

Amendments of Rules 2.107, 2.111, 2.116, 2.119, 2.406, 2.518, 2.625, 3.101, 3.203, 3.208, 3.211, 3.703, 3.802, 3.903, 3.930, 5.104, 5.105, 5.119, 6.310, 6.429, 6.431, 6.433, 6.502, 7.104, 7.204, 7.205, 7.206, 7.210, and 8.111 of the Michigan Court Rules and Rule 1.2 of the Michigan Rules of Professional Conduct

Amendments of Rules 3.201, 3.210, and 3.211, and Addition of Rules 3.222 and 3.223 of the Michigan Court Rules

To read ADM File No. 2002-37, dated August 30, 2018; and ADM File No. 2018-03, dated September 20, 2018; visit <http://courts.michigan.gov/courts/michigansupremecourt> and click “Administrative Matters & Court Rules” and “Proposed & Recently Adopted Orders on Admin Matters.”

### Proposed Administrative Order to Require Circuit Judges and County Clerks to Enter into an Agreement on the Assignment and Performance of Ministerial Duties

On order of the Court, dated September 20, 2018, the proposed Administrative Order to Require Circuit Judges and County Clerks to Enter into an Agreement on the Assignment and Performance of Ministerial Duties having been published for comment at 501 Mich 1248 (2018), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to enter an administrative order. This administrative file is closed without further action.

### Addition of Rule 2.228 of the Michigan Court Rules

On order of the Court, dated September 20, 2018, 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 addition of Rule 2.228 of the Michigan Court Rules is adopted, effective January 1, 2019.

#### MCR 2.228 Transfer to the Court of Claims

- (A) A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer.
- (B) After the time provided in subrule (A)—
- (1) If the court in which a civil action is pending has concurrent jurisdiction with the Court of Claims, the defendant must seek leave to file a notice of transfer and the court may grant leave if it is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed.
  - (2) If the court in which a civil action is pending does not have subject matter jurisdiction because the case is within the exclusive jurisdiction of the Court of Claims, MCR 2.227 governs.

STAFF COMMENT: MCL 600.6404(3) allows defendant to transfer a case to the Court of Claims. This rule requires such a transfer to be made at or before the time the defendant files an answer, which is the same period mandated for change of venue under MCR 2.221. The proposal arose from the Court’s consideration of *Baynesan v Wayne State University* (docket 154435), in which defendant waited until just a month before trial before transferring a case he could have transferred nearly a year sooner. In subrule (B), the rule distinguishes between courts with concurrent jurisdiction and courts without concurrent jurisdiction when an untimely notice of transfer is filed.

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 MCR 6.302 of the Michigan Court Rules

On order of the Court, dated September 20, 2018, 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 6.302 of the Michigan Court Rules is adopted, effective January 1, 2019.

[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 amendment of MCR 6.302 requires 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. Such an advisement would prompt further discussions between counsel and defendant, if necessary.

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.

## Amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct

On order of the Court, dated September 20, 2018, 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 amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct are adopted, effective January 1, 2019.

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

### 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;
- (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.

### Rule 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 is innocent of the crime for 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.

(h) A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Comments: [Unchanged.]

STAFF COMMENT: The amendments make several substantive changes in MCR 6.502 regarding postjudgment relief from judgment motions. First, the new language in MCR 6.502(G)(2) inserts a discretionary “actual innocence” waiver provision similar to that in MCR 6.508(D)(3). Further, MCR 6.502(G)(3) is 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 is 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 is innocent of the crime for which defendant was convicted, or who knows of clear and convincing evidence that shows defendant did not commit the offense. The additional language of MRPC 3.8 is taken from the ABA Model Rules of Professional Conduct 3.8, and includes the “safe harbor” provision as a separate provision of the rule (as opposed to being part of the comments as in the model rule).

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 7.202 of the Michigan Court Rules

On order of the Court, dated September 20, 2018, 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 7.202 of the Michigan Court Rules is adopted, effective January 1, 2019.

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

### Rule 7.202 Definitions

For purposes of this subchapter:

(1)–(5) [Unchanged.]

(6) “final judgment” or “final order” means:

(a) In a civil case,

(i)–(ii) [Unchanged.]

(iii) in a domestic relations action, a postjudgment order ~~affecting the custody of a minor~~ that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile,

(iv)–(v) [Unchanged.]

(b) [Unchanged.]

STAFF COMMENT: The amendment of MCR 7.202 clarifies what constitutes a final postjudgment order in a domestic relations case for purposes of appeal by right. This issue was raised in *Marik v Marik*, docket 154549.

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 7.1 of the Michigan Rules of Professional Conduct

On order of the Court, dated September 20, 2018, 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 7.1 of the Michigan Rules of Professional Conduct is adopted, effective January 1, 2019.

[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 amendment of MRPC 7.1 restricts and regulates the use of the terms "retired" or "former" for a justice, judge, referee, or magistrate who returns to the practice of law. It applies only where a lawyer is communicating information about the lawyer's services, and thus, would not apply to a former judge who does not return to the practice of law. This amendment 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.

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

On order of the Court, dated August 30, 2018, the amendment of Rule 7.2 of the Michigan Rules of Professional Conduct that was scheduled to take effect on September 1, 2018, is deferred until further order of this Court.

STAFF COMMENT: The Court has deferred the effective date of amendments adopted by order dated May 30, 2018. The deferral will allow the Court to consider recently enacted revisions adopted by the American Bar Association to its model rule, and other issues that have been identified during the last several months.

### Supreme Court Appointments to the Attorney Discipline Board

On order of the Court, dated September 20, 2018, pursuant to MCR 9.110, Jonathan E. Lauderbach (attorney member) and Barbara Williams Forney (layperson member) are reappointed to the Attorney Discipline Board for terms ending October 1, 2021. Anna Frushour is appointed as an attorney member of the Attorney Discipline Board for a term ending October 1, 2021.

Attorney Michael Murray is appointed chairperson of the board and Jonathan E. Lauderbach is appointed vice chairperson of the board for terms ending October 1, 2019.

### Supreme Court Appointments to the Attorney Grievance Commission

On order of the Court, dated September 20, 2018, pursuant to MCR 9.108, Valerie R. White and Latoya M. Willis (attorney members) and Cathy Joan Pietrofesa (layperson member) are reappointed to the Attorney Grievance Commission with terms ending October 1, 2021.

Victor Fitz is reappointed as chairperson and Valerie White is reappointed vice chairperson of the commission for terms ending October 1, 2019.

### Supreme Court Appointment of Commissioners-at-Large to the State Bar of Michigan Board of Commissioners

On order of the Court, dated September 20, 2018, pursuant to State Bar Rule 5, Section 2, Travis W. Weber, Barry R. Powers, and Josephine A. DeLorenzo are appointed commissioners-at-large of the State Bar of Michigan Board of Commissioners to serve three-year terms commencing on adjournment of the 2018 annual meeting of the outgoing board of commissioners.