3) of this rule. The appellee's appendix should not contain any of the documents contained in the appellant's appendix except when including additional pages to provide a

more complete context, but should only contain additional information described in subrule (3) that is relevant and necessary to the determination of the issues on appeal. To avoid duplication in cases with more than one appellant or appellee, the parties are encouraged to submit a joint appendix pursuant to subsection (4) rather than separate appendixes. An appendix is not required in appeals from:

(a) Criminal proceedings.

(b) Child protective proceedings.

(c) Delinquency proceedings under chapter XIIA of the Probate Code.

(d) Adoption proceedings under chapter X.

(e) Involuntary mental health treatment proceedings under the Mental Health Code.

(f) The Michigan Public Service Commission where the record is available on the Commission's e-docket, or the Michigan Tax Tribunal where the record is available on the Tribunal's tax docket lookup page. In those cases, the parties' briefs shall cite to the document number and relevant pages in the electronic record.

(2) Form. The appendix must include a cover page or pages with the case caption that sets forth the parties' names and their designations (e.g., plaintiff-appellant), along with the appellate court and trial court or tribunal docket numbers. The cover page(s) must also state whether the appendix is an "Appellant's Appendix," "Appellee's Appendix," or "Joint Appendix." Following the cover page(s), the appendix must include a table of contents that identifies each document with reasonable specificity and indicates both the appendix number or letter and the page number on which the first page of the document appears in the appendix. An appendix must be numbered sequentially in a prominent location at the bottoms of the pages. When the appendix is composed of multiple volumes, pagination must continue from one volume to the next. For multiple appendix volumes, each volume must include a cover page and table of contents, and the first volume must contain a complete table of contents referencing all volumes of the appendix. Each separate document in the appendix must be preceded by a title page that identifies the appendix number or letter and the title of the document.

(a) For an appendix filed in paper form, one signed copy that is separately bound from the brief shall be filed. The binding method should allow the easy dismantling of the appendix for scanning.

(b) For an appendix filed electronically:

(i) The appendix must be separate from the electronically-filed brief and should be transmitted as a single PDF document unless the file size is too large to do so, in which case the appendix should be divided into separate volumes.

(ii) The appendix must be text searchable and include bookmarks for each document in the appendix and for important information or sections within the documents.

(iii) The table of contents should link to the documents contained in the appendix or in that volume of the appendix.

(3) Content. The appendix must include copies of the following documents if they exist:

(a) The trial court or tribunal judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from.~~;~~

(b) ~~A copy of t~~The trial court or tribunal register of actions~~docket sheet;~~.

(c) The relevant pages of any transcripts cited in support of the argument~~appellant's position on appeal~~. When~~re~~ appropriate, pages that precede or follow~~the appellant may attach pages preceding and succeeding~~ the cited page should be included~~cited if helpful~~ to provide context to the citation. Submitting entire transcripts is discouraged unless necessary for the understanding of an argument. If a complete trial, deposition, or administrative transcript is filed, an~~the~~ index to such transcript must be included. Transcripts must contain only a single transcript page per document page, not multiple pages combined on a single document page.~~Only noncompressed (one sheet to a page) transcripts may be filed;~~

(d) When~~If~~ a jury instruction is challenged, the language~~a copy~~ of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction.~~; and~~

(e) Any other exhibit, pleading, or ~~other~~ evidence that was submitted to the trial court and that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

~~For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.~~

(4) Joint Appendix.

(a) The parties may stipulate to using a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrules (J)(2) and (3) and shall be included with the initial appellant's brief or, for a joint appendix of multiple appellees, with the first appellee's brief to be filed.

(b) The stipulation to use a joint appendix may specify that any party may file, as a supplemental appendix, additional portions of the record not covered by the joint appendix.

~~(2) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the information set forth in section (J)(1) of this rule. The appellee's appendix shall not contain any of the documents contained in the appellant's appendix, but shall only contain additional information described in section (J)(1) that is relevant and necessary to the determination of the issues raised in the appeal.~~

~~(3) Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."~~

~~(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief. Five copies of the paper appendix shall be filed with the court.~~

~~(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table~~

~~of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.~~

~~(4) In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.~~

~~(5) This subsection does not apply to appeals arising from the Michigan Public Service Commission (in which the record is available on the Commission's e-docket) or the Michigan Tax Tribunal (in which the record is available on the Tribunal's tax docket lookup page). In those cases, the parties shall cite to the document number and relevant pages.~~

Rule 7.312 Briefs and Appendixes in Calendar Cases

(A)-(C) [Unchanged.]

(D) Appendix~~es~~. Unless the Court orders otherwise, briefs in a calendar case or in a case being argued on an application must be filed with an individual or joint appendix that conforms with the requirements, form, and content of MCR 7.212(J), except that the exclusions listed in MCR 7.212(J)(1)(a)-(f) do not apply to the Supreme Court. The individual or joint appendix must also include a copy of the Court of Appeals opinion or order being appealed but need not include the briefs submitted in the Court of Appeals unless they pertain to a contested preservation issue.

~~(1) Form. Appendixes must be prepared in conformity with MCR 7.212(B), and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix. Appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.~~

~~(2) Appellant's Appendix. An appendix filed by the appellant must be entitled "Appellant's Appendix," must be separately bound, and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain:~~

~~(a) the relevant docket entries of the trial court or tribunal and the Court of Appeals arranged in a single column;~~

~~(b) the trial court judgment, order, or decision in question and the Court of Appeals opinion or order being appealed;~~

~~(c) any relevant finding or opinion of the trial court;~~

~~(d) any relevant portions of the pleadings or other parts of the record; and~~

~~(e) any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction.~~

~~The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.~~

~~(3) Joint Appendix.~~

~~(a) The parties may stipulate to use a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.~~

~~(b) The stipulation to use a joint appendix may provide that either party may file, as a supplemental appendix, any additional portion of the record not covered by the joint appendix.~~

~~(4) Appellee's Appendix. An appendix, entitled "Appellee's Appendix," may be filed. The appellee's appendix must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.~~

(E)-(J) [Unchanged.]

Staff comment: The proposed amendments of MCR 7.212 and 7.312 would allow practitioners to efficiently produce an appendix for all appellate purposes by making the appendix rule consistent within the Court of Appeals and Supreme Court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an 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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2019-29

Support with Amendments

Explanation

The committee voted unanimously to support ADM File No. 2019-29 with amendments. The committee supports the proposed rules because they would make the appendix rule consistent within Court of Appeals and the Supreme Court; however, the committee raises questions and concerns regarding the proposed rule amendments.

- The committee is concerned that as currently proposed MCR 7.212(J)(2)(B) imposes electronic format and booking requirements on appendices before the Court's pilot program on electronic briefs has concluded. Section 7.212(J)(2)(B) appears to get ahead of the pilot program – a program that is currently evaluating whether the electronic brief technology is affordable and accessible to all practitioners.

- The committee recommends clarification on whether practitioners need a separate Table of Contents for each volume of appendices or whether one full Table of Contents is sufficient.

- The committee recommends consideration of whether exclusions as currently proposed in MCR 7.212(J)(1)(a)-(f), should also apply to briefs in the Supreme Court, rather than being carved out.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

May 15, 2020

To: Michigan Supreme Court
From: Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)

RE: ADM File No. 2015-21 (MCR 7.202 and 7.204)
ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)
ADM File No. 2019-27 (MCR 7.205)
ADM File No. 2019-29 (MCR 7.212 and 7.312)
ADM File No. 2019-31 (MCR 7.216)

MCFLAA met via video conference on May 4, 2020 to discuss the appellate rule proposals as they relate to family law appeals.

ADM File No. 2015-21 (MCR 7.202 and 7.204)

The definition of a "custody case" in MCR 7.202(5) is expanded to include a delinquency proceeding where there is a dispositional order removing the minor from his/her home. This would give appeals from delinquency dispositions the same heightened priority as other appeals affecting custody or placement of children. We support the change. When delinquency appeals are not given priority, the minor ages out of the system before the appeal can be heard and decided.

Inexplicably, the proposal amends MCR 7.204(A)(1)(b) to eliminate the ability of the trial court to "for good cause" extend the time to file a post-judgment motion for new trial, rehearing, reconsideration, or other relief beyond the initial 21 days and still preserve the right to file a timely appeal from the order deciding that post-judgment motion. No explanation is given for how this change serves the purpose of making uniform the priority given to child custody, child protection, and delinquency appeals. The other proposal affecting MCR 7.204(A)(1) contained in ADM File Nos. 2018-33, 2019-20, and 2019-38 leaves this subsection unchanged. The inconsistency between this proposal and the proposal below needs to be explained and resolved. We believe the trial court is in the best position to determine if there should be a "good cause" extension.

ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)

Unlike ADM File No. 2015-21, this proposal leaves unchanged the ability of the trial court to extend the time for filing a post-judgment motion for new trial, reconsideration, etc., while preserving the ability to file a timely claim of

MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS
michcflaa@gmail.com

appeal from the order deciding that motion. This inconsistency should be resolved. We support retaining the trial court's authority to determine if there is good cause to extend the time to file a timely post-judgment motion without losing the right to appeal after than motion is decided.

This proposal amends MCR 7.211(C)(1) to eliminate the requirement that a motion to remand be filed within the time for filing appellant's brief. It also stays further proceedings in the COA upon ***filing*** a motion to remand. The current rule stays COA proceedings only if the motion is granted. We support the change.

ADM File No. 2019-27 (MCR 7.205)

According to the staff comment, the purpose of this proposal is to clarify and simplify rules regarding criminal appellate matters. However, its scope is broader and affects all appeals, including civil and family.

The "Late Appeal" provisions are rewritten, renamed "Delayed Application for Leave to Appeal" and relocated from MCR 7.205(G) to MCR 7.205(A)(4). Proposed MCR 7.205(A)(4)(b) could be interpreted to reduce the time for filing a delayed appeal although there is no indication that was the intent of the drafters. Current MCR 7.205(G)(5) requires that a late application be filed within 21 days after a dismissal order for lack of jurisdiction ***only if*** the 6-month late appeal jurisdiction window has expired. Proposed MCR 7.205(A)(4)(b) could be read to require filing a delayed application with 21 days after a dismissal order for lack of jurisdiction even if the 6-month delayed appeal window ***has not*** expired.

If interpreted to limit the delayed application period to 21 days after dismissal in all cases, even if the 6-month window has not expired, this presents potentially serious problems. If the dismissal order is issued shortly after the claim of appeal is filed, as often happens, the trial court transcripts and other information needed to prepare the delayed application may not yet be available to appellant's counsel. The 21-day period to file a delayed application would also rule out the option of an appeal to the Michigan Supreme Court on the jurisdictional issue and receiving a ruling from that Court before facing the deadline to file a delayed leave application in the Court of Appeals.

To avoid confusion, proposed MCR 7.205(A)(4)(b) could be rewritten to state:

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order denying reconsideration of the dismissal order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

ADM File No. 2019-29 (MCR 7.212 and 7.312)

This proposal changes the appendix rule in the Court of Appeals and Supreme Court. Proposed MCR 7.212(J)(2) governing the form of the appendix requires that each separate document in the appendix "must be preceded by a title page that identifies the appendix number or letter and the title of the document." While this may be useful for an appendix filed on paper, we do not see the need for this provision for an electronically filed appendix.

An electronically filed appendix must be bookmarked. The bookmark is a more efficient way to quickly move to any document in the appendix. Clicking on the bookmark should take you to the first page of that document, not a cover sheet that provides no additional useful information. Adding the cover page will also require more attorney or staff time (many appellate attorneys do not have staff and perform these tasks themselves) without a corresponding benefit to the court or court staff. It would unnecessarily drive up the cost of appeals, particularly for low and middle-income clients. This requirement should be deleted from the proposal.

Proposed MCR 7.212(J)(2)(b)(i) eliminates the page limit per appendix volume. It allows any number of pages in a volume so long as the file size is not too large for electronic filing. This is a welcome change we support.

Proposed MCR 7.212(J)(2)(b)(ii) and (iii) contain what we believe to be functionally redundant bookmark/TOC linking requirements. Subsection (ii) appropriately requires that the appendix be text searchable and that each document in the appendix be bookmarked. Although not part of the rule, we are instructed in the efiling guidelines to file our documents with the initial view including the bookmarks panel. That makes bookmarks the most visible and easiest way for judges, court staff, and opposing counsel to navigate to the various documents in the appendix.

Subsection (iii) is functionally redundant and unnecessary. It adds little to the ability of the reader to navigate through the appendix while driving up the cost of an appeal by requiring counsel to provide links to each document to the appendix table of contents. The TOC is visible from only one point in the appendix. The bookmarks panel is visible at all times, making it the preferred navigation option. We believe subsection (iii) should be eliminated from the proposal.

Proposed MCR 7.212(J)(3)(c) requires relevant pages of the transcript cited in support of the argument be included in the appendix. Submitting entire transcripts is discouraged.

In practice, it is prohibitively expensive for counsel to devote the hours needed to extract from the transcript those pages cited in support of the argument. Submitting the entire transcript is often a necessity for cost reasons.

If a complete transcript is submitted, this proposal requires that an index of the transcript be included. We see relatively few transcripts of trial court proceedings that include an index. Appellate counsel usually received transcripts from reporters via email in PDF format. Using Acrobat or its equivalents, it is not possible to create a printable index for a transcript received as a PDF. Until court reporters are required to include an index with each transcript they file, we oppose this proposal.

The proposal prohibits including in the appendix what are known as mini-scripts containing more than one page of transcript per document page. Court and deposition transcripts ordered by trial counsel during trial court proceedings are often received in mini-script format with up to four transcript pages per document page. Acrobat and equivalent software do not provide an obvious way to convert a mini-script transcript to a full-page transcript. The only option is to contact the reporter and request a full-page transcript. Depending on the length of time trial proceedings were pending, the transcripts may have been prepared a year or two earlier. The additional time and expense involved in tracking down the original reporter and requesting and paying for a full-page transcript adds delay and cost to the appellate process.

We agree that full-page transcripts should be included in the appendix when available. However, we oppose a ban on including mini-script transcripts when that is the only format reasonably available.

ADM File No. 2019-31 (MCR 7.216)

This proposal would add MCR 7.216(C)(3) to the Vexatious Proceedings rule. The current rule focuses on whether "an appeal or any of the proceedings in an appeal" are vexatious. The proposal would allow the court to also designate a party as a "vexatious litigator" and prohibit a party from continuing or instituting appeals without first obtaining leave from the court.

We oppose this proposal. The current rule allow sanctions for vexatious proceedings is sufficient to deter improper filings. A new rule is not needed. Because the proposal focuses on the party rather than the merits of the litigation, it could have an unwanted chilling effect on appeals presenting novel or politically unpopular issues. Keeping the focus on the merits of the litigation rather than the litigator is a better approach.

If it can be demonstrated that the existing rule is inadequate and a new rule addressing parties is needed, the rule must be more narrowly tailored. It should include clearly written standards defining the conduct making a party a vexatious litigator.

Yours truly,

Anne Argiroff	Scott Bassett	Judith Curtis	Kevin Gentry	Trish Oleksa Haas
Farmington Hills	Portage	Grosse Pointe	Howell	Grosse Pointe

Michigan Coalition of Family Law Appellate Attorneys

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,
Chief Justice

ADM File No. 2019-31

David F. Viviano,
Chief Justice Pro Tem

Proposed Amendment of
Rule 7.216 of the Michigan
Court Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.216 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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 7.216 Miscellaneous Relief

(A)-(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1)-(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.219, or other restriction the Court deems just.

Staff comment: The proposed amendment of MCR 7.216 would enable the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an 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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-31. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2019-31

Support with Amendments

Explanation
The committee unanimously supports ADM File No. 2019-31 with amendments. The committee supports amending MCR 7.216, the Court of Appeals vexatious litigator rule, to be consistent with MCR 7.316, the corresponding Supreme Court vexatious litigator rule.

The proposed rule amendment to MCR 7.216(C)(3) contains an internal reference to subsection (C)(1) that reads in relevant part (emphasis added in bold):

> Rule 7.216(C)(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under **subrule (C)(1),** . . .

The committee notes that the language in Appellate Court Rule 7. 216**(**C)(1)(a) is slightly different from the language of its Supreme Court analog, MCR.316(C)(1)(a).

