

# PROPOSED AMENDMENT TO RULES 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, AND 6.933 OF THE MICHIGAN COURT RULES

## Issue

Should the Representative Assembly support the proposed amendments to Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 of the Michigan Court Rules?

### Introduction

In June 2014 the State Court Administrative Office (SCAO) convened a workgroup of judges, court administrators, and attorneys to address the issue of sentencing indigent litigants to jail or prison for the failure to pay court-ordered fees, fines or costs without a prior determination of the ability to pay.<sup>1</sup>

The workgroup issued its report on May 1, 2015.<sup>2</sup> The report compiled a good deal of material that might be helpful to courts in addressing this issue. These materials included draft language to amend the Michigan Court Rules to make it clear that a litigant cannot be imprisoned for the failure to pay court-ordered fee, fine or cost without a prior determination that the litigant has the current ability to pay.<sup>3</sup>

The specific court rule amendments are:

### **Rule 3.605 – Collection of Penalties, Fines, Forfeitures, and Forfeited Recognizances**

(A) – (C) Unchanged

(D) Remission of Penalty. An application for the remission of a penalty, including bond forfeiture, may be made to the judge who imposed the penalty or ordered the forfeiture. The application may not be heard until reasonable notice has been given to the prosecuting attorney (or municipal attorney) and he or she has had an opportunity to examine the matter and prepare to resist the application. The application may not be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, unless waived by the court.

### **Rule 3.606 – Contempts Outside Immediate Presence of Court**

(A) – (E) Unchanged

(F) The court shall not sentence a person to a term of incarceration unless the court has complied with the provisions of MCL 6.425 (E)(3), notwithstanding proceedings pursuant to the Child Support and Parenting Time Enforcement Act, MCL 552.602 et seq.

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<sup>1</sup> This practice is also known as “pay or stay sentencing”.

<sup>2</sup> A link to the SCAO Workgroup report and its appendices can be found at:

[http://r.search.yahoo.com/\\_ylt=A0LEVirYm7dVd2QA5mYnnllQ;\\_ylu=X3oDMTByOHZyb21tBGNvbG88DYmYxBHBvcwMxBHZ0aWQDBHNlYwNzcg--/RV=2/RE=1438125144/RO=10/RU=http%3a%2f%2fcourts.mi.gov%2fAdministration%2fSCAO%2fResources%2fDocuments%2fPublications%2fReports%2fAbilityToPay.pdf/RK=0/RS=5hS5g46MsO8pJIFA\\_VB1pLqBj8Q-](http://r.search.yahoo.com/_ylt=A0LEVirYm7dVd2QA5mYnnllQ;_ylu=X3oDMTByOHZyb21tBGNvbG88DYmYxBHBvcwMxBHZ0aWQDBHNlYwNzcg--/RV=2/RE=1438125144/RO=10/RU=http%3a%2f%2fcourts.mi.gov%2fAdministration%2fSCAO%2fResources%2fDocuments%2fPublications%2fReports%2fAbilityToPay.pdf/RK=0/RS=5hS5g46MsO8pJIFA_VB1pLqBj8Q-)

<sup>3</sup> See Report at Exhibit M.

**Rule 3.928 – Contempt of Court**

(A) – (C) Unchanged

(D) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

**Rule 3.944 – Probation Violation**

(A) – (E) Unchanged

(F) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

**Rule 3.956 – Review Hearings; Probation Violation**

(A) – (B) Unchanged

(C) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

**Rule 6.001 – Scope; Applicability of Civil Rules; Superseded Rules and Statutes**

(A) Unchanged

(B) Misdemeanor Cases. MCR 6.001-6.004(B) and (C), 6.006, 6.102(D) and (F), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.445(A)-(G), and the rules in subchapters 6.600-6,800 govern matters of procedure in criminal cases cognizable in the district courts.

**Rule 6.425 – Sentencing; Appointment of Appellate Counsel**

(A) – (D) Unchanged

(E) (1)-(2) Unchanged

(3) Incarceration for Nonpayment.

