Agenda
Public Policy Committee
July 24, 2024 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……Joseph P. McGill, Chairperson

A. Reports

1. Approval of June 12, 2024 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2022-38: Proposed Amendments of MCR 2.625, 7.115, 7.219 and 7.319

The proposed amendments of MCR 2.625, 7.115, 7.219 and 7.319 would: (1) require courts to stay enforcement of taxed costs while an appeal is pending or until time for filing an appeal has passed, (2) align the timeframe for filing a bill of costs in the Court of Appeals with the timeframe for filing an application for leave to appeal, (3) incorporate into MCR 7.219 the Court of Appeals internal operating procedure 7.219(B) that allows, upon reversal of a Court of Appeals decision, the new prevailing party to file a new bill of costs in the Court of Appeals, and (4) include in the lists of taxable costs those costs awarded in the lower court in accordance with MCL 600.2445(4).

Status: 10/01/24 Comment Period Expires.
Referrals: 06/20/24 Civil Procedure & Courts Committee; Appellate Practice Section.
Comments: Civil Procedure & Courts Committee.
Liaison: Thomas P. Murray, Jr.

2. ADM File No. 2022-46: Proposed Amendment of MCR 3.305

The proposed amendment of MCR 3.305 would clarify where to file a mandamus action.

Status: 08/01/24 Comment Period Expires.
Referrals: 04/12/24 Civil Procedure & Courts Committee; All Sections.
Comments: Civil Procedure & Courts Committee.
Liaison: Joshua A. Lerner

3. ADM File No. 2024-06: Proposed Amendment of MCR 3.306

In accordance with MCL 600.4501(2), the proposed amendment of MCR 3.306(B)(3)(b) would prohibit a court from granting leave to a private individual who is bringing a quo warranto action that relates to the offices of electors of President and Vice President of the United States.

Status: 10/01/24 Comment Period Expires.
Referrals: 06/20/24 Civil Procedure & Courts Committee.
Comments: Civil Procedure & Courts Committee.
Liaison: John W. Reiser III

4. ADM File No. 2021-05: Proposed Amendment of MCR 6.302

The proposed amendment of MCR 6.302 would require a court that has engaged in a preliminary evaluation of the sentence to inform the defendant that the final sentencing range may differ from the original estimate, and if different, advise the defendant about whether they would be permitted to withdraw their plea, and include in the evaluation a numerically quantifiable sentence term or range.

Status: 08/01/24 Comment Period Expires.

Referrals: 04/12/24 to Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

Liaison: Takura N. Nyamfukudza

5. ADM File No. 2022-25: Proposed Amendment of MCR 7.103

The proposed amendment of MCR 7.103 would require that an appeal to circuit court be heard by a judge other than the judge that conducted the trial.

Status: 08/01/24 Comment Period Expires.

Referrals: 04/12/24 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

Liaison: Lori A. Buiteweg

6. ADM File No. 2022-12: Proposed Amendment of MCR 7.118

The proposed amendment of MCR 7.118 would allow the prisoner's attorney access to the parole eligibility report(s) and guidelines, require MDOC to provide the record on appeal within 14 days of being served with a prosecutor's application for leave to appeal the parole board's decision, require in all other appeals that MDOC provide the record on appeal within 14 days of the court granting the application for leave to appeal, and require confidential portions of the record to be filed under seal with access limited to certain people.

Status: 08/01/24 Comment Period Expires.

Referrals: 04/17/24 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; Criminal Law Section.

Liaison: Aaron V. Burrell

7. ADM File No. 2022-56: Proposed Amendment of MRPC 3.7

The proposed amendment of MRPC 3.7 would clarify that in accordance with Const 1963, art 1, § 13, a lawyer can appear in pro per.

Status: 10/01/24 Comment Period Expires.

Referrals: 06/27/24 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Professional Ethics Committee.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee. Comments provided to the Supreme Court are included in the materials.

Liaison: Joshua A. Lerner

C. Legislation

1. HB 5749 (Carter) Civil rights: public records; certain law enforcement disciplinary personnel records; require to be subject to freedom of information act requests. Amends sec. 13 of 1976 PA 442 (MCL 15.243).

Status: 05/30/24 Referred to House Committee on Criminal Justice.
Referrals: 06/03/24 Access to Justice Policy Committee, Civil Procedure & Courts Committee.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison: Takura N. Nyamfukudza

2. Landlord-Tenants

HB 5758 (Paiz) Housing: landlord and tenants; form containing summary of tenant's rights; require state court administrative office to provide. Amends 1978 PA 454 (MCL 554.631 - 554.641) by adding sec. 4a.

HB 5759 (Hoskins) Housing: landlord and tenants; form containing summary of tenant's rights; require the department to make available to the public. Amends sec. 57i of 1939 PA 280 (MCL 400.57i).

HB 5760 (Hoskins) Housing: landlord and tenants; form containing summary of tenant's rights; require the authority to make available to the public. Amends 1966 PA 346 (MCL 125.1401 - 125.1499c) by adding sec. 22e.

Status: 05/30/24 Referred to House Committee on Economic Development & Small Business.
Referrals: 06/03/24 Access to Justice Policy Committee, Civil Procedure & Courts Committee.
Comments: Access to Justice Policy Committee.
Liaison: Aaron V. Burrell

3. HB 5788 (Hope) Civil procedure: civil actions; lawsuits for exercising rights to free expression; provide protections against. Creates new act.

Status: 06/18/24 Reported out of House Committee on Criminal Justice without amendment.
Referrals: 06/11/24 Access to Justice Policy Committee, Civil Procedure & Courts Committee.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee. Comments provided to the June 11, 2024 House Committee on Criminal Justice are included in the materials.
Liaison: Suzanne C. Larsen

4. SB 810 (Shink) Civil procedure: personal protection orders; expiration date; prescribe. Amends sec. 2950 of 1961 PA 236 (MCL 600.2950).

Status: 04/09/24 Referred to Senate Committee on Civil Rights, Judiciary & Public Safety.
Referrals: 06/03/24 Access to Justice Policy Committee, Civil Procedure & Courts Committee; Children's Law Section, Family Law Section.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison: Lori A. Buiteweg

5. SB 914 (Shink) Criminal procedure: other; certain requirements for the use of informants in criminal proceedings; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 36a, 36b, 36c, 36d, 36e, 36f & 36g to ch. VIII.

Status:	06/12/24 Referred to Senate Committee on Civil Rights, Judiciary & Public Safety.
Referrals:	06/17/24 Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Valerie R. Newman

6. SB 916 (Santana) Criminal procedure: mental capacity; outpatient treatment for misdemeanor offenders with mental health issues; provide for. Amends sec. 461 of 1974 PA 258 (MCL 330.1461) & adds sec. 1021 & ch. 10A.

HB 4746 (Steele) Criminal procedure: mental capacity; outpatient treatment for misdemeanor offenders with mental health issues; provide for. Amends sec. 461 of 1974 PA 258 (MCL 330.1461) & adds sec. 1021 & ch. 10A.

Status:	SB 916 – 06/12/24 Referred to Senate Committee on Health Policy. HB 4746 – 06/14/23 Referred to House Committee on Health Policy
Referrals:	06/17/24 Access to Justice Policy Committee, Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee (HB 4746)
Liaison:	Valerie R. Newman

7. SB 936 (Irwin) Courts: reporters or recorders; prohibited conduct of court reporter, court recorder, stenomask reporter, or owner of firm; modify. Amends sec. 1491 of 1961 PA 236 (MCL 600.1491).

Status:	06/20/24 Referred to Senate Committee on Civil Rights, Judiciary & Public Safety.
Referrals:	06/24/24 Access to Justice Policy Committee, Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Danielle Walton

D. Consent Agenda

To allow the Criminal Jurisprudence & Practice Committee and Criminal Law Section to submit their positions on each of the following items:

1. M Crim JI 5.14a

The Committee proposes a new instruction, M Crim JI 5.14a (screening of witness) where the court has permitted a witness to be screened from viewing the defendant at trial. The instruction is entirely new.

2. M Crim JI 7.6

The Committee proposes amending jury instruction M Crim JI 7.6 (Duress) to comport with discussions of the defense in *People v Reichard*, 505 Mich 81, 96 n 32 (2020), and *People v Lemons* 454 Mich 234, 248 n 21 (1997). A question remains which party bears the burden of proof relative to the defense of duress, so alternative paragraphs are provided. Deletions are in ~~strike-through~~, and new language is underlined. A "clean copy" without the struck language but including the added language is also provided (without the Use Note).

MINUTES
Public Policy Committee
June 12, 2024 – 12 p.m. to 1:30 p.m.

Committee Members: Joe McGill, Lori Buiteweg, Aaron Burrell, Suzanne Larsen, Joshua Lerner, Thomas Murray, Valerie Newman, Takura Nyamfukudza, John Reiser, Danielle Walton
SBM Staff: Peter Cunningham, Nathan Triplett, Janna Sheppard, Carrie Sharlow
GCSI: Marcia Hune

A. Reports

1. Approval of April 17, 2024 minutes – The minutes were unanimously adopted.
2. Public Policy Report – Nathan Triplett provided a verbal update.

B. Court Rule Amendments

1. ADM File No. 2024-05: Proposed Amendment of MCR 7.306

The proposed amendment of MCR 7.306 would establish a procedure for two new original actions in the Supreme Court related to presidential elections in conformity with MCL 168.46 (as amended by 2023 PA 269) and MCL 168.845a (as adopted by 2023 PA 255).
The following entities offered recommendations for consideration: Civil Procedure & Courts Committee.
The committee voted unanimously (10) to support the proposed amendment of MCR 7.306.

2. ADM File No. 2022-10: Proposed Alternative Amendments of MCR 8.126

The proposed alternative amendments of MCR 8.126 would clarify and streamline the process for pro hac vice admission to practice in Michigan courts. A summary of the differences between the two alternatives is provided in the staff comment.
The following entities offered recommendations for consideration: Civil Procedure & Courts Committee.
The committee voted unanimously (10) to support the Alternative B proposed amendment of MCR 8.126 and to urge the Court to consider the concerns raised by the ADR Section.

C. Legislation

1. HB 4427 (Young) Civil rights: public records; limited access to public records; provide for incarcerated individuals. Amends secs. 1, 2, 3 & 5 of 1976 PA 442 (MCL 15.231 et seq.).
The following entities offered recommendations for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The committee voted unanimously (10) that the legislation is *Keller* permissible in affecting the availability of legal services to society.
The committee voted unanimously to support HB 4427.

2. Jury Legislation

HB 5689 (O'Neal) Courts: juries; local jury boards; eliminate, and create a centralized jury process. Amends secs. 857, 1301a, 1304a, 1307a, 1326, 1332, 1334, 1343, 1344, 1345, 1346, 1371 & 1372 of 1961 PA 236 (MCL 600.857 et seq.); adds secs. 1306 & 1307 & repeals secs. 1301, 1301b, 1302, 1303, 1303a, 1304, 1305, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1327, 1328, 1330, 1331, 1338, 1339, 1341, 1342, 1353, 1375 & 1376 of 1961 PA 236 (MCL 600.1301 et seq.) & repeals 1929 PA 288 (MCL 730.251 - 730.271) & repeals 1951 PA 179 (MCL 730.401 - 730.419).
HB 5690 (Hope) Courts: juries; reference in the uniform condemnation procedures act; amend to reflect repeal. Amends sec. 12 of 1980 PA 87 (MCL 213.62).
HB 5691 (Tsernoglou) Courts: juries; prospective jurors with certain criminal records and protected statuses; amend eligibility for service and peremptory challenges. Amends sec. 1307a of 1961 PA 236 (MCL 600.1307a) & adds secs. 1307b & 1356.