The committee favors the language of MCR.316(C)(1)(a); therefore, it recommends amending MCR 7.216(C)(1)(a) to be fully consistent with the language of MCR 7.316(C)(1)(a), to achieve uniformity between the Appellate and Supreme Court vexatious litigator rules. Recommended amendments to MCR 7.216(C)(1)(a) are as follow (recommended changes shown in bold and underlined):

> 7.216(C)(1)(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis **or is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law;** or ~~belief that there was a meritorious issue to be determined on appeal~~;

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Public Policy Position
ADM File No. 2019-31

Support

Explanation

The committee voted unanimously in favor of the proposed amendments to MCR 7.216. The committee supports the ability of the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule MCR 7.316; however, the committee acknowledges that the proposed rule will more likely impact civil rather than criminal litigation.

Position Vote:

Voted For position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 5

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

May 15, 2020

To: Michigan Supreme Court
From: Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)

RE: ADM File No. 2015-21 (MCR 7.202 and 7.204)
ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)
ADM File No. 2019-27 (MCR 7.205)
ADM File No. 2019-29 (MCR 7.212 and 7.312)
ADM File No. 2019-31 (MCR 7.216)

MCFLAA met via video conference on May 4, 2020 to discuss the appellate rule proposals as they relate to family law appeals.

ADM File No. 2015-21 (MCR 7.202 and 7.204)

The definition of a "custody case" in MCR 7.202(5) is expanded to include a delinquency proceeding where there is a dispositional order removing the minor from his/her home. This would give appeals from delinquency dispositions the same heightened priority as other appeals affecting custody or placement of children. We support the change. When delinquency appeals are not given priority, the minor ages out of the system before the appeal can be heard and decided.

Inexplicably, the proposal amends MCR 7.204(A)(1)(b) to eliminate the ability of the trial court to "for good cause" extend the time to file a post-judgment motion for new trial, rehearing, reconsideration, or other relief beyond the initial 21 days and still preserve the right to file a timely appeal from the order deciding that post-judgment motion. No explanation is given for how this change serves the purpose of making uniform the priority given to child custody, child protection, and delinquency appeals. The other proposal affecting MCR 7.204(A)(1) contained in ADM File Nos. 2018-33, 2019-20, and 2019-38 leaves this subsection unchanged. The inconsistency between this proposal and the proposal below needs to be explained and resolved. We believe the trial court is in the best position to determine if there should be a "good cause" extension.

ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)

Unlike ADM File No. 2015-21, this proposal leaves unchanged the ability of the trial court to extend the time for filing a post-judgment motion for new trial, reconsideration, etc., while preserving the ability to file a timely claim of

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appeal from the order deciding that motion. This inconsistency should be resolved. We support retaining the trial court's authority to determine if there is good cause to extend the time to file a timely post-judgment motion without losing the right to appeal after than motion is decided.

This proposal amends MCR 7.211(C)(1) to eliminate the requirement that a motion to remand be filed within the time for filing appellant's brief. It also stays further proceedings in the COA upon ***filing*** a motion to remand. The current rule stays COA proceedings only if the motion is granted. We support the change.

ADM File No. 2019-27 (MCR 7.205)

According to the staff comment, the purpose of this proposal is to clarify and simplify rules regarding criminal appellate matters. However, its scope is broader and affects all appeals, including civil and family.

The "Late Appeal" provisions are rewritten, renamed "Delayed Application for Leave to Appeal" and relocated from MCR 7.205(G) to MCR 7.205(A)(4). Proposed MCR 7.205(A)(4)(b) could be interpreted to reduce the time for filing a delayed appeal although there is no indication that was the intent of the drafters. Current MCR 7.205(G)(5) requires that a late application be filed within 21 days after a dismissal order for lack of jurisdiction ***only if*** the 6-month late appeal jurisdiction window has expired. Proposed MCR 7.205(A)(4)(b) could be read to require filing a delayed application with 21 days after a dismissal order for lack of jurisdiction even if the 6-month delayed appeal window ***has not*** expired.

If interpreted to limit the delayed application period to 21 days after dismissal in all cases, even if the 6-month window has not expired, this presents potentially serious problems. If the dismissal order is issued shortly after the claim of appeal is filed, as often happens, the trial court transcripts and other information needed to prepare the delayed application may not yet be available to appellant's counsel. The 21-day period to file a delayed application would also rule out the option of an appeal to the Michigan Supreme Court on the jurisdictional issue and receiving a ruling from that Court before facing the deadline to file a delayed leave application in the Court of Appeals.

To avoid confusion, proposed MCR 7.205(A)(4)(b) could be rewritten to state:

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order denying reconsideration of the dismissal order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

ADM File No. 2019-29 (MCR 7.212 and 7.312)

This proposal changes the appendix rule in the Court of Appeals and Supreme Court. Proposed MCR 7.212(J)(2) governing the form of the appendix requires that each separate document in the appendix "must be preceded by a title page that identifies the appendix number or letter and the title of the document." While this may be useful for an appendix filed on paper, we do not see the need for this provision for an electronically filed appendix.

An electronically filed appendix must be bookmarked. The bookmark is a more efficient way to quickly move to any document in the appendix. Clicking on the bookmark should take you to the first page of that document, not a cover sheet that provides no additional useful information. Adding the cover page will also require more attorney or staff time (many appellate attorneys do not have staff and perform these tasks themselves) without a corresponding benefit to the court or court staff. It would unnecessarily drive up the cost of appeals, particularly for low and middle-income clients. This requirement should be deleted from the proposal.

Proposed MCR 7.212(J)(2)(b)(i) eliminates the page limit per appendix volume. It allows any number of pages in a volume so long as the file size is not too large for electronic filing. This is a welcome change we support.

Proposed MCR 7.212(J)(2)(b)(ii) and (iii) contain what we believe to be functionally redundant bookmark/TOC linking requirements. Subsection (ii) appropriately requires that the appendix be text searchable and that each document in the appendix be bookmarked. Although not part of the rule, we are instructed in the efiling guidelines to file our documents with the initial view including the bookmarks panel. That makes bookmarks the most visible and easiest way for judges, court staff, and opposing counsel to navigate to the various documents in the appendix.

Subsection (iii) is functionally redundant and unnecessary. It adds little to the ability of the reader to navigate through the appendix while driving up the cost of an appeal by requiring counsel to provide links to each document to the appendix table of contents. The TOC is visible from only one point in the appendix. The bookmarks panel is visible at all times, making it the preferred navigation option. We believe subsection (iii) should be eliminated from the proposal.

Proposed MCR 7.212(J)(3)(c) requires relevant pages of the transcript cited in support of the argument be included in the appendix. Submitting entire transcripts is discouraged.

In practice, it is prohibitively expensive for counsel to devote the hours needed to extract from the transcript those pages cited in support of the argument. Submitting the entire transcript is often a necessity for cost reasons.

If a complete transcript is submitted, this proposal requires that an index of the transcript be included. We see relatively few transcripts of trial court proceedings that include an index. Appellate counsel usually received transcripts from reporters via email in PDF format. Using Acrobat or its equivalents, it is not possible to create a printable index for a transcript received as a PDF. Until court reporters are required to include an index with each transcript they file, we oppose this proposal.

The proposal prohibits including in the appendix what are known as mini-scripts containing more than one page of transcript per document page. Court and deposition transcripts ordered by trial counsel during trial court proceedings are often received in mini-script format with up to four transcript pages per document page. Acrobat and equivalent software do not provide an obvious way to convert a mini-script transcript to a full-page transcript. The only option is to contact the reporter and request a full-page transcript. Depending on the length of time trial proceedings were pending, the transcripts may have been prepared a year or two earlier. The additional time and expense involved in tracking down the original reporter and requesting and paying for a full-page transcript adds delay and cost to the appellate process.

We agree that full-page transcripts should be included in the appendix when available. However, we oppose a ban on including mini-script transcripts when that is the only format reasonably available.

ADM File No. 2019-31 (MCR 7.216)

This proposal would add MCR 7.216(C)(3) to the Vexatious Proceedings rule. The current rule focuses on whether "an appeal or any of the proceedings in an appeal" are vexatious. The proposal would allow the court to also designate a party as a "vexatious litigator" and prohibit a party from continuing or instituting appeals without first obtaining leave from the court.

We oppose this proposal. The current rule allow sanctions for vexatious proceedings is sufficient to deter improper filings. A new rule is not needed. Because the proposal focuses on the party rather than the merits of the litigation, it could have an unwanted chilling effect on appeals presenting novel or politically unpopular issues. Keeping the focus on the merits of the litigation rather than the litigator is a better approach.