(a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with a court order to pay financial obligations, unless the court determines on the record that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good faith effort to comply with the order.

(b) Payment alternatives. If the court determines on the record that the defendant is unable to comply with a court order to pay financial obligations without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or the entire amount of money owed to the extent permitted by law.

(c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:

(i) Defendant’s employment status and history.

(ii) Defendant’s employability and earning ability.

(iii) The willfulness of the defendant’s failure to pay.

(iv) Defendant’s financial resources.

(v) Defendant's basic living expenses, including but not limited to food, shelter, clothing, necessary medical expenses, or child support.

(vi) Any other special circumstances that may have bearing on the defendant's ability to pay.

#### **Rule 6.445 – Probation Revocation**

(A) – (F) Unchanged

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court without ~~and~~ having complied with the provisions set forth in MCR 6.425(B) and (E).

#### **Rule 6.610 – Criminal Procedure Generally**

(A) – (E) Unchanged

(F) (1) Unchanged

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCL 6.425(E)(3).

(23) Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction.

(34) Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

#### **Rule 6.933 – Juvenile Probation Revocation**

(A) – (D) Unchanged

(E) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines on the record that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

### **Synopsis**

A proposal to amend the Michigan Court Rules to provide clear guidance to courts that they must conduct ability-to-pay hearings before sentencing a person to incarceration for non-payment of court-ordered fines, fees, and costs.

### **Background**

The Criminal Issues Initiatives (CII) of the Committee on Justice Initiatives (CJI) have long supported the concept of amending various court rules regarding court fees, fines, and costs to clarify that indigent litigants cannot be sentenced to jail or prison for failing to pay court-ordered fees, fines or costs without a prior determination that the individual can pay that fee, fine, or cost.

In response the report submitted by the SCAO Ability to Pay Workgroup, the Michigan State Planning Body—of which Robert F. Gillett (CJI member) is co-chair, and Lorry Brown (Justice Policy Initiative co-chair), Judge Mable Mayfield (CII member), Kenneth Penokie (JPI member), and Linda Rexer (CJI co-chair) are members—submitted a proposal to the justices of the Michigan Supreme Court on May 27, 2015, requesting the adoption of amendments to the Michigan Court Rules that provide clear guidance to the lower courts they must conduct ability-to-pay hearings before sentencing a person to incarceration for non-payment of court-ordered fines, fees, and costs (see State Planning Body Letter, page 1).

The SCAO Workgroup concluded that:

The “ability to pay” must be determined and applied on an individual basis. Each judge, for each obligor brought before the court for failure to pay a court-ordered financial obligation, must review the required facts and circumstances and make an individual determination of the obligor’s ability and resources to pay the ordered monetary assessments and whether the obligor has made a good-faith effort to pay. Judges may have differing philosophies regarding ability to pay and may weigh facts in a given case differently. A judge’s discretion is tempered by the confines of the law and should be exercised with fairness and restraint. Ultimately, each decision is up to the individual judge.

CJI believes that it is critical that the guidance provided in the Workgroup report be communicated to judges, attorneys, and litigants through revisions to the Michigan Court Rules.

On June 28, 2015 in response to the Planning Body letter SCAO opened an administrative file (Adm. File #: 2015-12) on this issue. On June 19, 2015 the Michigan District Judges Association endorsed the Planning Body proposal. On July 21, 2015 the Michigan Association of Treatment Court Professionals endorsed the Planning Body proposal.

At its July 9, 2015 meeting, CII discussed the State Planning Body’s letter and proposed amendments and voted to support the proposals. CJI also discussed this package at its July 13, 2015 meeting and voted unanimously to support the proposals.

### **Opposition**

None known.

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

None known.

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

None known.

**STATE BAR OF MICHIGAN POSITION**  
**By vote of the Representative Assembly on October 8, 2015**

Should the Representative Assembly adopt the above resolution to support the proposed amendments to Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 of the Michigan Court Rules?

(a) Yes

Or

(b) No