HB 5692 (Wilson) Appropriations: supplemental; funding for jury selection program; provide for. Creates appropriation act.
HB 5693 (Young) Courts: juries; reference in the probate code; amend to reflect repeal. Amends sec. 17, ch. XIIA of 1939 PA 288 (MCL 712A.17).
The following entities offered recommendations for consideration: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The committee voted unanimously (10) that the legislation is *Keller* permissible in affecting the functioning of the courts.
The committee voted unanimously (10) to support HB 5689, 5690, 5692 and 5693.

The committee voted 6-4 to support HB 5691.

3. SB 723 (Santana) Criminal procedure: mental capacity; evaluation of competency to waive Miranda rights; require. Amends 1974 PA 258 (MCL 330.1101 - 330.2106) by adding secs. 1080, 1081, 1082 & 1083.
The following entities offered recommendations for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee voted unanimously (10) that the legislation is *Keller* permissible in affecting the functioning of the courts.
The committee voted unanimously to support SB 723 with the following amendments

> **First, that the statute should track the procedure in MCL 768.20a(3): The defendant may, at his or her own expense, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. If the defendant is indigent, the court may, upon showing of good cause, order that the county pay for an independent psychiatric evaluation. The defendant shall notify the prosecuting attorney at least 5 days before the day scheduled for the independent evaluation that he or she intends to secure such an evaluation. The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant is entitled to receive a reasonable fee as approved by the court.**
>
> **Second, there should be a penalty when a defendant declines to participate in the examination consistent with MCL 768.20a(4): The defendant shall fully cooperate in his or her examination by personnel of the center for forensic psychiatry or by other qualified personnel, and by any other independent examiners for the defense and prosecution. If he or she fails to cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant shall be barred from presenting testimony relating to his or her insanity at the trial of the case.**
>
> **Finally, a third amendment to strike the presumption of competency.**

4. SB 813 (Cherry) Criminal procedure: evidence; consideration of videorecorded statements in certain proceedings; allow. Amends sec. 2163a of 1961 PA 236 (MCL 600.2163a).
The following entities offered recommendations for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The committee voted unanimously (10) that the legislation is *Keller* permissible in affecting the functioning of the courts.
The committee voted 9-1 to oppose SB 813.

July 1, 2024

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2024-05: Proposed Amendment of Rule 7.306 of the Michigan Court Rules

Dear Clerk Royster:

At its most recent meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2024-05. In its review, the Board considered a recommendation from the Civil Procedure & Courts Committee.

Recognizing the need to conform the Court Rules to existing statute and to provide clarity to the unique procedures applicable to these original actions in advance of the next presidential election, the Board voted unanimously to support the proposed amendment of Rule 7.306.

Thank you for the opportunity to comment on the proposed amendment.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Daniel D. Quick, President

July 1, 2024

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2022-10: Proposed Alternative Amendments of Rule 8.126 of the Michigan Court Rules

Dear Clerk Royster:

At its most recent meeting, the Board of Commissioners of the State Bar of Michigan ("SBM") considered ADM File No. 2022-10 and voted unanimously to support the amendments to Rule 8.126 as set forth in Alternative B, with an additional amendment to include language from (B)(1) of Alternative A, regarding a tribunal's discretion to grant *pro hac vice* ("PHV") admissions.[1]

SBM initially proposed amendments to Rule 8.126 in February 2022 to help improve the effectiveness of the PHV admission process for both the bench and bar, and to clarify rule language based on inquiries the Bar frequently receives from attorneys seeking temporary admission. The proposal was based on feedback gathered from the Bar's Access to Justice Policy Committee, Civil Procedure & Courts Committee, and Appellate Practice Section, as well as Michigan Defense Trial Council and the Michigan Judges Association.

Both proposed alternatives incorporate several of SBM's initial suggestions, such as requiring foreign attorneys to provide notification if they are no longer in good standing in any jurisdiction and clarifying the definition of "case" for PHV admission purposes. However, only Alternative B includes one of the Bar's most important proposals: eliminating the five-case PHV admission limit for foreign attorneys employed by legal services programs and law school clinics providing services to indigent clients. This change is crucial to addressing the documented, significant need for legal aid[2] and aligns with the Court's Justice For All Commission's goal of ensuring 100% access to Michigan's civil justice system.

Additionally, the Bar's initial proposal recommended including facilitators and mediators within the definition of a tribunal for the purpose of PHV admissions, and we continue to believe that it is important for the Court to clarify the application of Rule 8.126 in these alternative dispute resolution contexts. The Board also took note of the concerns submitted by the Alternative Dispute Resolution Section and urges the Court to consider these carefully.

[1] "Permission for a foreign attorney to appear and practice is within the discretion of the tribunal."
[2] Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans* <https://justicegap.lsc.gov> (accessed June 28, 2024).

Thank you for publishing these proposed amendments and for the opportunity to comment.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Daniel D. Quick, President

Order

Michigan Supreme Court
Lansing, Michigan

June 18, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2022-38

Proposed Amendments of Rules
2.625, 7.115, 7.219 and 7.319
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.625, 7.115, 7.219 and 7.319 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 each public hearing are posted on the Public Administrative Hearings 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 2.625 Taxation of Costs

(A)-(F) [Unchanged.]

(G) Stay of Collecting Taxed Costs. The court or the clerk must stay the enforcement of an award taxing costs to a prevailing party under subrule (F) until expiration of the time for filing an appeal in the appropriate appellate court, or if an appeal is filed, while a claim of appeal or application for leave to appeal in the appropriate appellate court is pending.

(G)-(K) [Relettered (H)-(L) but otherwise unchanged.]

Rule 7.115 Taxation of Costs, Fees

(A)-(D) [Unchanged.]

(E) Stay of Collecting Taxed Costs. The clerk must stay the enforcement of an award taxing costs until expiration of the time for filing an appeal in the appropriate appellate court, or if an appeal is filed, while a claim of appeal or application for leave to appeal in the Court of Appeals is pending.

(E) [Relettered as (F) but otherwise unchanged.]

(GF) Taxable Costs and Fees. Except as otherwise provided by law or court rule, aA prevailing party may tax only the reasonable costs and fees incurred in the appeal, including:

(1)-(6) [Unchanged.]

(7) the additional costs incurred when a party to an appeal under the Administrative Procedures Act unreasonably refused to stipulate to shortening the record as provided in MCL 24.304(2); and

(8) costs awarded in the court below as permitted by MCL 600.2445(4); and

(8) [Renumbered as (9) but otherwise unchanged.]

Rule 7.219 Taxation of Costs; Fees

(A) [Unchanged.]

(B) Time for Filing. Within 4228 days after the dispositive order, opinion, or order denying reconsideration is mailed, the prevailing party may file a certified or verified bill of costs with the Court of Appeals clerk and serve a copy on all other parties. If the Supreme Court reverses the decision of the Court of Appeals, then within 28 days of the Supreme Court decision, the new prevailing party may file a certified or verified bill of costs with the Court of Appeals clerk and serve a copy on all other parties. Each item claimed in the bill must be specified. Failure to file a bill of costs within the time prescribed waives the right to costs.

(C)-(D) [Unchanged.]

(E) Stay of Collecting Taxed Costs. The clerk must stay the enforcement of an award taxing costs until expiration of the time for filing an appeal an application for leave to appeal in the Supreme Court, and if an appeal is filed, while an application in the Supreme Court is pending.

(E) [Relettered as (F) but otherwise unchanged.]

(GF) Costs Taxable. Except as otherwise provided by law or court rule, aA prevailing party may tax only the reasonable costs and fees incurred in the Court of Appeals, including:

(1)-(5) [Unchanged.]

(6) taxable costs allowed by law in appeals to the Supreme Court (MCL 600.2441); ~~and~~

(7) costs awarded in the court below as permitted by MCL 600.2445(4); and

(8~~7~~) other expenses taxable under applicable court rules or statutes.

(G)-(I) [Relettered as (H)-(J) but otherwise unchanged.]

Rule 7.319 Taxation of Costs; Fees

(A) Rules Applicable. Unless this rule provides a different procedure, t~~T~~he procedure for taxation of costs in the Supreme Court is as provided in MCR 7.219.

(B) [Unchanged.]

(C) Taxation and Stay. The clerk will promptly verify the bill and tax those costs allowable. If the Supreme Court retains jurisdiction in a case, the clerk must stay the enforcement of an award taxing costs until the Supreme Court no longer has jurisdiction over the case.

(C)-(D) [Relettered as (D)-(E) but otherwise unchanged.]

Staff Comment (ADM File No. 2022-38): The proposed amendments of MCR 2.625, 7.115, 7.219 and 7.319 would: (1) require courts to stay enforcement of taxed costs while an appeal is pending or until time for filing an appeal has passed, (2) align the timeframe for filing a bill of costs in the Court of Appeals with the timeframe for filing an application for leave to appeal, (3) incorporate into MCR 7.219 the Court of Appeals internal operating procedure 7.219(B) that allows, upon reversal of a Court of Appeals decision, the new prevailing party to file a new bill of costs in the Court of Appeals, and (4) include in the lists of taxable costs those costs awarded in the lower court in accordance with MCL 600.2445(4).

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 submitted by October 1, 2024 by clicking on the

"Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2022-38. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

June 18, 2024

Clerk

Public Policy Position
ADM File No. 2022-38: Proposed Amendments of MCR 2.625, 7.115, 7.219, and 7.319

Support

Explanation
The Committee voted unanimously to support the amendments to the Court Rules in ADM File No. 2022-38. The Committee believes that the amendments bring greater clarity to the procedures governing taxation of costs, especially the treatment of costs at issue in matters where a direct appeal is pending or could still be filed under the Rules.

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

Contact Person:
Marla Linderman Richelew lindermanrichelewm@michigan.gov

Order

Michigan Supreme Court
Lansing, Michigan

April 11, 2024

ADM File No. 2022-46

Proposed Amendment of
Rule 3.305 of the Michigan
Court Rules

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.305 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 each public hearing are posted on the Public Administrative Hearings 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 3.305 Mandamus

(A) Jurisdiction.

(1) Unless the constitution, a statute, or court rule requires a~~A~~n action for mandamus against a state officer to be brought in the Supreme Court, the action must~~may~~ be brought in the Court of Appeals or the Court of Claims.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

Staff Comment (ADM File No. 2022-46): The proposed amendment of MCR 3.305 would clarify where to file a mandamus action.

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 submitted by August 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-46. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

April 11, 2024

Clerk

Public Policy Position
ADM File No. 2022-46: Proposed Amendment of MCR 3.305

Support with Amendment

Explanation

The Committee voted unanimously to support the proposed amendment of MCR 3.305 with an amendment striking "must" and maintaining "may," as in the existing rule. The proposed amendment is based upon the language of MCL 600.4401(1), which states that: "An action for mandamus against a state officer shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham County, at the option of the party commencing the action."[1]

Position Vote:

Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 12

Contact Person:

Marla Linderman Richelew lindermanlaw@sbcglobal.net

[1] However, MCL 600.6419 provides, in pertinent part, that "the jurisdiction of the court of claims . . . is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals." It also provides that the court of claims has the power and jurisdiction to "[t]o hear and determine any . . . demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."

Order

Michigan Supreme Court
Lansing, Michigan

June 18, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2024-06

Proposed Amendment of
Rule 3.306 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.306 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 each public hearing are posted on the Public Administrative Hearings 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 3.306 Quo Warranto

(A) [Unchanged.]

