

### Proposed Amendment of Rule 4.4 of the Michigan Rules of Professional Conduct

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

Amendments of Rules 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119 of the Michigan Court Rules

#### Amendments of Rules 6.310, 6.429, and 6.431 of the Michigan Court Rules

#### Amendments of Rules 9.112 and 9.131 of the Michigan Court Rules

To read ADM File No. 2017-29, dated May 23, 2018; ADM File No. 2016-49, dated May 23, 2018; ADM File No. 2002-37, dated May 30, 2018; ADM File No. 2016-42, dated May 23, 2018; and ADM File No. 2016-30, dated May 23, 2018; visit <http://courts.michigan.gov/courts/michigansupremecourt> and click “Administrative Matters & Court Rules” and “Proposed & Recently Adopted Orders on Admin Matters.”

### Administrative Order No. 2018-2 Adoption of Concurrent Jurisdiction Plan for the 8th Circuit Court, the 64th District Court, the Ionia and Montcalm County Probate Courts (Dated May 16, 2018)

Administrative Order No. 2003-1 and MCL 600.401, *et seq.* authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Court.

The Court hereby approves adoption of the following concurrent jurisdiction plan, effective immediately:

- The 8th Circuit Court, the 64th District Court, and the Ionia County and Montcalm County Probate Courts.

The plan shall remain on file with the state court administrator.

Amendments to concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401, *et seq.*

### Proposed Amendment of Rule 6.302 of the Michigan Court Rules (Dated May 16, 2018)

On order of the Court, this is to advise that the Court is considering an amendment of MCR 6.302 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 6.302 Pleas of Guilty and Nolo Contendere

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands: (1)–(4) [Unchanged.]

(5) if the plea is accepted, the defendant may be giving up the right to appeal issues that would otherwise be appealable if she or he were convicted at a trial. Further, any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)–(F) [Unchanged.]

STAFF COMMENT: The proposed amendment of MCR 6.302 would require a trial court judge to advise a defendant that if a plea is accepted, the defendant will give up the right to appeal issues that might have been available after the conclusion of a trial.

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 September 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or [ADMcomment@courts.mi.gov](mailto:ADMcomment@courts.mi.gov). When filing a comment, please refer to ADM File No. 2017-16. 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 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct (Dated May 16, 2018)

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 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.

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#### MCR 6.502 Motion for Relief from Judgment

(A)–(F) [Unchanged.]

(G) Successive Motions.

(1) [Unchanged.]

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(3) For purposes of subrule (G)(2), “new evidence” includes new scientific evidence. This includes, but is not limited to, shifts in science entailing changes:

(a) in a field of scientific knowledge, including shifts in scientific consensus or the emergence of differing or contradictory scientific theories that were not previously available to the defendant;

(b) in a testifying expert’s own scientific knowledge and opinions; or

(c) in a scientific method on which the relevant scientific evidence at trial was based.

#### MRPC 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a)–(e) [Unchanged.]

(f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

STAFF COMMENT: The proposed amendments would make several substantive changes in MCR 6.502 regarding postjudgment relief from judgment motions. First, the proposed new language in MCR 6.502(G)(2) would insert an “actual innocence” waiver provision similar to that in MCR 6.508(D)(3). Further, MCR 6.502(G)(3) would be added to clarify that shifts in science are included in the definition of “new evidence” for purposes of the exemption from the successive motion limitation. Finally, new language would be added to MRPC 3.8 to require certain actions by a prosecutor who knows of new, credible, and material evidence creating a reasonable likelihood that defendant did not commit the offense of which defendant was convicted, or who knows of clear and convincing evidence that shows defendant did not commit the offense. The proposed additional language of MRPC 3.8 is taken from the ABA Model Rules of Professional Conduct 3.8.

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 September 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. 2013-05/2014-46. 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 7.1 of the Michigan Rules of Professional Conduct (Dated May 23, 2018)

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.1 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.

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

#### Rule 7.1 Communications Concerning a Lawyer’s Services

A lawyer may, on the lawyer’s own behalf, on behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or the lawyer’s law firm, use or participate in the use of any form of public communication that is not false, fraudulent, misleading, or deceptive. A communication shall not:

(a)–(c) [Unchanged.]

Except as otherwise provided in this rule, a lawyer who is a retired or former justice, judge, referee, or magistrate may use the title (“justice,” “judge,” “referee,” or “magistrate,”) only when the title is preceded by the word “retired” or “former.” A justice, judge, referee, or magistrate who is removed from office or terminated on grounds of misconduct is prohibited from using the title.

Comment: [Unchanged.]

STAFF COMMENT: The proposed amendment of MRPC 7.1 would restrict and regulate the use of the terms “retired” or “former” for a justice, judge, referee, or magistrate who returns to the practice of law. This proposal is a narrower version than one submitted by the State Bar of Michigan Representative Assembly.

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 September 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. 2017-25. 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.

### Addition of Rule 6.417 of the Michigan Court Rules

(Dated May 23, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Rule 6.417 of the Michigan Court Rules is adopted, effective September 1, 2018.

#### Rule 6.417 Mistrial

Before ordering a mistrial, the court must, on the record, give each defendant and the prosecutor 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 new rule, based on FR Crim P 26.3, requires 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 rule 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.