If it can be demonstrated that the existing rule is inadequate and a new rule addressing parties is needed, the rule must be more narrowly tailored. It should include clearly written standards defining the conduct making a party a vexatious litigator.

Yours truly,

Anne Argiroff	Scott Bassett	Judith Curtis	Kevin Gentry	Trish Oleksa Haas
Farmington Hills	Portage	Grosse Pointe	Howell	Grosse Pointe

Michigan Coalition of Family Law Appellate Attorneys

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

ADM File No. 2019-26

Proposed Amendment of
Rule 7.314 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.314 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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 7.314 Call and Argument of Cases

(A) [Unchanged.]

(B) Argument.

(1) In a calendar case in which one side is or both sides are entitled to oral argument, the time allowed for argument shall be provided in the order granting leave~~is 30 minutes for each side unless the Court orders otherwise~~. ~~When only one side is scheduled for oral argument, 15 minutes is allowed unless the Court orders otherwise.~~

(2) [Unchanged.]

The time for argument may be extended by Court order on motion of a party filed at least 14 days before the session begins or by the Chief Justice during the argument.

Staff comment: The proposed amendment of MCR 7.314 would eliminate the oral argument time period and instead provide for an amount of time established by the Court in the order granting leave to appeal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an 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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2019-26

Support

Explanation
The committee voted unanimously to support ADM File No. 2019-26. The committee supports the proposed rule amendments to MCR 7.314 because they would provide the Court with the discretion to assign an amount of time for oral argument that is tailored to the case at hand.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Public Policy Position
ADM File No. 2019-26

Support

Explanation
The committee voted to support the proposed amendment to MCR 7.314. The committee agreed that it would be beneficial to be notified in advance of the time allowed for oral argument. Furthermore, the committee noted that the Court is already exercising discretion in allocating time for argument, especially when hearing mini-oral arguments on the application ("MOAA's"); this proposed amendment is just formalizing what is already occurring in practice.

Position Vote:
Voted For position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote (absent): 7

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2019-26

Support

Position Vote:
Voted For position: 22
Voted against position: 1
Abstained from vote: 1
Did not vote (absent): 2

Contact Person: Christina Hines
Email: cbhines89@gmail.com

Order

Michigan Supreme Court
Lansing, Michigan

March 19, 2020

ADM File No. 2020-03

Proposed Administrative Order Regarding Election-Related Litigation

_____

On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order regarding election-related litigation. 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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.

Administrative Order No. 2020-XX – Election-Related Litigation Procedures

In an effort to promote the efficient and timely disposition of election-related litigation, the Court adopts the following requirements and procedural rules.

1. Court proceedings regarding an election matter lawsuit may not be instituted and orders may not be issued except upon a written complaint filed pursuant to the pertinent MCR provision. A full and complete record of the proceedings must be kept.

2. Upon the filing of a complaint regarding an election matter, the following persons must be notified of the lawsuit as soon as practicable:

   (a) Supreme Court Clerk

   (b) State Director of Elections

   (c) Attorney General Civil Litigation, Employment, & Elections Division (if the complaint is against the state or one of its subdivisions).

   The State Court Administrator will circulate a memo before each election that identifies the names and contact information for the individuals and offices listed above.

3. The chief judge or chief judge's designee of the court in which the election matter lawsuit is filed must provide the following information to the Supreme Court Clerk:

   (a) Case number and names of parties

   (b) Name of assigned judge and the telephone number where he or she can be reached

   (c) Brief statement of the issues, and

   (d) Brief statement of the case status.

4. Upon receiving notice of the lawsuit, the Supreme Court Clerk will notify the Chief Justice of the Supreme Court so the Court can decide whether the trial court should certify the controlling question(s) in conformity with the procedures set forth in MCR 7.308(A). The trial court may take preliminary action to move the case forward, such as establishing a briefing schedule or conducting a hearing on the matter. But an order or judgment granting or denying the relief requested may not enter until the Supreme Court Clerk notifies the trial court of the Court's decision regarding certification. An electronic copy of the final order or judgment, or an order granting a stay or injunctive relief, must be transmitted to the Supreme Court Clerk at the email address provided in the memo referenced above.

5. On or before the date of an election, the Court of Appeals will publish on the home page of its website information for contacting that court's clerk's office after business hours and the steps required of a party who might wish to seek emergency appellate relief.

Staff Comment: This administrative order would provide requirements and procedural rules to promote the efficient and timely disposition of election-related litigation.

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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-03. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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.

March 19, 2020

Clerk

Public Policy Position
ADM File No. 2020-03

Recommended Amendments

Explanation
The committee did not take a position on the substance of the proposed order, but recommends that rules governing election related litigation should be addressed in court rules, rather than in administrative orders.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

March 11, 2020

ADM File No. 2019-33

Administrative Order No. 2020-X

Proposed Adoption of a
Mandatory Continuing Judicial
Education Program

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, the Court is considering adoption of a mandatory continuing judicial education program for the state's justices, judges, and quasi-judicial officers. The program is intended to promote and sustain competence and professionalism in Michigan's judiciary, and ensure continued proficiency in the core competencies of Michigan's judicial education curriculum, including knowledge about the current law, integrity and demeanor, communication skills, and administrative capacity.

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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules 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.

Administrative Order No. 2020-X — Mandatory Continuing Judicial Education Program

1. Requirement.

(A) General Requirement. As of X/X/XXXX, every judicial officer must complete a program of continuing judicial education as described in this order.

(B) Exceptions and Exemptions. There shall be no exceptions to or exemptions from this requirement (including waivers, extensions, or deferments) except in limited instances only with approval of the Judicial Education Board.

2. Definitions. The following words and phrases, when used in this order, shall have the following meanings (unless the context clearly indicates otherwise):

(A) "Accredited Provider" is an individual or organization that offers continuing judicial education activities that are consistent with the requirements established under this order.

(B) "Approved Course" is a learning opportunity offered by a nonaccredited provider, but which is consistent with the requirements established under this order.

(C) "Alternative Education Activity" is a learning opportunity that is not otherwise specifically addressed here, but which is consistent with the requirements established under this order.

(D) "Board" is the Judicial Education Board established by this order.

(E) "MCJE" is the mandatory continuing judicial education to be provided under this order.

(F) "Judicial Officer" is a Justice, appellate court judge, full-time judge, part-time judge, retired judge assigned by SCAO as a visiting judge, full-time quasi-judicial officer (including a district court magistrate or circuit court family division referee), or a part-time quasi-judicial officer (including a district court magistrate or a circuit court family division referee).

3. Judicial Education Board.

(A) Establishment. The Supreme Court establishes the Judicial Education Board.

(B) Purpose. The primary purpose of the Board is to guide development and delivery of continuing judicial education to all judicial officers.

(C) Composition. The Board shall consist of twelve members appointed by the Supreme Court as follows:

(i) 2 members selected from judges of the Court of Appeals;

(ii) 2 members selected from judges of the Circuit Court;

(iii) 2 members selected from judges of the District Court;

(iv) 2 members selected from judges of the Probate Court;

(v) 3 members selected from quasi-judicial officers; and

(vi) 1 member selected as a retired judge.

(D) Leadership. The Supreme Court shall appoint from the members of the Board a chair and vice-chair who shall serve one-year terms, which may be renewed. The Board may designate other officers and form committees as it deems appropriate.

(E) Term of Board Members. The members serve three-year terms. A member may not serve more than two full terms unless a member is appointed to fill a mid-term vacancy. In such a situation, the member shall serve the remainder of that term and may be reappointed to serve up to two more full terms. Terms of the initial board members shall be staggered to ensure reasonable continuity.

(F) Action by the Board. Seven board members shall constitute a quorum. The Board shall act only with the concurrence of at least seven board members. The Board may adopt rules providing for participation of teleconference meetings or the use of other technology to enable maximum participation.

(G) Responsibilities of the Board.

(i) Accreditation and Approval Decisions. The Board shall make decisions regarding accreditation of providers and approval of courses consistent with the purpose and standards set forth in this order.

(ii) Noncompliance Appeals. The Board shall hear and decide appeals from judicial officers determined to be out of compliance with this order's requirements.

(iii) Waiver, Extension, Deferment. The Board shall hear and decide requests from judicial officers for waiver, extension, or deferment from the requirements in this order.

(iv) Reporting and Budget. The Board shall report at least annually to the Supreme Court on its activities, and annually propose a budget for the Board and submit it to the Supreme Court for approval.