(B) Parties.

(1)-(2) [Unchanged.]

(3) Application to Attorney General.

(a) [Unchanged.]

(b) If, on proper application and offer of security, the Attorney General refuses to bring the action, the person may apply to the appropriate court for leave to bring the action himself or herself. The court must not grant leave under this subrule if the action relates to the offices of electors of President and Vice President of the United States.

(C)-(E) [Unchanged.]

Staff Comment (ADM File No. 2024-06): In accordance with MCL 600.4501(2), the proposed amendment of MCR 3.306(B)(3)(b) would prohibit a court from granting leave to a private individual who is bringing a quo warranto action that relates to the offices of electors of President and Vice President of the United States.

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 submitted by October 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2024-06. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

June 18, 2024

Clerk

Public Policy Position
ADM File No. 2024-06: Proposed Amendment of MCR 3.306

Support

Explanation
The Committee voted to support the proposed amendment of MCR 3.306 to align the Court Rules with statutory amendments to Sec. 4501 of the Revised Judicature Act, 1961 PA 236, which became effective February 13, 2024.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 8

Contact Person:
Marla Linderman Richelew lindermanrichelewm@michigan.gov

Order

Michigan Supreme Court
Lansing, Michigan

April 11, 2024

ADM File No. 2021-05

Proposed Amendment
of Rule 6.302 of the
Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 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 each public hearing are posted on the Public Administrative Hearings 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)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the court engages in a preliminary evaluation of the sentence to be imposed, the court must:

(a) state that any sentencing range discussed at the plea hearing is a preliminary estimate and that the final sentencing range determined by the court may differ,

(b) advise the defendant whether they will be permitted to withdraw their plea if the preliminary estimate completed at the time of the evaluation is different than the final sentencing range determined by the court at sentencing, and

(c) include in the evaluation a numerically quantifiable sentence term or range. A quantifiable sentence range includes language such as "lower/upper half" or "lower/upper quarter."

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

(E)-(F) [Unchanged.]

Staff Comment (ADM File No. 2021-05): The proposed amendment of MCR 6.302 would require a court that has engaged in a preliminary evaluation of the sentence to inform the defendant that the final sentencing range may differ from the original estimate, and if different, advise the defendant about whether they would be permitted to withdraw their plea, and include in the evaluation a numerically quantifiable sentence term or range.

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 submitted by August 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

April 11, 2024

Clerk

Public Policy Position
ADM File No. 2021-05: Proposed Amendment of MCR 6.302

Support

Explanation
The Committee voted unanimously (15) to support the proposed amendment of Rule 6.302.

Administrative Order 2021-05 amends Rules 6.302 to retain all of its current language and to add additional requirements to subsection (D) regarding an "accurate" plea. Specifically, AO 2021-05 provides that if a court engages in a preliminary evaluation of the sentence to be imposed in a case, then the court must: (a) specify that the sentencing range discussed at the plea hearing is a preliminary estimate and that the final sentencing range imposed may differ; (b) advise the defendant whether they may withdraw their plea if the preliminary estimate is different than the final sentencing range; and (c) include a numerically quantifiable sentence term or range in the evaluation.

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

Contact Persons:
Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2021-05: Proposed Amendment of MCR 6.302

Support

Explanation:
The Committee voted unanimously (18) to support the proposed amendment of Rule 6.302.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

Public Policy Position
ADM File No. 2021-05: Proposed Amendment of MCR 6.302

Support

Position Vote:
Voted for position: 13
Voted against position: 0
Abstained from vote: 1
Did not vote: 0

Contact Person: Edwar Zeineh
Email: edwar@zeinehlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

April 11, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2022-25

Proposed Amendment of
Rule 7.103 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.103 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 each public hearing are posted on the Public Administrative Hearings 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 7.103 Appellate Jurisdiction of the Circuit Court and Judicial Authority

(A)-(B) [Unchanged.]

(C) In courts with a concurrent jurisdiction plan, an appeal under this subchapter must be heard by a judge other than the judge that conducted the trial.

Staff Comment (ADM File No. 2022-25): The proposed amendment of MCR 7.103 would require that an appeal to circuit court be heard by a judge other than the judge that conducted the trial.

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 submitted by August 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-25. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

April 11, 2024

Clerk

Public Policy Position
ADM File No. 2022-25: Proposed Amendment of MCR 7.103

Support

Explanation

The Committee voted unanimously (15) to support the proposed amendment of Rule 7.103. The necessity of a rule requiring that an appeal to circuit court be heard by a judge other than the judge that conducted the trial seems glaringly self-evident. Many members of the Committee were surprised to discover that this practice occurs in some regions of the state today. Even in circumstances where judicial resources are limited, fundamental principles of fairness and due process demand that a judge not sit in review of their own prior actions/decisions.

Position Vote:

Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

Contact Persons:

Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2022-25: Proposed Amendment of MCR 7.103

Support

Explanation:
The Committee voted unanimously (18) to support the proposed amendment of Rule 7.103

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

Public Policy Position
ADM File No. 2022-25: Proposed Amendment of MCR 7.103

Support with Amendment

Explanation
The Committee voted unanimously to support the proposed amendment of MCR 8.126 with an amendment striking "conducted the trial" and replacing that language with "presided below or decided the issue appealed."

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 12

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
ADM File No. 2022-25: Proposed Amendment of MCR 7.103

Support

Position Vote:
Voted for position: 13
Voted against position: 0
Abstained from vote: 1
Did not vote: 0

Contact Person: Edwar Zeineh
Email: edwar@zeinehlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

April 17, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2022-12

Proposed Amendment of
Rule 7.118 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.118 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 each public hearing are posted on the Public Administrative Hearings 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 7.118 Appeals from the Michigan Parole Board

(A)-(B) [Unchanged.]

(C) Access to Reports and Guidelines. Upon request, the prosecutor, the victim, counsel for the prisoner, and the prisoner shall receive the parole eligibility report, any prior parole eligibility reports that are mentioned in the parole board's decision, and any parole guidelines that support the action taken.

(D)-(E) [Unchanged.]

(F) Record on Appeal. The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.

(1) Within 14 days of being served with a prosecutor's application for leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties.

(2) In all other appeals, within 14 days after being served with an order granting

leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties.

(3) The confidential portion of the parole board file, including victim information, shall be filed under seal and made available only to counsel for the parties and the court. The parole board shall provide a prisoner who is responding in propria persona with a copy of the confidential portion of the parole board file with any victim contact information redacted. The confidential portion of the parole board file shall not be otherwise distributed.

(4) Any of the prisoner's medical, psychological, and treatment records that are part of the record on appeal shall be filed under seal and shall be made available only to counsel for the parties, a prisoner who is responding in propria persona, and the court. The prisoner's medical, psychological, and treatment records shall not be otherwise distributed.

(5) In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.

(F)-(G) [Relettered (G)-(H) but otherwise unchanged.]

(I~~H~~) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(E)(4) applies along with the following:

~~(1) Record on Appeal.~~

~~(a) The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.~~

~~(b) Within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties. In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.~~

~~(c) The expense of preparing and serving the record on appeal may be taxed as costs to a nonprevailing appellant, except that expenses may not be taxed to an indigent party.~~

(2)-(4) [Renumbered (1)-(3) but otherwise unchanged.]

(I)-(J) [Relettered (J)-(K) but otherwise unchanged.]

Staff Comment (ADM File No. 2022-12): The proposed amendment of MCR 7.118 would allow the prisoner's attorney access to the parole eligibility report(s) and guidelines, require MDOC to provide the record on appeal within 14 days of being served with a prosecutor's application for leave to appeal the parole board's decision, require in all other appeals that MDOC provide the record on appeal within 14 days of the court granting the application for leave to appeal, and require confidential portions of the record to be filed under seal with access limited to certain people.

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 submitted by August 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-12. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

April 17, 2024

Clerk

Public Policy Position
ADM File No. 2022-12: Proposed Amendment of MCR 7.118

Support

Explanation

The Committee voted unanimously (15) to support the proposed amendment of Rule 7.118. The Committee believes that the proposed amendment will provide necessary clarity and consistency to the rules governing appeals from decisions made by the Michigan Parole Board.

Position Vote:

Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

Contact Persons:

Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2022-12: Proposed Amendment of MCR 7.118

Support

Explanation:
The Committee voted unanimously (17) to support the proposed amendment of Rule 7.118.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 7

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

Public Policy Position
ADM File No. 2022-12: Proposed Amendment of MCR 7.118

Support

Position Vote:
Voted for position: 12
Voted against position: 0
Abstained from vote: 1
Did not vote: 1

Contact Person: Edwar Zeineh
Email: edwar@zeinehlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

June 26, 2024

ADM File No. 2022-56

Proposed Amendment of Rule 3.7 of the Michigan Rules of Professional Conduct

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.7 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 will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings 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 3.7. Lawyer as Witness

(a)-(b) [Unchanged.]

(c) Nothing in this rule prohibits a lawyer from appearing as attorney of record in a case in which the lawyer is a party and is representing themselves.

[Official comment unchanged.]

Staff Comment (ADM File No. 2022-56): The proposed amendment of MRPC 3.7 would clarify that in accordance with Const 1963, art 1, § 13, a lawyer can appear in pro per.

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 submitted by October 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-56. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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.

June 26, 2024

Clerk

Public Policy Position
ADM File No. 2022-56: Proposed Amendment of MRPC 3.7

Support

Explanation
The Committee voted unanimously to support ADM File No. 2022-56 as drafted.

The proposed amendment clarifies that Michigan Rule of Professional Conduct 3.7, which limits the circumstances in which a lawyer can be a witness, does not preclude a lawyer from representing themselves. The Michigan Constitution provides that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." Const 1963, art 1, § 13. As the Staff comment to the proposed amendment explains, the amendment would clarify that a lawyer can appear in pro per like any other suitor in a Michigan court.

The proposed amendment also closes a loophole some lawyers currently use to represent themselves: hiring another lawyer in their law firm to be the attorney of record while handling the matter behind the scenes themselves. Under the proposed amendment, the lawyer could unquestionably serve as the attorney of record in their own case.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

Contact Persons:
Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
ADM File No. 2022-56: Proposed Amendment of MRPC 3.7

Support

Explanation
The Committee voted to support the proposed amendment of MRPC 3.7.

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

Contact Person:
Marla Linderman Richelew lindermanrichelewm@michigan.gov

July 1, 2024

ADMcomment@courts.mi.gov
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

RE: ADM 2022-56, MRPC 3.7 amendment (Lawyer as Witness)
Order issued June 26, 2024

Dear Chief Justice Clement and Justices:

My written comment takes no position on the proposed amendment to add subparagraph (c) to Michigan Rule of Professional Conduct 3.7 clarifying that "Nothing in this rule prohibits a lawyer from appearing as attorney of record in a case in which the lawyer is a party and is representing themselves."

If the proposal is adopted, I encourage the Supreme Court to adopt a similar clarifying provision for the Michigan Code of Judicial Conduct Canon 2(D), which is now framed as:

> D. A judge should not appear as a witness in a court proceeding unless subpoenaed.

I share this consideration because some judicial officers self-represent in matters originating with the Judicial Tenure Commission (JTC). The ongoing proceedings in FC 106 (Docket 165115) is one example. This can especially become necessary when a judicial officer does not carry professional liability insurance that would provide counsel or cannot hire counsel. See FC 106, October 5, 2023 filing to the JTC [https://perma.cc/CVE8-PNCY], and June 14, 2024 filing to the JTC [https://perma.cc/GXC6-8SLG].

