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Proposed Addition of Rule 6.417
of the Michigan Court Rules

On order of the Court, dated January 17, 2018, this is to advise that the Court is considering an addition of MCR 6.417. 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.

Rule 6.417 Mistrial

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

STAFF COMMENT: This proposed new rule, based on FR Crim P 26.3, would require a trial court to provide parties an opportunity to comment on a proposed order of mistrial, to state their consent or objection, or suggest alternatives. The proposal was pursued following the Court's consideration of *People v Howard*, docket 153651.

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 Office of Administrative Counsel in writing or electronically by May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-10. 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.

Proposed Amendment of Rule 6.429
of the Michigan Court Rules

On order of the Court, dated January 24, 2018, this is to advise that the Court is considering an amendment of Rule 6.429 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 6.429 Correction and Appeal of Sentence

(A) Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~But~~ the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

(B)–(C) [Unchanged.]

STAFF COMMENT: This proposed amendment is intended to provide trial courts with broader authority to *sua sponte* address erroneous judgments of sentence, following the Court's recent consideration of the issue in *People v Comer*, 500 Mich 278 (2017).

For purposes of publication, the Court included a six-month time period in which such a correction must be made *sua sponte*, and the Court is especially interested in input related to this aspect of the proposed amendments. In balancing the interest in correcting a sentence at any time against the interest in promoting finality and definiteness, adoption of a prescribed time period seems appropriate. Parties have six months to file such a motion under MCR 6.429(B)(3), and a good argument can be made that if the Court adopted a different time period for *sua sponte* corrections, the six-month period for parties would be irrelevant, as a party could simply ask the court to do *sua sponte* what the party could not do by motion.¹ But there may be good reason to adopt a time period longer than that allowed for parties, or to consider a more flexible provision that does not include a specific time period but focuses on application of a standard such as “reasonableness,” “good cause,” or other language that leaves the determination to the trial court. Therefore, the Court is particularly interested in comments that address this issue.

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 May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-04. 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.

1. Note that other states have adopted rules with no time limitation on the ability of a court to correct an invalid sentence, but those states may not have, like Michigan, adopted a time limitation for parties to do so. See, for example, Nev Rev Stat 176.555; AK Cr P Rule 35(a).

Proposed Addition of Rule 1.18 and Proposed Amendment
of Rule 7.3 of the Michigan Rules of Professional Conduct

On order of the Court, dated January 17, 2018, this is to advise that the Court is considering an addition of Rule 1.18 and an amendment of Rule 7.3 of the Michigan Rules of Professional Conduct. 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.

[Proposed Rule 1.18 is a new rule, and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.18 Duties to Prospective Client

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (i) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

Comments:

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the

lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 7.3 ~~Solicitation Direct Contact With Prospective Clients~~

- (a) A lawyer shall not solicit professional employment from a ~~person~~prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).
- (b) A lawyer shall not solicit professional employment from a ~~person~~prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
- (1) the ~~person~~prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.

Comments: There is a potential for abuse inherent in direct contact by a lawyer with a ~~person~~prospective client known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~at the~~ the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. ~~A person~~The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of ~~at the~~ the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

However, the United States Supreme Court has modified the traditional ban on written solicitation. *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Paragraph (a) of this rule is therefore modified to the extent required by the *Shapero* decision.

The potential for abuse inherent in direct solicitation of ~~prospective clients~~ justifies its partial prohibition, particularly since lawyer advertising and the communication permitted under these rules are alternative means of communicating necessary information to those who may be in need of legal services.

Advertising and permissible communication make it possible for a ~~person~~prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting a ~~person~~the prospective client to impermissible persuasion that may overwhelm a ~~person's~~the client's judgment.

The use of general advertising and communications permitted under *Shapero* ~~to transmit information from lawyer to prospective client~~, rather than impermissible direct contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. The contents of some impermissible direct conversations ~~between a lawyer and a prospective client~~ can be disputed and are not subject to third-party scrutiny. Consequently they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and detail concerning, the plan or arrangement that the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific ~~person~~prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under these rules.

STAFF COMMENT: The proposed addition of new rule MRPC 1.18 and amendment of MRPC 7.3 would clarify the ethical duties that lawyers owe to prospective clients and create consistency in the use of the term "prospective client." This proposal was submitted to the Court by the Representative Assembly of the State Bar of Michigan.

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 May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-49. 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.

Proposed Amendment of Rule 7.2 of the Michigan Rules of Professional Conduct

On order of the Court, dated January 10, 2018, this is to advise that the Court is considering alternative amendments of Rule 7.2 of the Michigan Rules of Professional Conduct. Before determining whether either of the alternative proposals 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 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 these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Alternative A

Rule: 7.2 Advertising

(a)–(c) [Unchanged.]

(d) Services of a lawyer or law firm that are advertised under the heading of a phone number, web address, image, or icon shall identify the lawyers or law firm providing the services. Any website advertising the services of a lawyer or law firm must contain the name(s) of the attorney(s) providing the services.

Alternative B

Rule: 7.2 Advertising

(a)–(c) [Unchanged.]

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

STAFF COMMENT: The first proposed amendment of Rule 7.2 of the Michigan Rules of Professional Conduct (Alternative A) would require certain lawyer advertisements to identify the lawyer or law firm providing services. This proposal was submitted by the State Bar of Michigan Representative Assembly. Alternative B is the model rule provision that relates to providing information about the lawyer or law firm responsible for the advertisement's content.

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 Office of Administrative Counsel in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-27. 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.

MCCORMACK, J. (*concurring*). This topic is worth the Court's consideration and I look forward to the public comment. I hope that

the public comment process will, at a minimum, address and clarify the following questions:

(1) Is MRPC 7.1 already an adequate mechanism for protecting the public?

(2) Should the proposal's first sentence be targeted only to advertisements that solely consist of a web address or a telephone number, which is how the proposal was described by the State Bar of Michigan in its submission letter, or should it apply to all advertisements, which is how the proposal is currently styled? In other words, should the proposal read "Services of a lawyer or law firm that are advertised under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services," or should it read "Services of a lawyer or law firm that are advertised *only* under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services"?

(3) Will the proposal affect law offices that self-identify by solely listing their telephone number on their physical building or road sign, such as 1-800-LAW-FIRM in the attached photo?



(4) What is the scope of website advertising that would fall within this rule? For example, should it be limited to individual websites owned or managed by lawyers or law firms, or will it include third-party media advertising such as Craigslist listings, Facebook places, and Google places?

(5) What are the proper definitions of "image" and "icon" as used in the proposal?

(6) Will this rule regulate online advertising differently than the current rules regulate billboard, transit bus, television/cable, radio, and smartphone pop-up ads? If so, is that appropriate? If not, why not?

Supreme Court Appointments to the Court Reporting and Recording Board of Review (Dated January 17, 2018)

On order of the Court, pursuant to MCR 8.108(G)(2)(a):

Effective immediately, **Honorable Colleen A. O'Brien** (Court of Appeals judge) is appointed to fill a partial term that will expire March 31, 2018, and, effective April 1, 2018, to a first four-year term that will expire March 31, 2022.

Effective April 1, 2018, **Brad Hall** (attorney) is appointed to a first four-year term that will expire March 31, 2022.

Effective immediately, **Kristine Fuller** (official certified electronic recorder) is appointed to fill a partial term that will expire March 31, 2019.