(v) Incidental Responsibilities. The Board shall undertake all incidental tasks attendant to the above activities, including providing essential notices and recordkeeping activities.

(vi) Rules for Mandatory Continuing Judicial Education. The Board shall prepare a set of rules governing continuing judicial education for review and approval by the Supreme Court to replace this order. The proposed rules must be submitted to the Court no later than X/X/XXXX.

(H) Compensation and Expenses. Board members shall receive no compensation for services provided under these rules, but they shall be reimbursed by the Board for their reasonable and necessary expenses in attendance at meetings and in otherwise fulfilling their responsibilities.

(I) Immunity. The Board and its members, employees, and agents are absolutely immune from suit for conduct and communications arising out of the performance of their duties under this act. In addition, any other person is immune from suit for statements and communications transmitted solely to the Board or its staff related to the requirements contained in this order.

4. Minimum Continuing Judicial Education Requirements.

(A) General Requirements. Commencing X/X/XXXX, every judicial officer annually shall complete a minimum of 12 hours of continuing judicial education. The hours shall be distributed as follows:

(i) 3 hours in the subject area of integrity and demeanor (including ethics); and

(ii) 9 hours in the subject area of judicial practice and related areas as defined by the Board.

(B) Fulfillment.

(i) Course Attendance and Alternatives. The MCJE requirement shall be fulfilled by attending the required number of MCJE courses delivered by the Michigan Judicial Institute or Accredited Providers, or by completing a MCJE activity approved by the Board as sufficient to meet the MCJE general requirement.

(ii) Courses Offered by MJI. At least six of the annual MCJE required hours shall be earned through courses offered by the Michigan Judicial Institute.

(iii) Distance Learning Courses. Up to four of the annual MCJE required hours may be earned through Board-approved computer-based or distance education courses.

(iv) Teaching or Alternative Educational Activity. Up to four of the annual MCJE required hours may be earned through Board-approved teaching or alternative education activities. The activity must be approved in advance of including such activity in the required hours.

(C) Newly-elected or Appointed Judicial Officers. Every newly-elected or appointed judicial officer serving in a general or limited jurisdiction court shall attend the New Judge/New Magistrate/New Referee Orientation Program as applicable (administered by the Michigan Judicial Institute) in its entirety at his or her first opportunity. This requirement shall be in addition to the annual MCJE requirements described elsewhere in this order.

(D) Newly-appointed Chief Judges. Every newly-appointed chief judge shall attend the New Chief Judge Orientation Program (administered by the Michigan Judicial Institute) in its entirety as his or her first opportunity. This requirement shall be in addition to the annual MCJE requirements described elsewhere in this order.

5. Waivers, Extensions, Deferrals.

(A) Waiver. Except as provided in subsection (d), the Board may waive the MCJE requirements for a period of not more than one year upon a finding by the Board of undue hardship or circumstances beyond the control of the judicial officer which prevent him or her from complying in any reasonable manner with the MCJE requirement.

(B) Extensions of Waivers. A waiver may be extended upon application to the Board and Board approval. Upon termination of the waiver, the Board may make such additional MCJE requirements as it deems appropriate.

(C) Deferrals. Deferment is available to a judge who has left judicial office by reason of resignation or retirement and who has been approved for assignment under the SCAO Guidelines for Assignment following retirement or resignation. A judge who seeks a judicial assignment but who has not completed the annual judicial education requirement shall complete the MCJE requirement by the deadline of the assignment year and will have until the following compliance deadline to complete the standard requirement plus the deferred MCJE requirements, not to exceed two (2) times the current annual requirement.

(D) Members of the Armed Forces.

(i) Waiver. Upon written request to the Board, the MCJE requirements will be waived in their entirety for any compliance period in which a judicial officer is a member of the Armed Forces serving on full-time active duty.

(ii) Termination of Active Duty. Within thirty days after termination of active duty, the judicial officer must notify the Board and will be required to comply with MCJE requirements for the forthcoming year.

6. Standards for Approval of MCJE Activities.

(A) General Standards. All MCJE activities approved for credit shall meet the following standards:

(i) The activity shall have significant intellectual or practical content, the primary objective of which is to improve a judicial officer's knowledge of current law and/or professional capacity in the following competency areas: communication, integrity and demeanor, and administrative capacity to fulfill their judicial responsibilities.

(ii) The activity shall be an organized program of learning to deal with matters directly related to subjects that satisfy the objectives of these rules.

(iii) Each MCJE activity shall be open to all judicial officers interested in the subject matter or with a docket assignment complementary to the subject matter of the MCJE activity and there shall be no attendance restrictions, except as may be permitted by the Board, upon application from a provider, where:

(a) attendance is restricted based on objective criteria for a bona fide educational objective to enhance the MCJE activity; or

(b) membership in the provider organization is open to all interested judicial officers of a particular type (judges or quasi-judicial officers) on a reasonable nondiscriminatory basis and cost.

(v) The program leaders or lecturers shall be qualified with the practical and/or academic experience necessary to conduct the program effectively.

(vi) Each attendee shall be provided with thorough, high quality and carefully prepared written course materials before or at the time of the activity. Although written materials may not be appropriate to all courses, they are expected to be utilized whenever possible.

(vii) The course or activity must be presented in a suitable setting to create a positive educational environment.

(viii) The Board will take into consideration the special needs of disabled and incapacitated judicial officers in gaining access to and participation in MCJE activities. The Board shall require providers to make reasonable accommodations for disabled and incapacitated judicial officers.

(B) Distance Education. Distance learning courses—including computer-based and teleconference programs—may be approved for credit provided that they meet interactive, technical, and accreditation standards set forth by the Board, as well as the following terms and conditions:

(i) Seminars viewed at remote sites by electronic transmission will be approved for credit if they offer the opportunity for learner engagement and interaction.

(ii) Only distance learning courses pre-approved for credit or conducted by Accredited Providers may be taken for credit.

7. Credit for MCJE Activities.

(A) Accreditation or Approval. Credit will be given only for completion of MCJE activities that are accredited or approved by the Board.

(B) Course Length. No course of instruction less than 60 minutes shall be considered eligible for MCJE credit.

(C) Credit. One hour of credit will be awarded for each 60 minutes of instruction.

(D) Credit Increments. Credit will be awarded in 30 minute increments beyond the first 60 minutes.

(E) Local Education Activities. Local education activities will be subject to approval by the Board for credit upon submission of appropriate documentation. Accreditation will be determined by the Board according to the standards set forth in 6(A).

(F) Approval of MCJE Activities Conducted by NonAccredited Providers, Alternative Education Activities, and Teaching Activities.

(i) General Statement. Courses offered by a provider that is not an accredited MCJE provider, alternative education activities, and teaching activities that are consistent with the purposes of this order may qualify for MCJE credit, subject to the following terms and conditions.

(ii) Individual Approval Required. All MCJE activities conducted by a non-accredited provider, alternative education activity, or teaching activity must be individually approved by the Board for credit.

(iii) Requests for Approval. A judicial officer should request Board approval for MCJE activities conducted by a non-accredited provider, alternative education activities, or teaching activities at least 60 days prior to the activity, but in all cases, the judicial officer must request such approval no more than 30 days after completing the activity for the request to be considered.

(iv) Form of Application. The application shall be in the form and with such documentation required by the Board.

(v) Additional Information. Upon request by the Board, the applicant shall submit to the Board information concerning the course or activity, including the brochure describing the activity and the qualifications of anticipated speakers, the method or manner of presentation of materials, and, if requested, a set of the materials.

(vi) Courses Pertaining to Nonjudicial Subjects or Deemed to Fall Below Minimum Standards. If a course does not bear entirely on at least one of the four core competencies comprising Michigan's judicial education curriculum outlined in Section 6 (i.e., legal knowledge and ability, communication, integrity and demeanor, or administrative capacity), or the manner of presenting the course is deemed to fall below minimum standards, the Board may determine that such course is entitled to no credit or may assign such partial credit as it deems appropriate.

(vii) Teaching Activities. The following additional terms and conditions apply to credit for teaching activities:

(a) Credit will be given on the basis of two hours credit for each one hour of presentation to a peer audience where the applicant has prepared quality written materials for use in the presentation.

(b) Credit for repeat presentations or presentations without such written materials (whether peer presentations or nonjudicial presentations) will be given only for the actual time of presentation.

(c) Credit will be given on the basis of one hour of credit for each hour of presentation where the applicant has prepared quality written materials for use in the presentation to a nonjudicial audience.