Continued thanks to the Court for considering the public's comments.

Sincerely,
Lori Shemka
P.O. Box 15284
Lansing, Michigan 48901
shemka@gmail.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: HB 5749 – Law Enforcement Disciplinary Personnel Records

Background

HB 5749 would amend the Freedom of Information Act ("FOIA"), 1976 PA 442, to permit access to certain law enforcement disciplinary records. Proponents of this legislation believe that such access is essential to litigants' ability to bring civil actions against law enforcement officers or departments that have violated their rights or otherwise injured them. They argue that lack of access to these records makes it nearly impossible for a plaintiff to plead a cause of action sufficient to survive a motion to dismiss, effectively closing the courthouse door to those seeking redress from law enforcement defendants.

HB 5749 makes several amendments to Section 13 of FOIA, which delineates public records that are exempt from disclosure. For example, "[i]nformation of a personal nature if disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy"—MCL 15.243(1)—would be amended to specify that "the release of law enforcement disciplinary records is not an unwarranted invasion of an individual's privacy." Records related to the medical history of a law enforcement officer or use of an employee assistance program, mental health service, or substance abuse assistance service by a law enforcement officer or agent would be exempt from disclosure, unless the public interest in disclosure outweighed the public interest in nondisclosure. Use of a program or service mandated by a disciplinary proceeding would not be exempt.

The bill sets forth detailed definitions of what constitutes "law enforcement disciplinary records" and a "disciplinary proceeding."

HB 5749 was introduced by Representative Tyrone Carter—a former law enforcement officer—and referred to the House Criminal Justice Committee. The bill was part of a larger law enforcement accountability bill package, but only HB 5749 was referred to sections and committees by staff as *Keller*-permissible.

***Keller* Considerations**

On two prior occasions this legislative session, the Board of Commissioners has taken a position in support of legislation amending the Freedom of Information Act, 1976 PA 442, when the proposed amendments were necessary to facilitate a litigant's access to the court system. SB 73 exempted public records that would reveal the identity of parties proceeding anonymously in civil actions alleging sexual misconduct from disclosure. HB 4427 provided incarcerated individuals with limited access to public records related to themselves and their minor children. In both cases, the Board reasoned that the FOIA amendments were reasonably related to the availability of legal services, because without them a class a litigants would have great difficulty accessing the courts and pressing their claims. Similarly, HB 5749 would amend FOIA to give a class of litigants access to public records essential to their

ability to bring civil actions against law enforcement officers or departments that have violated their rights or otherwise injured them. While other stakeholders will likely have differing rationales for supporting (or opposing) HB 5749, the Bar's interest is limited to the legislation's impact on facilitating individuals' ability to access legal services.

The two SBM committees that reviewed HB 5749 reached differing conclusions on the question of *Keller*-permissibility. The Access to Justice Policy Committee found the bill to be reasonably related to the availability of legal services and therefore *Keller*-permissible. By a vote of 11-10, the Civil Procedure & Courts Committee disagreed and instead believed that the bill's connection to the availability of legal services was too attenuated to satisfy *Keller*'s germaneness test. Because the *Keller* question was decided by a single vote, Civil Procedure & Courts also considered the substance of HB 5749 in the event that the Board of Commissioners found the bill to be *Keller*-permissible. On the substance of the legislation, both committees recommended that the Board support the bill.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	**Improvement in Quality of Legal Services**
Regulation and discipline of attorneys	Improvement in functioning of the courts
Ethics	✓ Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

As with other recent legislation amending FOIA to facilitate individuals' efforts to press their legal claims, HB 5749 is reasonably related to the availability of legal services and therefore *Keller*-permissible. The bill may be considered on its merits.

HOUSE BILL NO. 5749

May 30, 2024, Introduced by Reps. Tyrone Carter, Hoskins, Brabec, Wilson, Young, Grant, Dievendorf, Pohutsky, MacDonell, Wegela, Brixie, Liberati, Tsernoglou, Haadsma, Roth, Farhat, Hope, Scott, Snyder and Aiyash and referred to the Committee on Criminal Justice.

A bill to amend 1976 PA 442, entitled

"Freedom of information act,"

by amending section 13 (MCL 15.243), as amended by 2021 PA 33.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 13. (1) A public body may exempt from disclosure as a public record under this act any of the following:

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. **For the purpose of the exemption under this subdivision, the release of law enforcement disciplinary records is not an unwarranted invasion of an individual's privacy.**

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

(*i*) Interfere with law enforcement proceedings.

(*ii*) Deprive a person of the right to a fair trial or impartial administrative adjudication.

(*iii*) Constitute an unwarranted invasion of personal privacy.

(*iv*) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

(*v*) Disclose law enforcement investigative techniques or procedures.

(*vi*) Endanger the life or physical safety of law enforcement personnel.

(c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(d) Records or information specifically described and exempted from disclosure by statute.

(e) A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record

remain applicable.

(f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

(*i*) The information is submitted upon a promise of confidentiality by the public body.

(*ii*) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(*iii*) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

(g) Information or records subject to the attorney-client privilege.

(h) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.

(i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.

(j) Appraisals of real property to be acquired by the public body until either of the following occurs:

(*i*) An agreement is entered into.

(*ii*) Three years have elapsed since the making of the

appraisal, unless litigation relative to the acquisition has not yet terminated.

(k) Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(*l*) Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information, as defined in 45 CFR 160.103.

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.

(n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act

outweighs the public interest in nondisclosure in the particular instance.

(o) Information that would reveal the exact location of archaeological sites. The department of natural resources may promulgate rules in accordance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to provide for the disclosure of the location of archaeological sites for purposes relating to the preservation or scientific examination of sites.

(p) Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes the testing.

(q) Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.

(r) Records of a campaign committee including a committee that receives money from a state campaign fund.

(s) ~~Unless~~ **Only if** the public interest in ~~disclosure~~ **nondisclosure** outweighs the public interest in ~~nondisclosure~~ **disclosure** in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

(*i*) Identify or provide a means of identifying an informant.

(*ii*) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer

as a law enforcement officer or agent.

(*iii*) Disclose the **Social Security number,** personal **or email** address, or telephone **or cellular phone** number of active or retired law enforcement officers or agents or a special skill that they may have.

(*iv*) Disclose the name, **Social Security number, personal or email** address, or telephone **or cellular phone** numbers of family members, relatives, children, or parents of active or retired law enforcement officers or agents.

(*v*) Disclose operational instructions for law enforcement officers or agents.

(*vi*) Reveal the contents of staff manuals provided for law enforcement officers or agents.

(*vii*) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

(*viii*) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.

(*ix*) Disclose ~~personnel records of law enforcement agencies.~~**records of either of the following:**

(A) The medical history of a law enforcement officer or agent.

(B) The use of an employee assistance program, mental health service, or substance abuse assistance service by a law enforcement officer or agent, unless the use of the program or service is mandated by a disciplinary proceeding the records of which are not exempt under this section.

(*x*) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.

(t) Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, before a complaint is issued. This subdivision does not apply to records or information pertaining to 1 or more of the following:

(*i*) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.

(*ii*) The fact that an allegation was received by the department; the fact that the department did not issue a complaint for the allegation; and the fact that the allegation was dismissed.

(u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

(v) Records or information relating to a civil action in which the requesting party and the public body are parties.

(w) Information or records that would disclose the Social Security number of an individual.

(x) Except as otherwise provided in this subdivision, an application for the position of president of an institution of higher education established under section 4, 5, or 6 of article VIII of the state constitution of 1963, materials submitted with such an application, letters of recommendation or references concerning an applicant, and records or information relating to the process of searching for and selecting an individual for a position described in this subdivision, if the records or information could be used to identify a candidate for the position. However, after 1

or more individuals have been identified as finalists for a position described in this subdivision, this subdivision does not apply to a public record described in this subdivision, except a letter of recommendation or reference, to the extent that the public record relates to an individual identified as a finalist for the position.

(y) Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and cybersecurity plans, assessments, or vulnerabilities, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

(z) Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software.

(aa) Research data on road and attendant infrastructure

collected, measured, recorded, processed, or disseminated by a public agency or private entity, or information about software or hardware created or used by the private entity for such purposes.

(bb) Records or information that would reveal the specific location or GPS coordinates of game, including, but not limited to, records or information of the specific location or GPS coordinates of game obtained by the department of natural resources during any restoration, management, or research project conducted under section 40501 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.40501, or in connection with the expenditure of money under section 43553 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.43553. As used in this subdivision, "game" means that term as defined in section 40103 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.40103.

(2) A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection is not used, rented, or sold for the purpose of

surveys, marketing, or solicitation. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this subsection will not be used, rented, or sold for the purpose of surveys, marketing, or solicitation.

(3) This act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(4) Except as otherwise exempt under subsection (1), this act does not authorize the withholding of a public record in the possession of the executive office of the governor or lieutenant governor, or an employee of either executive office, if the public record is transferred to the executive office of the governor or lieutenant governor, or an employee of either executive office, after a request for the public record has been received by a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government that is subject to this act.

(5) As used in this section:

(a) "Disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or other proceeding conducted by the Michigan commission on law enforcement standards or any state or local law enforcement agency, department, independent review board, or other entity tasked with evaluating any complaint, allegation, or charge against a law enforcement officer or agent.

(b) "Law enforcement agency" means a public body that employs 1 or more law enforcement officers or agents.

(c) "Law enforcement disciplinary records" means all records created in furtherance of a disciplinary proceeding conducted by the Michigan commission on law enforcement standards or any state or local law enforcement agency, department, independent review board, or other entity tasked with evaluating any complaint, allegation, or charge against a law enforcement officer or agent, other than a complaint, allegation, or charge of a technical infraction, including, but not limited to, all of the following records and information:

(*i*) Records of any complaint, allegation, or charge against a law enforcement officer or agent.

(*ii*) The name of any law enforcement officer or agent against whom a complaint, allegation, or charge has been made.

(*iii*) All records, documents, and files, in whatever form, related to the investigation, adjudication, or disposition of any complaint, allegation, or charge against a law enforcement officer or agent.

(*iv*) The transcript of any disciplinary proceeding, including any exhibits introduced at the proceeding, regarding any complaint, allegation, or charge against a law enforcement officer or agent.

(*v*) Any finding by the Michigan commission on law enforcement standards or any state or local law enforcement agency, department, independent review board, or other entity tasked with evaluating any complaint, allegation, or charge against a law enforcement officer or agent during a disciplinary proceeding.

(*vi*) Any final written opinion or memorandum supporting the disposition and disciplinary action imposed, or the decision not to

impose disciplinary action, on a law enforcement officer or agent against whom a complaint, allegation, or charge has been made, including all of the following:

(A) All factual findings.

(B) Any analysis of alleged misconduct.

(C) A description of the disciplinary action imposed on the law enforcement officer or agent, if any, and the data supporting the disciplinary action taken or the decision not to take disciplinary action.

(d) "Law enforcement officer or agent" includes a police officer employed by a municipality, county, or this state, an employee of a sheriff's office who performs law enforcement duties, a correctional officer, or any employee who provides public safety or investigative services for the department of corrections, a state correctional facility, a county jail, or a juvenile detention facility.

(e) "Technical infraction" means a minor rule violation by a law enforcement officer or agent, solely related to the enforcement of administrative departmental rules, that meets all of the following:

(*i*) Did not involve interaction with members of the public.