### Amendment of Rule 5.125 of the Michigan Court Rules

(Dated May 23, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 5.125 of the Michigan Court Rules is adopted, effective September 1, 2018.

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

#### Rule 5.125 Interested Persons Defined

(A)–(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)–(21) [Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are (a)–(d) [Unchanged.]

(e) if no spouse, adult child, or parent is living, the presumptive heirs of the individual,

(f)–(h) [Unchanged.]

(23) The persons interested in receiving a copy of the report of a guardian of a minor, or of a legally incapacitated individual, on the condition of the ward are:

(a) the ward, if 14 years of age or older;

(b) the person who has principal care and custody of the ward, and if other than the guardian;

(c) for an adult guardianship, the spouse and adult children or, if no adult children are living, the presumptive heirs of the individual; and

(d) for a minor guardianship, the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor.

(24)–(33) [Unchanged.]

(D)–(E) [Unchanged.]

STAFF COMMENT: The amendment of MCR 5.125(C)(22) ensures that minor children of an alleged legally incapacitated person receive notice of a petition as presumptive heirs. The amendment of MCR 5.125(C)(23) was submitted by the Representative Assembly of the State Bar of Michigan, and clarifies the definition of persons interested in receiving a copy of a guardianship report for a minor, as referenced by MCL 700.5215, and expressly distinguishes between adult and minor guardianships.

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.

### Amendment of Rule 6.429 of the Michigan Court Rules

(Dated May 23, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.429 of the Michigan Court Rules is adopted, effective September 1, 2018.

[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 amendment provides trial courts with 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). The amendment requires any such correction initiated by the court to occur within six months after entry of the judgment of conviction and sentence.

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.

### Amendment of Rule 6.610 of the Michigan Court Rules (Dated May 23, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.610 of the Michigan Court Rules is adopted, effective September 1, 2018.

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

## Rule 6.610 Criminal Procedure Generally

(A)–(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1)–(3) [Unchanged.]

(4) A defendant or defendants may be informed of the trial rights listed in subrule (3)(b) as follows:

(a)–(c) [Unchanged.]

Except as provided in subrule (E)(7), ifff the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5)–(6) [Unchanged.]

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if (a)–(c) [Unchanged.]

A “writing” includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8)–(9) [Unchanged.]

(F)–(H) [Unchanged.]

STAFF COMMENT: The amendment of MCR 6.610 eliminates an arguable conflict by exempting pleas taken under subsection (E)(7) from the requirements of subsection (E)(4), and clarifies what constitutes a “writing” by incorporating digital communications.

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.

### Amendment of Rule 8.119 of the Michigan Court Rules (Dated May 16, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of MCR 8.119 of the Michigan Court Rules is adopted, effective September 1, 2018.

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

## Rule 8.119 Court Records and Reports; Duties of Clerks

(A)–(H) [Unchanged.]

(I) Sealed Records.

(1)–(3) [Unchanged.]

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

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

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

(7) [Unchanged.]

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

(9) Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the

order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).

(J)–(L) [Unchanged.]

STAFF COMMENT: The amendment of MCR 8.119 clarifies the procedure for sealing files and better accommodates protective orders issued under MCR 2.302 by clarifying that a protective order may authorize parties to file materials without also filing a motion to seal.

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.

#### Amendment of Rule 9.122 of the Michigan Court Rules (Dated May 23, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.122 of the Michigan Court Rules is adopted, effective September 1, 2018.

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

##### Rule 9.122 Review by Supreme Court

(A) Kinds Available; Time for Filing.

(1) [Unchanged.]

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.306 within 182 days after the date of the letter notifying the party of the dismissal.

(B)–(E) [Unchanged.]

STAFF COMMENT: The amendment of MCR 9.122 establishes a 182-day time period within which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission has dismissed a request for investigation.

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.

#### Amendment of Rule 1.16 of the Michigan Rules of Professional Conduct (Dated May 23, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 1.16 of the Michigan Rules of Professional Conduct is adopted, effective September 1, 2018.

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

##### Rule 1.16 Declining or Terminating Representation

(a) [Unchanged.]

(b) Except as stated in paragraph (c), after informing the client that the lawyer cannot do so without permission from the tribunal for the pending case, a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1)–(6) [Unchanged.]

(c)–(d) [Unchanged.]

Comment: [Unchanged.]

STAFF COMMENT: The amendment of MRPC 1.16 addresses the concern raised during the Court's consideration of *People v Townsend*, docket 153153, to ensure that criminal defendants are made aware of the fact that an attorney cannot withdraw without the court's permission.

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.

#### Amendment of Rule 7.2 of the Michigan Rules of Professional Conduct (Dated May 30, 2018)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.2 of the Michigan Rules of Professional Conduct is adopted, effective September 1, 2018.

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

##### 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, or trade name shall identify the name, office address, and business telephone number of at least one lawyer responsible for the content of the advertisement.

STAFF COMMENT: The amendment of MRPC Rule 7.2 requires certain lawyer advertisements to identify the lawyer or law firm responsible for the advertisement's content. This new language is a revised version of a proposal submitted by the State Bar of Michigan Representative Assembly, and is intended to identify at least one lawyer responsible for the advertisement's content as a way to provide potential clients with important information when the services are advertised under the heading of a phone number, web address, or trade name.

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.