(G) Carry Forward Credits. A judicial officer may carry forward a balance of credit hours earned in excess of the annual MCJE requirement—including computer-based and distance learning credits, which shall retain their character as such—for the succeeding reporting year, subject to the following limitations.

(i) Credit Limitation. No more than one times the current annual MCJE requirement may be carried forward into the succeeding reporting year.

(ii) Time Limitation. No MCJE credit may be carried forward more than one succeeding reporting year.

(iii) Credit Attributes. Carry forward credits retain the same attributes (subject matter, manner of presentation) that they would have had if used in the year in which they were earned.

(H) Law School and Graduate School Courses. Law school and graduate school courses taken as a student may qualify for MCJE credit, computed in accordance with these standards, subject to the following terms and conditions:

(i) Courses must otherwise qualify for credit, and the law school or graduate school courses in question cannot be required to qualify for the awarding of a basic degree.

(ii) Courses offered toward graduate or advanced degrees may receive credit, upon submission of appropriate documents and approval by the Board.

(iii) One hour of MCJE credit may be given for each approved law school/graduate credit hour awarded by the school (or the non-credit equivalent).

(iv) The school offering the course shall be a law school accredited by the American Bar Association or a regionally-accredited college or university.

(v) The course offers a learning opportunity which is consistent with the scope and purposes of this order.

(I) Self Study. Self study will not be approved for credit.

8. Accreditation of Mandatory Continuing Judicial Education Providers.

(A) Application. Application may be made for accreditation as an Accredited Provider by submitting the appropriate form to the Board.

(B) Evaluations. The provider shall develop and implement methods to evaluate its course offerings to determine their effectiveness and the extent to which they meet the needs of judicial officers and, upon a request from the Board, provide course evaluations by the attendees on such forms as the Board shall approve.

(C) Period of Accreditation.

(i) General Rule. The grant of accreditation shall be effective for a period of two years from the date of the grant.

(ii) Continuation of Accreditation. The accreditation may be continued for an additional two year period if the provider files an application for continued accreditation with the Board before the end of the provider's accreditation period, subject to further action by the Board.

(D) Conditional Accreditation. In considering whether to continue an approved provider's accreditation, the Board shall determine if there are pending or past breaches of these rules by the approved provider. The Board, at its discretion, may condition continuation upon the provider meeting additional requirements specified by the Board.

(E) Termination. If an application for continuation is not filed within 30 days before the end of the provider's accreditation period, the provider's accredited status will terminate at the end of the period. Any application received thereafter shall be considered by the Board as an initial application for Accredited Provider status.

(F) Revocation. Accredited Provider status may be revoked by the Board if the requirements specified by the Board are not met or if, upon review of the provider's performance, the Board determines that content of the course material or the quality of the MCJE activities or provider's performance does not meet the standards set forth in this order.

9. Standards for Accredited Provider Status. Accredited Provider status may be granted at the discretion of the Board to applicants that satisfy one of the following requirements:

(A) The provider has presented, within the past two years prior to the date of the application, five separate programs of judicial education which meet the standards of quality set forth in these rules;

(B) The provider has demonstrated to the Board that its judicial education activities have consistently met the standards of quality set forth in this order; or

(C) The provider is an American Bar Association-accredited law school.

10. Accreditation of a Single Course or MCJE Activity by a Provider. A provider of MCJE activities that has not qualified as an Accredited Provider may apply for accreditation of a single MCJE activity in a form provided by the Board, subject to the following terms and conditions:

(A) The Board may require submission of a detailed description of the provider, the course, the course materials, and the lectures.

(B) Application by a provider for accreditation of a single MCJE activity should be submitted prior to the date of presentation of the activity. Application for retroactive approval must be made within 30 days after the event or activity.

(C) The MCJE activity must meet the standards set forth in this order.

11. Reporting.

(A) Reporting Responsibility. Reporting shall be the responsibility of the individual judicial officer.

(B) Form of Reporting of MCJE Activities. A judicial officer shall report accredited MCJE activities to the Board in a manner approved by the Board.

(C) Time for Reporting. A judicial officer should report accredited MCJE activities within 30 days after successfully completing the activity.

(D) Annual Compliance Reporting. All judicial officers shall report MCJE compliance in writing within 30 days after the end of each calendar year.

12. Compliance.

(A) Records.

(i) Recordkeeping by the Board. The Board shall maintain a record of MCJE attendance for each judicial officer to whom this order applies. These records shall be made available as the Board shall determine, but shall at least establish whether the judge met the required standard for a particular reporting period.

(ii) Recordkeeping by Judicial Officers. Each active judicial officer shall maintain records sufficient to establish compliance with the MCJE requirement in the event of a dispute or inconsistency.

(B) Annual Status Notification. The Board will notify each judicial officer of his or her MCJE status three months prior to the end of the reporting period and will provide a final compliance notice within 60 days after the end of the reporting period. The final compliance notice shall include the hours earned during the reporting period which have been reported and carryover hours, if applicable.

(C) Noncompliance and Compliance Disputes.

(i) Notification. If a judicial officer fails to comply with this order, or is determined by the Board to have failed to fully comply with the MCJE requirements, such judicial officer shall be notified in writing by the

Board of the nature of the noncompliance and be given 180 days from the date of the notice to remedy the noncompliance.

(ii) Evidence of Compliance or Hearing Request. Within 30 days after the date of the notice of noncompliance, the judicial officer shall either submit evidence of compliance or request a hearing.

(iii) Hearing. If the judicial officer timely files a request for a hearing under this subsection, the Board shall schedule a hearing. The hearing shall be held at least ten days after written notice to the judicial officer. In addition, the State Court Administrator, or his or her designee, is required to attend a hearing held under this provision, and is entitled to notice in the same manner as the judicial officer.

(iv) Reasonable Cause for Noncompliance. If the Board finds that the judicial officer had reasonable cause for noncompliance, the judicial officer shall have 180 days from the date of notice of the Board's decision to correct the noncompliance. If compliance is not achieved within the 180 day period, the Board shall proceed as provided.

(v) Report to Judicial Tenure Commission and State Court Administrator. If a judicial officer fails to remedy noncompliance within 180 days after the later of the date of the notice of noncompliance or the date of a decision from the Board finding reasonable cause for noncompliance, the Board shall report that fact to the Judicial Tenure Commission and the State Court Administrator for their consideration.

(vi) Sanctions by State Court Administrator. Upon receiving notice from the Board of a judge's noncompliance, the State Court Administrator may impose an appropriate sanction, separate from any judicial sanction recommended by the JTC.

(D) Crediting Hours During a Period of Noncompliance. Credit hours earned shall be first applied to satisfy the requirements of the compliance period that was the subject of the notice to the judicial officer before any excess credits earned during the notice period may be applied to subsequent requirements.

13. Remedial Education. Upon being notified that a judicial officer is not performing as expected or required of the position, the State Court Administrator may require that a judicial officer engage in remedial education. Any remedial education required of a judicial officer will be in addition to the annual MCJE requirements of all judicial officers.

14. Confidentiality. The files, records, and proceedings of the Board as they relate to or arise out of any alleged failure of a judicial officer to satisfy the requirements of this order shall be deemed confidential and shall not be disclosed except in furtherance of the duties of the Board or upon the request of the affected judicial officer or as they may be introduced in evidence or otherwise produced in proceedings under this order.

Staff Comment: This proposed administrative order would establish a mandatory continuing judicial education program for the state's justices, judges, and quasi-judicial officers.

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 sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-33. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MARKMAN, J. (*concurring*). I support the Court's decision to publish for public comment the proposed administrative order for mandatory continuing judicial education (CJE), but write to raise the following questions that might perhaps be addressed in the course of such comment:

First, given that Michigan has lacked mandatory CJE since its formation, what should be viewed as the most compelling present rationale for such a program?

Second, if CJE is not to devolve into an assemblage of "make-work" requirements, how should mandatory CJE programs be designed to ensure that they are of genuinely lasting value to those who exercise the judicial power of the state, as well as the public these persons serve?

Third, should mandatory CJE include a testing component in which judges demonstrate that they have actually gained useful or practical legal insight, or otherwise derived benefit, from these programs?