(*ii*) Was unrelated to the investigative, enforcement, training, supervision, or reporting responsibilities of the law enforcement officer or agent.

(*iii*) Did not involve deception, misrepresentation, dishonesty, or intemperate behavior by the law enforcement officer or agent.

Public Policy Position
HB 5749

Support

Explanation
The Committee voted unanimously (18) to support HB 5749. The legislation strikes the appropriate balance between providing litigants access to information essential to bringing legal claims (as well as increased transparency regarding misconduct by law enforcement officers) and protecting law enforcement officers from unwarranted invasion of their privacy.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

***Keller* Permissibility Explanation**
The Committee voted that HB 5749 is reasonably related to the availability of legal services and therefore *Keller*-permissible.

Contact Persons:
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Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
HB 5749

Not *Keller*; Support

Explanation

The Committee voted 11-10 that HB 5749 was not *Keller*-permissible because its connection to the availability of legal services was too attenuated to satisfy the germaneness (reasonable relationship) test.

The Committee acknowledged that others who have reviewed the bill reached a different *Keller* conclusion and therefore also reviewed the substance of the bill and voted unanimously to support the legislation should the Board of Commissioners ultimately determine that the bill is *Keller*-permissible. The Committee did note that the effectiveness of HB 5749 will likely be somewhat impaired by the existing requirements of the Bullard Plawecki Employee Right-to-Know Act, 1978 PA 397, which are not altered by HB 5749 (and could not be without a separate bill).

Position Vote:

Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

Contact Person:

Marla Linderman Richelew lindermanrichelewm@michigan.gov

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: HB 5758 – HB 5760 - Summary of Tenant's Rights

Background
Earlier this legislative session, the Board of Commissioners adopted a public policy position supporting legislation (HB 5236) requiring the State Court Administrative Office ("SCAO") to create a form summarizing tenant's rights and listing legal resources available to tenants with recommended amendments.[1]

HB 5758 is quite similar to HB 5236, but does include substantive differences:

- HB 5236 gave SCAO 6 months to create the required form. HB 5758 cuts that time to 90 days.
- HB 5758 adds language requiring the summary of tenant's rights to be in 12-point boldface type. The summary of a tenant's rights "about a release from rental payment obligation when a tenant is under apprehension of danger from domestic violence, criminal sexual conduct, of stalking" must be in 14-point boldface type.
- HB 5236 made the summary of tenant's rights form a required lease addendum beginning 6 months after SCAO creates the form. HB 5758 cuts that time to 60 days.
- In addition to being a required lease addendum, HB 5758 adds a requirement that the tenant's rights form be posted in a common area on leased premises.

HB 5759 is tie-barred to HB 5758. It would amend the Social Welfare Act, 1939 PA 280, to require the Department of Health and Human Services to have the tenant's rights form available at its offices and on its website.

HB 5760 is tie-barred to HB 5758. It would amend the State Housing Development Authority Act of 1966, 1966 PA 346, to require the Michigan State Housing Development Authority ("MSHDA") to have the tenant's rights form available at its offices and on its website.

HB 5758 – 5760 were referred to the House Economic Development and Small Business Committee for consideration.

[1] The Board's recommended that (1) Section (1)(c) of HB 5236 be amended to read: "Contact information for the statewide self-help website, the statewide legal aid hotline, and the 2-1-1 system telephone number."; (2) the bill require landlords to serve the summary of rights and resources form on tenants with the summons and complaint in eviction cases; and (3) the bill provide enforcement remedies to tenants if landlords do not comply.

Keller Considerations

The sponsors' purpose in introducing HB 5758 – HB 5760 is to establish a mechanism by which tenants can be better informed about their legal rights and the legal resources that are available to them. In doing so, the bills aim to assist tenants in better representing themselves or with obtaining legal counsel who can represent them in an eviction or other landlord-tenant proceeding. Generally speaking, proceedings involving clients represented by counsel who are familiar with court procedures and the relevant law are conducted more efficiently. An unrepresented client who is nevertheless aware of their rights is likewise better able to conduct themselves in court. Providing tenants with information about their rights and available legal resources is therefore germane (reasonably related) to the improvement in the functioning of the courts. Moreover, the argument that the bill will impact the functioning of the courts is even stronger if the Board of Commissioners opts to support amendments to HB 5758 similar to those it recommended for HB 5236 earlier this session (i.e., requiring landlords to serve the SCAO-created form on tenants with the summons and complaint in eviction cases). While the bill as introduced only requires that the form be included with lease agreements and posted in a common area, the previously proposed amendment makes the form an integral part of the pleadings and court proceeding itself. Additionally, in so far as the bills make tenants more aware of legal resources available to them and thereby increase the likelihood of their retaining counsel, it is also germane to the availability of legal services to society.

As was the case with HB 5236 several months ago, the two SBM committees that reviewed HB 5758-5760 disagreed on the question of *Keller*-permissibility. The Access to Justice Policy Committee voted unanimously that the legislation is *Keller*-permissible as reasonably related to both functioning of the courts and availability of legal services to society. The Civil Procedure & Courts Committee determined that the bills were not closely related enough to any of the *Keller*-permissible subject areas to be germane. The Board was faced with the same split option from these two committees when it reviewed HB 5236 and ultimately decided that the Access to Justice Committee had the better argument. The Board concurred that HB 5236 was *Keller*-permissible as reasonably related to both functioning of the courts and availability of legal services to society.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	Improvement in Quality of Legal Services
Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
Ethics	✓ Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

HB 5758 – HB 5760 are reasonably related to both improvement in functioning of the courts and availability of legal services to society. The bills are therefore *Keller*-permissible and may be considered on their merits.

HOUSE BILL NO. 5758

May 30, 2024, Introduced by Reps. Paiz, Wilson, Weiss, Price, O'Neal, Hope, Morgan, Tsernoglou and Brenda Carter and referred to the Committee on Economic Development and Small Business.

A bill to amend 1978 PA 454, entitled

"Truth in renting act,"

(MCL 554.631 to 554.641) by adding section 4a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 4a. (1) Not more than 90 days after the effective date of the amendatory act that added this section, the state court administrative office shall, after consultation with the Michigan state housing development authority created under section 21 of the state housing development authority act of 1966, 1966 PA 346, MCL 125.1421, create a form that contains all of the following

information:

(a) A summary of a tenant's rights under this act, 1972 PA 348, MCL 554.601 to 554.616, the housing law of Michigan, 1917 PA 167, MCL 125.401 to 125.543, and the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

(b) A list of legal resources that are available to a tenant who alleges that a rental agreement violates this act, 1972 PA 348, MCL 554.601 to 554.616, the housing law of Michigan, 1917 PA 167, MCL 125.401 to 125.543, or the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

(2) Except as otherwise provided in this subsection, the summary of a tenant's rights required under subsection (1) must be in 12-point boldface type. The summary of a tenant's rights about a release from rental payment obligation when a tenant is under apprehension of danger from domestic violence, criminal sexual conduct, or stalking as provided under section 1b of 1972 PA 348, MCL 554.601b, must be in 14-point boldface type.

(3) The state court administrative office must have copies of the form available in its office and make the form easily accessible on its website.

(4) Beginning 60 days after the state court administrative office creates the form under subsection (1), both of the following apply to a form created pursuant to subsection (1):

(a) The form must be attached as an addendum to a lease agreement provided to a tenant in this state.

(b) A landlord shall post the form in a common area on the premises. As used in this subdivision, "common area" means a portion of a premises that is generally accessible to all occupants of the premises. Common area includes, but is not limited to, a

hallway, stairway, laundry and recreational room, mailbox room, playground, community center, or garage.

HOUSE BILL NO. 5759

May 30, 2024, Introduced by Reps. Hoskins, Wilson, Weiss, Price, O'Neal, Hope, Morgan, Tsernoglou and Brenda Carter and referred to the Committee on Economic Development and Small Business.

A bill to amend 1939 PA 280, entitled

"The social welfare act,"

by amending section 57i (MCL 400.57i), as amended by 2011 PA 131.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 57i. (1) If a landlord or provider of housing participates in the department rent vendoring program, the landlord shall certify that the dwelling unit being provided meets all of the following requirements:

(a) The dwelling unit does not have a condition that would

facilitate the spread of a communicable disease. As used in this subdivision, "communicable disease" means that term as defined in section 5101 of the public health code, 1978 PA 368, MCL 333.5101.

(b) The dwelling unit is fit for human habitation.

(c) The dwelling unit is not dangerous to life or health due to lack of repair of, a defect in, or the construction of a drainage source or device, plumbing, lighting, ventilation, or a heating source or device.

(2) If the department is notified by an enforcing agency that a landlord or provider of housing has a violation of a housing code that constitutes a hazard to the health or safety of the occupants, the department shall terminate that landlord's or provider's participation in the rent vendoring program for the dwelling unit until the violation is corrected.

(3) A landlord or provider of housing shall not evict an occupant from a dwelling unit based solely on termination of the landlord's or provider's participation in the rent vendoring program due to action taken by the department under subsection (2) or subsection (4). An occupant who is evicted in violation of this subsection may bring an action in any court having jurisdiction to recover treble damages, costs of the action, and reasonable attorney fees.

(4) If the department is notified that a landlord or provider of housing is delinquent on payment of property taxes or if the title of the property reverts to ~~the~~ **this** state for nonpayment of property taxes, the department shall terminate that landlord's or provider of housing's participation in the rent vendoring program for that property.

(5) Not later than 60 days after the state court

administrative office creates the form required under section 4a of the truth in renting act, 1978 PA 454, MCL 554.643a, the department must have copies of the form available in its office and make the form easily accessible on its website.

(6) As used in this section, "form" means the form described under section 4a of the truth in renting act, 1978 PA 454, MCL 554.643a.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No.____ (request no. 04069'23 *) of the 102nd Legislature is enacted into law.

HOUSE BILL NO. 5760

May 30, 2024, Introduced by Reps. Hoskins, Wilson, Weiss, Price, O'Neal, Hope, Morgan, Tsernoglou and Brenda Carter and referred to the Committee on Economic Development and Small Business.

A bill to amend 1966 PA 346, entitled

"State housing development authority act of 1966,"

(MCL 125.1401 to 125.1499c) by adding section 22e.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 22e. (1) Not later than 60 days after the state court administrative office creates the form required under section 4a of the truth in renting act, 1978 PA 454, MCL 554.643a, the authority must have copies of the form available in its office and make the form easily accessible on its website.

(2) As used in this section, "form" means the form described under section 4a of the truth in renting act, 1978 PA 454, MCL 554.643a.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No.____ (request no. 04069'23 *) of the 102nd Legislature is enacted into law.

Public Policy Position
HB 5758 – HB 5760

Support with Amendments

Explanation
The Committee voted to support HB 5758-5760 with the amendments to HB 5758 that SBM had previously recommended for similar legislation earlier this session (HB 5236):

- Include "Contact information for the statewide self-help website, the statewide legal aid hotline, and the 2-1-1 system telephone number" in the information that must be provided on the summary of tenant's rights for developed by SCAO under Sec. 4a(1).

- Require landlords to serve the form on tenants with summons and complaint in eviction cases and provide enforcement remedies to tenants if landlords do not comply.

- Include a specific remedy for non-compliance with the provisions of the bill.

Additionally, the Committee proposed the following enhancements to the form itself:

- **Multilingual Availability:** Ensure the form is available in multiple languages, similar to other DHHS documents that feature English on the front and translations on the back. This will help non-English speaking tenants understand their rights and resources, improving overall accessibility.

- **Legal Design Implementation:** Incorporate visuals (e.g., infographics, diagrams, charts, graphics) and minimize legal jargon. This will make the information more accessible to all tenants, including those with limited legal knowledge.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 6

***Keller* Permissibility Explanation**
The Committee voted unanimously that the legislation is *Keller*-permissible because it will improve the functioning of the courts by helping tenants access resources and obtain legal knowledge prior to their initial court date, which will also improve the availability of legal services to society.

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HOUSE BILL NO. 5236

October 25, 2023, Introduced by Reps. Rheingans, Wilson, Hood, Dievendorf, Morgan and Tsernoglou and referred to the Committee on Economic Development and Small Business.

A bill to amend 1978 PA 454, entitled

"Truth in renting act,"

(MCL 554.631 to 554.641) by adding section 4a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 4a. (1) Not more than 6 months after the effective date of the amendatory act that added this section, the state court administrative office, after consultation with the Michigan state housing development authority created under section 21 of the state housing development authority act of 1966, 1966 PA 346, MCL 125.1421, shall create a form that contains all of the following

information:

(a) A summary of a tenant's rights under this act, 1972 PA 348, MCL 554.601 to 554.616, the housing law of Michigan, 1917 PA 167, MCL 125.401 to 125.543, and the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

(b) A list of legal resources that are available to a tenant who alleges that a rental agreement violates this act, 1972 PA 348, MCL 554.601 to 554.616, the housing law of Michigan, 1917 PA 167, MCL 125.401 to 125.543, or the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

(c) An operating 2-1-1 system telephone number.

(2) The state court administrative office must have copies of the form available in its office and make the form easily accessible on its website.

(3) Beginning 6 months after the state court administrative office creates the form under subsection (1), a form created pursuant to subsection (1) must be attached as an addendum to a lease agreement provided to a tenant in this state.

Public Policy Position
HB 5236

Support with Amendments

Explanation

The Committee voted unanimously to support House Bill 5236 with the amendments proposed by the Justice Initiatives Committee; namely:

(1) amend Section (1)(c) to read: "Contact information for the statewide self-help website, the statewide legal aid hotline, and the 2-1-1 system telephone number." And,
(2) require landlords to serve the form on tenants with summons and complaint in eviction cases and provide enforcement remedies to tenants if landlords do not comply.

The Committee further voted to recommend that:

(1) The Truth in Renting Act, 1978 PA 454, MCL 554.631 to 554.641 be added to the list of statutes enumerated in Section (1)(a) and (b).
(2) The bill include a specific remedy for non-compliance with its provisions.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

***Keller* Permissibility Explanation**

The Committee concluded that House Bill 5236 is *Keller*-permissible because it will impact the functioning of the courts by helping tenants access resources and obtain legal knowledge prior to their initial court appearance, which will improve the efficiency and effectiveness of court proceedings. The bill will also improve availability of legal services as tenants may be better informed of legal resources and representation options available to them. As such, the bill is reasonably related to both the functioning of the courts and availability of legal services to society.

Contact Persons:

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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: HB 5788 – Strategic Lawsuits Against Public Participation (SLAPPs)

Background

HB 5788 would enact the Uniform Public Expression Protection Act ("UPEPA") in Michigan. UPEPA is uniform law approved and recommended by the Uniform Law Commission ("ULC") for enactment in all the states and is intended to address strategic lawsuits against public participation ("SLAPPs"). In its Prefatory Note to the UPEPA, the ULC explains that:

> In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief for harm or to vindicate one's legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions "Strategic Lawsuits Against Public Participation," or SLAPPs.
>
> SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.[1]

Thirty-two states and the District of Columbia have enacted some type of anti-SLAPP statute. Drawing on the experience of these jurisdictions over the last thirty years and recognizing the desirability of harmonizing state approaches to these abusive suits, the ULC approved the UPEPA in 2020. It has since been enacted into law in eight jurisdictions (Hawaii, Kentucky, Maine, Minnesota, New Jersey, Oregon, Utah, and Washington) and is currently pending in 10 others.

HB 5788 is not the first anti-SLAPP statute reviewed by the State Bar of Michigan. In 2009, SBM supported HB 5036 as introduced. After the bill had been reported with recommendation by the House Judiciary Committee, a concern was raised within the Bar about language requiring a court to

[1] Uniform Public Expression Protection Act, Prefatory Note, p 5.

award sanctions to a moving defendant in an action that was dismissed under the provisions of the legislation. While the concern was brought back to the Board for consideration, SBM maintained its previously adopted public policy position. The bill was ultimately approved by the House by a bipartisan vote of 68-34 but died in the Senate.

Legislation identical to HB 5036 was reintroduced in 2011.[2] It was referred to the House Judiciary Committee but was never reported.

In 2013, legislation identical to HB 5036 was again reintroduced.[3] The Board of Commissioners reviewed the bill and voted to oppose the legislation citing concerns about the sanctions provision and the breadth of the statute. This iteration of the bill was referred to the House Judiciary Committee, but never reported. No anti-SLAPP bills were introduced in either the 2015-2016 or the 2017-2018 legislative sessions. In 2020, the issue remerged when legislation identical to 2009 HB 5036 was reintroduced.[4] It was referred to the House Local Government & Municipal Finance Committee, but never reported.

No anti-SLAPP bills were introduced in the 2021-2022 legislative session in large part due to the fact that the ULC had approved recommended language for the UPEPA at the end of 2020 and the bill sponsor was now working with the ULC to update Michigan's proposed legislation. The result is HB 5788,[5] which was introduced by House Criminal Justice Committee Chair Kara Hope and referred to her committee. The bill was reported with recommendation and without amendment on June 18 by a bipartisan vote of 10-0-3. In Committee, the Michigan Domestic and Sexual Violence Prevention and Treatment Board, Michigan Coalition to End Domestic and Sexual Violence, Sierra Club Michigan, Michigan Association for Justice, ACLU of Michigan, and representatives of two law firms (Pitt McGehee and Abdnour Weiker LLP) supported the bill. There was no opposing testimony and no opposition cards were submitted. The bill is now awaiting action by the full House on second reading.

Keller Considerations

As noted above, the Board of Commissioners has previously adopted public policy positions on anti-SLAPP legislation. In 2014, the two committees (Civil Procedure & Courts and Domestic Violence) that submitted positions on the anti-SLAPP bill being reviewed by the Board indicated that they believed that the bill was germane to the availability of legal services to society, but without further explanation.

The UPEPA is designed to limit abuse of the judicial process by providing expediated judicial review (and establishing the burden of proof for expedited review), outlining the evidence that may be considered when the court evaluates a special motion for expediated relief under the proposed act, and providing for a stay of discovery, etc. during expediated review. The bill sets forth the particulars for how a party may file a motion for expediated relief to dismiss a SLAPP suit, as well as the remedy available, and the circumstances under which a party may be awarded court costs, attorney fees, and litigation expenses. All of these components of the legislation are necessarily related to the functioning of the courts. Both of the SBM committees that reviewed HB 5788 concurred and found that the bill

[2] 2011 HB 4743
[3] 2013 HB 4913
[4] 2020 HB 5372
[5] While there are a number of substantive differences between prior iterations of anti-SLAPP legislation in Michigan and the UPEPA, it is particularly notable that the UPEPA does not contain the sort of sweeping sanctions provisions that concerned the Board of Commissioners in 2010 and 2014.

was necessarily related to the functioning of the courts and therefore *Keller*-permissible. The committees both recommended that SBM support the bill.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	**Improvement in Quality of Legal Services**
Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
Ethics	Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

HB 5788 is necessarily related to the functioning of the courts and therefore *Keller*-permissible. It may be considered on its merits.

HOUSE BILL NO. 5788

June 06, 2024, Introduced by Reps. Hope, Breen, Hill, Rheingans, Steckloff, Dievendorf, Coffia, MacDonell, Paiz, Byrnes, Hood, Wilson and Andrews and referred to the Committee on Criminal Justice.

A bill to enact the uniform public expression protection act; and to provide protections and remedies to persons sued for exercising rights to expression and other constitutionally protected rights.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. (1) This act may be cited as the "uniform public expression protection act".

(2) The purpose and intent of this act is to do all of the following:

(a) Establish that it is the public policy of this state to

promote the rights of citizens to vigorously participate in government.

(b) Protect citizens from the chilling effect of retributive and abusive strategic lawsuits against public participation, commonly referred to as SLAPP suits.

(c) Enact substantive law to minimize the damage of lawsuits described in subdivision (b) by shifting the burden of litigation back to the party bringing the lawsuit, by doing all of the following:

(*i*) Providing for expedited judicial review.

(*ii*) Providing for a stay on discovery and other time and money consuming maneuvers during the expedited judicial review.

(*iii*) Proscribing the evidence that may be considered in the expedited judicial review.

(*iv*) Establishing the burden of proof for the expedited judicial review.

(*v*) Providing for sanctions.

Sec. 2. (1) As used in this act:

(a) "Goods or services" does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(b) "Governmental unit" means a public corporation or government or governmental subdivision, agency, or instrumentality.

(c) "Person" means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(d) "Eligible cause of action" means a cause of action asserted after the effective date of this act in a civil action

against a person based on any of the following:

(*i*) A communication by the person in a legislative, executive, judicial, administrative, or other governmental proceeding.

(*ii*) A communication by the person on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding.

(*iii*) The person's exercise of the right of freedom of speech or of the press, the right to assemble or petition the government for a redress of grievances, or the right of association, guaranteed by the United States Constitution or the state constitution of 1963 on a matter of public concern.

(2) An otherwise eligible cause of action is not an eligible cause of action if 1 or more of the following apply:

(a) It is against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity.

(b) It is by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety.

(c) It is against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services.

(d) It arises from a claim by an individual for the violation of any of the following:

(*i*) The Elliott-Larsen civil rights act, 1976 PA 453, MCL 37.2101 to 37.2804.

(*ii*) The persons with disabilities civil rights act, 1976 PA 220, MCL 37.1101 to 37.1607.

(*iii*) The whistleblowers' protection act, 1980 PA 469, MCL 15.361 to 15.369.

(*iv*) The worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941.

(*v*) The freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(*vi*) Title VII of the civil rights act of 1964, 42 USC 2000e to 2000e-17, including, but not limited to, the pregnancy discrimination act, 42 USC 2000e(k).

(*vii*) Title IX of the education amendments of 1972, 20 USC 1681 to 1689.

(*viii*) The age discrimination in employment act of 1967, 29 USC 621 to 634.

(*ix*) The Americans with disabilities act of 1990, Public Law 101-336.

(*x*) The family and medical leave act of 1993, Public Law 103-3.

(*xi*) The fair labor standards act of 1938, 29 USC 201 to 219.

Sec. 3. Not later than 60 days after a party is served with a complaint, cross-claim, counterclaim, third-party claim, or other pleading that asserts an eligible cause of action, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to dismiss the action or part of the action.

Sec. 4. (1) Except as otherwise provided in subsections (4) to (7), all of the following apply on the filing of a motion under section 3:

(a) All other proceedings between the moving party and the responding party, including discovery and a pending hearing or

motion, are stayed.

(b) On motion by the moving party, the court may stay a hearing or motion involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the motion under section 3.

(2) A stay under subsection (1) remains in effect until entry of an order ruling on the motion under section 3 and expiration of the time under section 9 for the moving party to appeal the order.

(3) Except as otherwise provided in subsections (5), (6), and (7), if a party appeals an order ruling on a motion under section 3, all proceedings between all parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

(4) During a stay under subsection (1), the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under section 7(1) and the information is not reasonably available unless discovery is allowed.