Fourth, in developing a mandatory CJE curriculum, do we wish to give emphasis to "nuts-and-bolts" courses such as those currently offered by the Michigan Judicial Institute, or do we want to give emphasis to "law school-oriented" courses such as jurisprudence, the evolution of the common law, and legal history? And in emulating the mandatory CJE requirements of Pennsylvania, as our proposal does, should there be some sense that courses offered in that state such as "America's Fascination with Serial Killers," "Best Practices for Handling Sovereign Citizen Litigants," and "Storytelling and Persuasion Skills for Lawyers" are to be discouraged or avoided?

Fifth, is there any basis to agree or disagree with Justice BERNSTEIN in his dissent that if mandatory CJE is adopted, mandatory continuing legal education (CLE) for attorneys will likely follow? And if it *is* to follow, and in light of the fact that Michigan has lacked mandatory CLE since its formation, what should be viewed as the most compelling present rationale for such a program?

Sixth, what is inadequate about the present range of *voluntary* CJE programs currently offered by the Michigan Judicial Institute and elsewhere? If the only difference is that the current proposal is mandatory and MJI and other programs are voluntary, what, if anything, does this portend for the success of the newly created requirement?

Seventh, because the judiciary, as with any other governmental entity, is expected to serve as a responsible custodian of public funds, how significant a consideration should new program costs be as to whether mandatory CJE is adopted and its specific form?

Eighth, what will be the impact upon the expedition of the judicial process of 591 judges throughout the state being obligated to convene and participate in mandatory CJE programs?

Ninth, must distinctive curriculums be established for the trial and appellate judges of the state? For circuit, probate, and district judges?

Tenth, by what means can it best be ensured that mandatory CJE programs remain neutral and even-handed in their influence upon substantive judicial perspectives?

BERNSTEIN, J. (*dissenting*). I agree that the goal of continuing judicial education is a fine one—however, my problem lies with the idea of mandating educational goals for an already burdened judiciary. We should respect the autonomy of individual judicial officers to choose for themselves; the government should not seek to intervene in these individual

decisions. Stated simply, I believe that any of the problems that continuing judicial education seeks to correct could be better addressed in private forums by private actors.

Moreover, should continuing judicial education become a reality in Michigan, I fear that continuing legal education for all attorneys might come next.

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.

March 11, 2020

Clerk

From: Marilyn Antrim <mleonard1050@comcast.net>
Sent: Monday, May 4, 2020 10:24 AM
To: Clerk Info <ClerkInfo@courts.mi.gov>
Subject: Yearly Coursework for Judges

Dear Sir,
I am a retired judge from the state of Colorado. My husband and I moved to Michigan after my retirement to be nearer to family. I was on the bench for twenty years, first as a magistrate then as a district court judge. In Colorado, district courts are the highest trial courts in the state. I believe they have a different name here.
I am contacting you because I read that the Michigan Supreme Court is seeking comments on a proposal to require annual education courses for judges, and I believe that my experience supports that proposal.
In Colorado, we had mandatory coursework every year. The conferences were three day events usually held at a Colorado resort. We earned legal education credits (CLEs). At the same time, prosecutors and public defenders (state paid defense counsel) met at different locations and also earned CLEs. By attending morning and afternoon sessions, a luncheon with an ethics topic, a keynote speaker address and an update on the state of the judiciary outlined by the chief justice, we earned our yearly requirement of CLE credits.
Breakout sessions would include caselaw updates in criminal law, civil law, tribal law, water law, etc. All breakfasts, lunches and one dinner were provided. We were given reduced room rates at the resort and the conferences were held off season. One breakfast was held in separate rooms so that district, county, trust and probate, tribal and other judge groups could meet separately to develop camaraderie.
I am available to chat if your committee thinks that my experience might be helpful. My contact information is at the bottom of this note. I am sure that Colorado justices would also be more than happy to offer input if asked.

Sincerely,
Marilyn Leonard Antrim
18250 Riverside Drive
Beverly Hills, MI 48025
(303) 883-0199
Mleonard1050@comcast.net

Michigan District Judges Association

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

Re: Proposed Adoption of a Mandatory Continuing Judicial Education Program

Dear Clerk Royster:

On May 15, 2020, the board of the Michigan District Judges Association voted to recommend against the adoption of the proposed mandatory continuing judicial education program. MCR 8.110(D)(4) already provides an expectation that a judge take two weeks every three years for continuing legal education and training in addition to required judicial conferences. We do not believe that an additional administrative order is necessary, nor do we believe that another level of bureaucracy will provide a significant benefit. Although we agree that continuing judicial education is vital to our success as judges, we do not see an additional level of control as necessary or helpful. If there is a problem with a specific judge not meeting the standard set forth in the court rule or not performing adequately in a way that could be improved by further education, this could be better addressed individually with that judge.

Thank you for considering our position.

Sincerely,

Timothy J. Kelly, President
Michigan District Judges Association

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Government Relations Team

Date: June 5, 2020

Re: Request for Civil Legal Aid Funding from the Coronavirus Relief Fund

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Background

To help provide assistance to states from the Coronavirus Disease 2019 (COVID-19) pandemic, the federal government created the Coronavirus Relief Fund (the "Fund") as part of the Coronavirus Aid, Relief, and Economic Security Act ("CARES" Act). Congress appropriated $150 billion to the Fund for states to utilize to cover costs that:

1. are necessary expenditures incurred due to the public health emergency with respect to COVID–19;
2. were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the state government; and
3. were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

The Michigan State Bar Foundation has requested that Michigan appropriate $1,127,850 from the Fund to meet the dramatic increased need for civil legal aid through December 31, 2020. This request for funding is to provide a coordinated civil legal need response from Michigan's legal aid providers. With increased resources, legal aid organizations would be able to expand staffing to handle the increased needs for low-income Michiganders and families.

This request for funding covers critical COVID-19-related civil legal needs in four primary subject matter areas that represent the first and second waves of COVID-19-related emergency legal problems. These include problems involving:

1. **Unemployment Issues**, including helping claimants access benefits and helping with denials and appeals;
2. **Housing Preservation**, including, but not limited to eviction defense, foreclosure avoidance, access to local and state rental assistance, and other homelessness prevention related legal problems;
3. **Family Safety**, including, but not limited to civil protection of victims of domestic violence and sexual assault who are much more vulnerable as a result of the family and economic stresses associated with the emergency and social distancing orders; and

4. **Economic Security** for families and wage earners who have lost jobs and must retain new employment or replace income by looking to federal aid and state income and food assistance.

Keller Considerations

Since 1974, the State Bar of Michigan has consistently advocated for civil legal aid funding through the Legal Services Corporation. Civil legal aid organizations in Michigan increase the availability of legal services to society by handling the basic civil legal needs of economically disadvantaged people.

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

This item satisfies the requirements of *Keller* and may be considered on its merits.

MICHIGAN STATE BAR FOUNDATION MSBF

May 7, 2020

To Whom it May Concern:

Attached please find a proposal from the Michigan State Bar Foundation for funding from the Coronavirus Relief Fund to provide Disaster Relief Legal Help for Michiganders.

I am available to provide more information. We would appreciate an opportunity to discuss this proposal. I can be reached at 517-346-6401 or jennifer@msbf.org.

Respectfully Submitted,

Jennifer Bentley
Executive Director

Attachment

The Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083
(517) 346-6400
FAX (517) 371-3325
msbf.org

Coronavirus Disaster Relief Legal Help for Michiganders

Proposal Submitted by Michigan State Bar Foundation

Request

The COVID-19 pandemic has already generated a dramatic increased need for civil legal aid throughout Michigan. The Michigan State Bar Foundation (MSBF) is requesting $1,127,850 from the Coronavirus Relief Fund to meet this tremendous increased need for civil legal aid through December 31, 2020. The legal aid programs have developed a comprehensive statewide plan to help Michiganders through this pandemic and the state's recovery.

Increased Civil Legal Needs

In the past month, about 18,500 people each day (a 125% increase in visits) have visited the Michigan Legal Help website searching for information about child custody and support, eviction, foreclosure, debt collection, domestic violence, and unemployment benefits. Demographic data from legal aid programs have consistently demonstrated that a disproportionate number of those looking for legal aid are people of color.

Our legal aid programs are working heroically to respond to immediate needs, while also trying to prepare for an avalanche of new demands for legal help in the coming weeks and months. The spike in immediate and longer-term need for civil legal help will be overwhelming. As courts reopen and moratoriums lift, we will see more Michiganders facing evictions and foreclosures, subject to debt collection lawsuits and attempts to garnish wages and attach to their bank accounts, and domestic violence survivors and victims of elder abuse needing help.