(5) A motion under section 10 for costs, attorney fees, and expenses is not subject to a stay under this section.

(6) A stay under this section does not affect a party's ability voluntarily to dismiss an action or part of an action or move to sever a cause of action.

(7) During a stay under this section, the court for good cause may hear and rule on the following:

(a) A motion unrelated to the motion under section 3.

(b) a motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

Sec. 5. (1) The court shall hear a motion under section 3 not

later than 60 days after the motion is filed, unless the court orders a later hearing for either of the following reasons:

(a) To allow discovery under section 4(4).

(b) For other good cause.

(2) If the court orders a later hearing under subsection (1)(a), the court shall hear the motion under section 3 not later than 60 days after the court order allowing the discovery, unless the court orders a later hearing under subsection (1)(b).

Sec. 6. In ruling on a motion under section 3, the court shall consider the pleadings, the motion, any reply or response to the motion, affidavits, depositions, admissions, or other documentary evidence.

Sec. 7. (1) In ruling on a motion under section 3, the court shall dismiss with prejudice an action, or part of an action, if all of the following apply:

(a) The moving party establishes the cause of action is an eligible cause of action.

(b) The responding party fails to establish that the cause of action is not an eligible cause of action under section 2(2).

(c) Either of the following applies:

(*i*) The responding party fails to establish a prima facie case as to each essential element of the cause of action.

(*ii*) The moving party establishes either of the following:

(A) The responding party failed to state a cause of action on which relief can be granted.

(B) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the action or part of the action.

(2) A voluntary dismissal without prejudice of a responding

party's action, or part of an action, that is the subject of a motion under section 3 does not affect a moving party's right to obtain a ruling on the motion and seek costs, attorney fees, and expenses under section 10.

(3) A voluntary dismissal with prejudice of a responding party's action, or part of an action, that is the subject of a motion under section 3, establishes for the purpose of section 10 that the moving party prevailed on the motion.

Sec. 8. The court shall rule on a motion under section 3 not later than 60 days after a hearing under section 5.

Sec. 9. A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under section 3. The appeal must be filed not later than 21 days after entry of the order.

Sec. 10. On a motion under section 3, the court shall award court costs, reasonable attorney fees, and reasonable litigation expenses related to the motion as follows:

(a) To the moving party if the moving party prevails on the motion.

(b) To the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

Sec. 11. This act must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition the government for a redress of grievances, and the right of association, guaranteed by the United States Constitution and the state constitution of 1963.

Sec. 13. This act applies to a civil action filed or cause of action asserted in a civil action on or after the effective date of

this act.

Legislative Analysis

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

House Bill 5788 as introduced
Sponsor: Rep. Kara Hope
Committee: Criminal Justice
Complete to 6-10-24

SUMMARY:

House Bill 5788 would create a new act, the Uniform Public Expression Protection Act, which would allow the filing of special motions for expedited relief concerning certain lawsuits the bill calls *eligible causes of action*. This would allow a stay for a review and determination to be made as to whether the lawsuit should be dismissed at an earlier point in the proceedings. The bill is based on a model uniform law drafted by the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (ULC).[1]

Eligible cause of action

The bill would apply to a cause of action asserted in a civil action against a ***person*** after the bill's effective date that is based on any of the following:

- A communication by the person in a legislative, executive, judicial, administrative, or other governmental proceeding.
- A communication by the person on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding.
- The person's exercise, on a matter of public concern, of any of the following rights guaranteed by the United States Constitution or the Michigan Constitution:
  - The right of freedom of speech.
  - The right of freedom of the press.
  - The right to assemble.
  - The right to petition the government for a redress of grievances.
  - The right of association.

However, the bill would *not* apply to a cause of action described above if one or more of the following apply:

- It is against a ***governmental unit*** or an employee or agent of a governmental unit acting or purporting to act in an official capacity.
- It is by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety.
- It is against a person primarily engaged in the business of selling or leasing ***goods or services*** if the cause of action arises out of a communication related to the person's sale or lease of the goods or services.
- It arises from a claim by an individual for the violation of any of the following state laws:
  - The Elliott-Larsen Civil Rights Act.
  - The Persons with Disabilities Civil Rights Act.

[1] https://higherlogicdownload.s3.amazonaws.com/UNIFORMLAWS/46a646fa-5ef6-8dd0-7b0a-ce95c59f0d14_file.pdf

- The Whistleblowers' Protection Act.
- The Worker's Disability Compensation Act.
- The Freedom of Information Act (FOIA).

- It arises from a claim by an individual for the violation of any of the following federal laws:
  - Title VII of the Civil Rights Act of 1964.
  - Title IX of the Education Amendments of 1972.
  - The Age Discrimination in Employment Act of 1967.
  - The Americans with Disabilities Act of 1990 (ADA).
  - The Family and Medical Leave Act of 1993.
  - The Fair Labor Standards Act of 1938.

Person would mean an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

Governmental unit would mean a public corporation or government or governmental subdivision, agency, or instrumentality.

Goods or services would not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

Special motion for expedited relief

No later than 60 days after a party is served with a complaint, cross-claim, counterclaim, third-party claim, or other pleading that asserts an eligible cause of action (or, if good cause is shown, at a later time), the party may file a special motion for expedited relief to dismiss the action or part of the action. (For ease of reference, this motion is called a "special motion" below.)

Stay

Except as described below, all of the following would apply upon the filing of a special motion:

- All other proceedings between the moving party and the responding party, including discovery and a pending hearing or motion, would be stayed.
- Upon motion by the moving party, the court could stay a hearing or motion involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the special motion.

A stay described above would remain in effect until entry of an order ruling on the special motion and expiration of the time for the moving party to appeal the order, as described below.

However, during a stay described above, the court could allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden described below (under "Ruling") and the information is not reasonably available unless discovery is allowed.

If a party appeals an order ruling on a special motion, all proceedings between all parties in the action would be stayed. The stay would remain in effect until the conclusion of the appeal.

A motion for costs, attorney fees, and expenses as described below would not be subject to a stay under these provisions.

A stay under these provisions would not affect a party's ability to voluntarily dismiss an action or part of an action or move to sever a cause of action.

During a stay, the court for good cause could hear and rule on either of the following:

- A motion unrelated to the special motion.
- A motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

Hearing

The court would have to hear a special motion no later than 60 days after it is filed, unless the court orders a later hearing to allow limited discovery or for other good cause. If the court orders a later hearing to allow limited discovery, the court would have to hear the special motion no later than 60 days after the court order allowing the discovery, unless the court orders a later hearing for other good cause.

Ruling

The court would have to rule on a special motion no later than 60 days after a hearing.

In ruling on a special motion, the court would have to consider the pleadings, the motion, any reply or response to the motion, affidavits, depositions, admissions, or other documentary evidence.

The court would have to dismiss with prejudice an action, or part of an action, if all of the following apply:

- The moving party establishes the cause of action is one to which the bill applies as described above under "Eligible cause of action."
- The responding party fails to establish that the cause of action is one to which the bill does *not* apply as described above under "Eligible cause of action."
- Either of the following:
    - The responding party fails to establish a prima facie case as to each essential element of the cause of action.
    - The moving party establishes either of the following:
        - The responding party failed to state a cause of action on which relief can be granted.
        - There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the action or part of the action.

A voluntary dismissal without prejudice of a responding party's action, or part of an action, that is the subject of a special motion would not affect a moving party's right to obtain a ruling on the special motion and seek costs, attorney fees, and expenses as described below.

A voluntary dismissal with prejudice of a responding party's action, or part of an action, that is the subject of a special motion would establish that the moving party prevailed on the special motion for the purpose of seeking costs, attorney fees, and expenses.

Appeal

A moving party could appeal as a matter of right from an order denying, in whole or in part, a special motion. The appeal would have to be filed no later than 21 days after entry of the order.

Costs, attorney fees, and expenses

The court shall award court costs, reasonable attorney fees, and reasonable litigation expenses related to a special motion as follows:

- To the moving party if the moving party prevails on the motion.
- To the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

Applicability and construction

The new act states that it must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition the government for a redress of grievances, and the right of association, guaranteed by the United States Constitution and the Michigan Constitution.

Effectiveness

The new act would apply to a civil action filed or cause of action asserted in a civil action on or after the bill's effective date.

FISCAL IMPACT:

House Bill 5788 would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, the right of citizens to participate in government and not be retaliated against for public participation would be promoted. It is not known if an increase in court caseloads would occur under provisions of the bill. Any fiscal impact on the judiciary and local court systems would depend on how court caseloads and related administrative costs are affected.

Legislative Analyst: Rick Yuille
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

Public Policy Position
HB 5788

Support

Explanation

The Committee voted unanimously to support HB 5788, which would adopt a uniform law in Michigan that is meant to address and limit Strategic Lawsuits Against Public Participation (SLAPP), which are lawsuits filed with the aim of punishing individuals for speaking out or otherwise engaging publicly on a particular topic. SLAPPs are a significant abuse of the legal process that negatively impact court dockets and chill individuals from engaging in issues of public concern and availing themselves of legal remedies through the courts. This legislation would adopt appropriate guardrails to expeditiously address SLAPPs and limit such abuse of process.

Position Vote:

Voted For position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

***Keller* Permissibility Explanation**

The Committee voted unanimously that HB 5788 is necessarily related to the functioning of the courts and therefore *Keller*-permissible.

Contact Persons:

Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
HB 5788

Support

Explanation
The Committee voted to support HB 5788. The legislation will improve court functioning in Michigan by expediting the resolution/dismissal of vexatious SLAPP actions and deterring parties from bringing such abusive suits to begin with. The Committee also noted that, because HB 5788 is a uniform law, it will promote greater consistency between jurisdictions, which also improves court functioning.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 4
Did not vote (absence): 9

Keller Permissibility Explanation:
The Committee voted that HB 5788 is necessarily related to the functioning of the courts and therefore *Keller*-permissible.

Contact Person:
Marla Linderman Richelew lindermanrichelewm@michigan.gov

ACLU
Michigan

House Criminal Justice Committee
June 11, 2024
House Bill 5788 – SLAPP Suits
Position: Support

The American Civil Liberties Union of Michigan supports House Bill 5788. Passage of this legislation is long overdue. The bill would promote and protect the public's right to express their opinions in speech about matters of public concern, by deterring "SLAPP" lawsuits, also known as strategic lawsuits against public participation.

SLAPP suits are designed to intimidate, deter, and punish individuals for exercising their First Amendment right to speak out on issues impacting businesses and government actions. Some past examples include citizens being sued for testifying before their local elected officials about building permit and zoning change applications, expressing concerns about public education, and for reporting violations of environmental laws to regulatory agencies.

There are many reasons why the Michigan Legislature should be concerned about these lawsuits. SLAPP suits are often intended to bankrupt those who express their opinions in public by embroiling individuals in lawsuits and forcing them to hire attorneys to defend themselves. In contrast to most litigation, the SLAPP suit is brought not to resolve a problem, but to remove a controversy from the public arena. Those who file SLAPP suits do not sue to achieve a litigation outcome; rather, they file to silence their opposition. They are often filed to prevent citizen oversight of government.

House Bill 5788 will provide a way to quickly terminate frivolous claims that threaten First Amendment rights. The legislation includes clear statements of protection for speech in areas of public importance, along with a legal procedure for early dismissal of a SLAPP. By providing a way to quickly dismiss SLAPP suits and forcing those who bring them to pay the legal fees, anti-SLAPP statutes discourage the filing of these kinds of frivolous claims.