Government Faces Unprecedented Needs from Michiganders

The State of Michigan, through the Governor's office, has provided tremendous leadership through this crisis, including expanding unemployment benefits, placing a moratorium on evictions, and creating a task force focused on racial disparities. Even with these herculean efforts, there will be gaps both now and on the horizon. Legal Aid organizations are uniquely qualified with legal expertise in these areas and stand ready to provide help.

Legal Aid in Michigan Can Help Respond to COVID But the Infrastructure Must Expand

Michigan's legal aid programs share many of Governor Whitmer's goals including protecting overall public health, getting unemployment and other benefits to every eligible Michigander, addressing rising domestic violence, and addressing racial disparities made worse by this pandemic. The legal aid community hopes to partner as much as possible to achieve those goals, but needs additional resources to meet these influx of need.

Michigan's nonprofit civil legal aid programs unique history of coordination has strengthened their ability to collectively respond to this pandemic. Legal aid providers have quickly adapted to serve as many people as they can through remote client consultations, virtual clinics, and representation in emergency telephonic and virtual hearings. Two key and currently available resources have ramped up and with new resources could expand to meet the increased need:

Michigan Legal Help Program – created a COVID-19 response page for up- to- date information and direct links to resources. The MLH website also includes a triage and referral function through the Guide to Legal Help for information and referrals tailored to an individual's legal problem.

Counsel and Advocacy Law Line – calling 888-783-8190 connects Michiganders to a statewide attorney-staffed telephone advice, brief service, and referrals to low- income individuals and older adults. Unemployment related issues are among those on a steep rise. CALL also operates the Michigan Health Link Ombudsman line and operated a FEMA helpline during the Flint water crisis.

MLH and CALL works closely with the five regional legal aid organizations that collectively have approximately 35 staffed offices throughout Michigan, to provide timely, relevant, and helpful referrals. MLH and CALL also coordinate closely with the State Bar of Michigan's Lawyer Referral Service so that individuals who are able to afford market-based legal counsel or pay a reduced fee, also receive meaningful referrals. The regional legal aid programs in Michigan are integrated within their communities and work closely with community partners to identify clients who need help.

MSBF funds those regional programs as well as grantees that provide statewide free civil legal help to migrant and seasonal farmworkers, immigrants and Native Americans, working closely with statewide community organizations to meet the needs of thousands of clients.

MSBF also funds the Michigan Poverty Law Program (MPLP), a program of the Michigan Advocacy Program, that operates in conjunction with the University of Michigan Law School. MPLP's full-service state support program for legal services offices provides support and training and helps identify, track, and coordinate response to our state's most urgent needs plaguing low-income families. MPLP has led several successful collaborative statewide advocacy efforts, including the Michigan Foreclosure Prevention Project and the Crime Victims Legal Assistance Project.

Michigan legal aid programs developed the Michigan Racial Justice Collaborative to support race equity advocacy, both locally and statewide, and train legal staff to ensure equitable solutions for all people who seek help.

Request for funding to help Michiganders with their COVID-19 Related Civil Legal Needs

This request for funding is to provide a coordinated civil legal need response to help Michiganders through this pandemic and the issues that arise in its aftermath. With increased resources, legal aid organizations could expand staffing to handle the increased needs for low-income Michiganders and families.

This request for funding covers critical COVID-19 related civil legal needs in four primary subject matter areas that represent the first and second waves of COVID-19 related emergency legal problems. These include problems involving:

1. **Unemployment Issues** including helping claimants access benefits and helping with denials and appeals;
2. **Housing Preservation** including, but not limited to eviction defense, foreclosure avoidance, access to local and state rental assistance, and other homelessness prevention related legal problems;
3. **Family Safety** including but not limited to civil protection of victims of domestic violence and sexual assault who are much more vulnerable as a result of the family and economic stresses associated with the emergency and social distancing orders;
4. **Economic Security** for families and wage earners who have lost jobs and must retain new employment or replace income by looking to federal aid and state income and food assistance.

In addition to providing legal help on cases to thousands of Michiganders, legal aid is also well positioned to provide helpful analysis and regular information to state agencies, with a race equity lens, regarding the barriers and opportunities that Michiganders are facing, some of which could be resolved through dissemination of user-friendly navigation tools and some of which could be resolved through modification of agency policies or procedures. Following is a chart including the proposed activities and estimated costs.

Proposed Activities	Estimated 6 month cast through 12/31/2020	Annual Cost
A. Recruit and engage 3 temporary emergency staff and contract attorneys (as appropriate) to handle COVID-19 related requests for assistance in each of the four core areas of focus as part of the statewide hotline through Counsel and Advocacy Law Line (CALL). CALL could utilize their current toll free number or route calls through a dedicated COVID-19 Disaster hotline.	3 * $35,000 = $105,000	$210,000
B. Recruit and engage the equivalent of 15 temporary emergency staff attorneys and (as appropriate) contract attorneys to work directly and/or remotely with Legal Aid organizations to address the need for legal assistance to low-income individuals and older adults, including oversight and support of courthouse based eviction clinics, with COVID-19 related legal problems in the four care areas of focus.	15 * $35,000 = $525,000	$1,050,000
C. Recruit and engage the equivalent of 3 temporary emergency staff attorneys and (as appropriate) contract attorneys to work	3 * $35,000 = $105,000	$210,000

directly and/or remotely with statewide Legal Aid organizations to address the need of vulnerable populations such as migrant farmworkers, Native Americans and immigrants.		
D. (1) Staff and technology at MLH to expand the development and availability of self-help materials, language access materials and capacities designed to help individuals and families navigate the legal system and address issues arising from the COVID-19 pandemic. (2) Access to the Courts Attorney to coordinate access through expanded remote technology, support and expand the development of Eviction Diversion Projects, and coordinate with the Courts on other technology and systems to improve access.	2 * $37,500 = $75,000	$150,000
E. Administrative staff to support the provision of statewide training, support and advocacy coordination to respond to the continual changes and emerging changes in court rules and substantive federal, state and local calls.	$35,000	$70,000
F. Support to upgrade and expand technology infrastructure and case management database to enable legal aid program staff to deliver services more effectively and enhance collaboration among programs.	$200,000	$200,000
G. An attorney focused on statewide policy, especially race equity, to collaborate with the Racial Justice Collaborative, support the field programs, and lead the development of racial justice advocacy across the state.	$50,000	$100,000

The total 6-month cost through 12/31/2020 is $1,127,850, including 3% for enhanced temporary administrative costs for the Michigan State Bar Foundation. The annual cost of this request is $2,049,700, including 3% for administrative costs.

Project Administration and Organization History

The Michigan State Bar Foundation was created in 1947 and is the largest state funder for civil legal aid in Michigan. The Foundation has administered the Interest on Lawyer Trust Account program since 1990 and in 1994 was assigned the responsibility of administering filing fee funds. The Foundation provides annual grants to 12 nonprofit civil legal aid organizations, including five regional legal aid programs, statewide programs serving specific vulnerable populations, a statewide website and a statewide hotline.

MSBF is willing to administer these dollars to distribute to legal aid providers throughout Michigan and possesses a solid administrative structure to accept and distribute these funds. The MSBF requires regular reports on the volume of services provided and evaluates grantees to assure efficient and effective services. MSBF currently administers the contracts and bidding process for the provision of Indigent Civil Legal Assistance through state filing fees, pursuant to MCLA 600.1485.

We would appreciate an opportunity to have a dialog about how legal aid organizations can support Michiganders. Please feel free to contact Jennifer Bentley, the Executive Director of the Michigan State Bar Foundation at 517-346-6401 or jennifer@msbf.org

Public Policy Position
Michigan State Bar Foundation Request for Funding from the Cornoavirus Relief Fund to provide Disaster Relief Legal Help for Michiganders

Support

Explanation

The committee voted unanimously to support the Michigan State Bar Foundation's request for funding from the coronavirus relief fund. The committee supports the funding request because it would provide necessary funding to support a coordinated civil legal need response to help Michiganders through the Covid-19 pandemic and the legal issues that arise in its aftermath. With increased resources, legal aid organizations could expand staffing to handle the increased needs for low-income Michiganders and families.

Position Vote:

Voted for position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 8

***Keller* Permissibility:**

The committee agreed that this proposal is *Keller* permissible because it affects the availability of legal services to society.

Contact Persons:

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