Thirty-four states and the District of Columbia more broadly provide protection against lawsuits that seek to chill the exercise of freedom of expression[1]. Now is the time for Michigan to follow their lead. We ask that the Michigan Legislature move HB 5788 with haste.

Merissa Kovach, Political Director
ACLU of Michigan
mkovach@aclumich.org

[1] https://www.rcfp.org/anti-slapp-legal-guide/#:~:text=As%20of%20May%202024%2C%2034,%2C%20New%20Jersey%2C%20New%20Mexico%2C

Written Testimony before the Michigan House Criminal Justice Committee in support of House Bill No. 5788

Danielle Canepa
Attorney, Pitt McGehee Palmer Bonanni & Rivers PC

Tuesday, June 11, 2024

Chair Hope, Vice Chair Andrews, Vice Chair Filler, and Members of the Committee, good morning. Thank you all for the opportunity to speak with you today.

My name is Danielle Canepa. I'm an attorney practicing civil rights law at Pitt McGehee Palmer Bonanni and Rivers, a Michigan law firm protecting civil rights for over 30 years. Our firm is known for leadership roles in a number of significant cases, including the Flint Water case, cases against US Olympic Committee and the FBI following the widespread sexual abuse committed by Larry Nassar, and the recent *Bauserman* case, which exonerated 3,000 Michiganders who were falsely accused of unemployment fraud by state AI software.

My own civil rights practice includes defending clients against the retaliatory lawsuits known as "SLAPP suits" -- Strategic Litigation Against Public Participation.

A. How SLAPP Suits Work

SLAPP suits are lawsuits used to intentionally silence someone from exercising their First Amendment right of free speech, by intimidating them with the legal process and burdening them with legal costs. This may sound niche and technical, but it's actually increasingly common. Beginning in the 1980s, legal scholars noticed that real estate developers were suing their critics for defamation and coined the term "SLAPP suit."[1] More recently, defamation SLAPP suits are

[1] *See* Pring and Canan, *SLAPPs: Getting Sued for Speaking Out* (1996), at 30.

used more and more to attack women who report sexual assault or domestic violence.

As we all know, the very First Amendment in our Bill of Rights protects freedom of speech.[2] The Michigan Constitution enshrines this same right.[3] Free speech is essential to a democracy to allow the free exchange of ideas. There are a small group of exceptions. As individuals, we do not have a right to speech to incite immediate violence or illegal conduct; we do not have a right to make genuine threats of serious bodily harm. We do not have a right to express obscenity. And we do not have a right to commit defamation.

SLAPP suits use this defamation exception to claim that a person's speech is illegal. But as we can all intuit, criticizing a public real estate proposal or disclosing sexual assault is not defamation. Defamation requires a **false** statement, made with **negligence** about whether it was true.[4] Expressing sincere concerns about a local development project or describing a sexual assault that truly happened is not defamatory when they are factually true and the speaker believes they are true. And most importantly for our purposes here, the law is clear that speech "on matters of public concern" is protected speech. Speech deals with matters of public concern when it fairly relates "to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Am. I.

[3] "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const. 1963, art. 1, § 5. The United States and Michigan Constitutions provide the same protections of the freedom of speech. *In re Contempt of Dudzinski,* 257 Mich. App. 96, 100, 667 N.W.2d 68 (2003).

[4] Defamation is "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication [defamation per quod]." *Smith v. Anon. Joint Enterprise*, 487 Mich. 102, 113, 793 N.W.2d 533 (2010).

So if speech on public issues is already protected by our state and federal constitutions, why do we need an anti-SLAPP bill?

B. Why we need HB 5788

Without an anti-SLAPP law like HB 5788, ordinary people must summon the money and the legal assistance to survive an entire lawsuit to prove that their speech was protected by the First Amendment. The average lawsuit takes about two years to get to trial. By that time, the damage is done: the speaker has suffered the very significant costs of a lawsuit and likely gone silent to avoid any other trouble.

To illustrate this point, I'd like to highlight for the Committee the typical parties involved in a SLAPP suit. The people who suddenly find themselves *targeted* by a SLAPP lawsuit are frequently ordinary people, without legal expertise or formal political affiliation who speak out on public issues. They may be speaking on a proposed development project, a local landlord, a government official, an environmental issue, land use, or a former boss. They may have spoken to the press, posted on social media, or organized a meeting of concerned community members.

SLAPP suits are typically *filed* by a person or company with the money to pay for a strategic lawsuit that is ultimately going to lose. The point is not to win — it's to intimidate and silence. Even if the case ultimately loses at trial, the person who filed the suit has often succeeded in two ways. First, the lawsuit effectively silences the target because they are terrified of being subject to any legal consequences. Second, they have been forced to pay significant money to defend themselves. Defending a basic lawsuit from start to finish can easily cost $50,000 or much more. An ordinary person either pulls together the money, sees their insurance premium impacted, or incurs significant debt.

SLAPP suits are also an egregious waste of taxpayer dollars and court resources. Managing a frivolous lawsuit consumes court time, public funds, and delays justice for legitimate cases.

House Bill 5788 specifically remedies these retaliatory lawsuits that have no legal merit. It expedites the legal process by requiring a court hearing with 60 days to determine whether the case should be dismissed for lack of a plausible claim or

lack of essential evidence. This Bill allows the party asserting defamation to request specific evidence to prove that their claim is legitimate.

A legitimate defamation lawsuit will survive this process unscathed because a legitimate case will have the evidence to show that the basic elements of defamation are present. Both parties also have the right of appeal.

The Uniform Public Expression Protection Act does not increase the burden of proof or costs for either party — it just expedites the case to allow the court to assess whether the First Amendment protects the speech at issue in 60 days instead of two years. This Bill follows an anti-SLAPP model that has an extremely broad coalition of supporters — from the National Right to Life Committee to the ACLU.

Michigan should embrace this opportunity to protect free speech and pass the Uniform Public Expression Protection Act, House Bill 5788.

Respectfully submitted,

Danielle Canepa

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To: Honorable Members of the House Criminal Justice Committee

Re: Sierra Club Support for HB 5788

Honorable Members of the House Criminal Justice Committee,

It's a privilege to be with you today to share Sierra Club Michigan's enthusiastic support for HB 5788.

The fossil fuel industry uses our legal system to deploy costly, protracted, and merciless SLAPP suits that target activists, non-profits, and other organizations exercising their first amendment rights. The rights to free speech, peaceful assembly, and a free press are fundamental to our ability to fully participate in our democracy, but for decades SLAPP suits have allowed polluting corporations to chill speech and dissent. The fossil fuel industry in particular targets non-profits and individuals by claiming defamation, trespass, and even racketeering to deter them from speaking out against projects that contribute to climate change. HB 5788 will help stop wealthy polluters weaponizing the law to protect shareholder profits.

The consequences of SLAPP suits can be dire. For the past six years Greenpeace has been fighting SLAPP suits that seek more than 400 million dollars in damages, and even the filing of a SLAPP suit can be enough to silence individuals and smaller organizations–which is precisely the intent of those that wield these legal weapons. There is a rising volume of legal actions brought by the energy sector against civil society groups. The Business and Human Rights Resource Center, which tracks SLAPP actions, found that 12 carbon majors brought at least 24 lawsuits against 71 environmental & human rights defenders between 2015 and 2018, seeking a total $904 million in damages.[1] EarthRights International released a report in which it identified 152 cases over the past ten years where the fossil fuel industry has used SLAPP suits and what it describes as other judicial harassment tactics in attempts to silence or punish its critics in the United States.

The fossil fuel industry's use of SLAPP suits not only stifles free speech, but also serves as another form of disinformation about climate change. After years of **spreading denial and disinformation,**[2] fossil fuel companies now acknowledge the existence of climate change but are attempting to ensure their greenwashing narrative

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1 https://oversightdemocrats.house.gov/legislation/hearings/free-speech-under-attack-part-iii-the-legal-assault-on-environmental-activists

2 https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/Ramasastry%20Testimony.pdf

dominates by silencing opposing views. In order for this greenwashing to work, they have to attack individuals and public interest groups from speaking out against their disinformation.

To bring it closer home, On May 3rd of this year, Sierra Magazine reported on the uptick of SLAPP suits against environmental journalists writing stories critical of the fossil fuel industry,[3] and the Sierra Club Loxahatchee Group's 2019 Environmentalist of the Year, Maggy Hurchalla, spent seven years fighting a SLAPP suit brought against her by a rock mining company that she criticized during a Martin County Commission meeting.[4]

By introducing HB 5788, Representative Hope and the co-sponsors are ensuring that Michiganders can speak up about problems and injustices in their own communities. SLAPP lawsuits aren't regular court cases. They're baseless legal actions filed by powerful individuals and business interests, targeting the free speech of protestors, journalists, and activists that speak out. The aim of these cases is to tie up their targets in court until they sign away their First Amendment rights. Dozens of states have also passed similar anti-SLAPP laws protecting people from this abusive tactic. HB 5788 will do the same for Michigan, and it will help curb the use of this harmful tactic. We urge your support for this important legislation.

Thank you for your time and attention.

Sincerely,

Christy McGillivray

Political and Legislative Director

Sierra Club Michigan

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[3] Ghantous, Nour.2024, Sierra Magazine, retrieved from: https://www.sierraclub.org/sierra/environmental-crisis-worsens-so-too-does-safety-journalists-covering-it

[4] Calderon and Gates, 2021. Retrieved from: https://www.sierraclub.org/florida/loxahatchee/blog/2021/05/environmental-heroine

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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Written Testimony of
Kaitlin Wolff, ULC Legislative Program Director
In Support of
HB 5788
Before the House Criminal Justice Committee
Tuesday, June 11, 2024

Dear Chair Hope, Vice Chair Andrews, and Committee Members:

Thank you for the opportunity to share my support for House Bill 5788, which would enact the Uniform Public Expression Protection Act. The Uniform Law Commission ("ULC") drafted this bill to address the problem of strategic lawsuits against public participation, or "SLAPPs." I serve as the ULC's Legislative Program Director and have the pleasure of working with our commissioners nationwide. Below I offer some details about how HB 5788 works and how it can benefit Michigan.

"SLAPPs" and "Anti-SLAPP" Statutes

First, what is a "SLAPP" suit and what is an "anti-SLAPP" statute? A SLAPP suit—or Strategic Lawsuit Against Public Participation—is a lawsuit brought not to seek legal redress or relief for harm, but instead, for the purpose of subjecting a citizen to lengthy and expensive litigation. In essence, it's using the legal system to silence someone for exercising their First Amendment rights. Anti-SLAPP statutes provide an expedited process to deal with SLAPPs and serve as a deterrent to filing SLAPPs in the first place.

Thirty-four states, plus the District of Columbia and Territory of Guam, have some version of an anti-SLAPP statute. Some of the older statutes are narrow in scope, designed to protect persons under limited circumstances, such as from statements made in testimony before a zoning board or planning commission. Michigan, unfortunately, has no anti-SLAPP statute at all, leaving its citizens vulnerable to attack for exercising their First Amendment rights.

Modern anti-SLAPP statutes have a much wider scope, covering speech and conduct in a wide variety of circumstances. These modern statutes encompass any action that arises out of a person's exercise of free speech rights on issues of public import, no matter the forum. HB 5788 contains this broad scope, covering *all* constitutionally protected communication about issues of public concern, including blog posts or tweets, for example. A broad statute is incredibly important given how quickly methods of communication have evolved and will continue to evolve as technology advances.

Why Uniformity Matters

Addressing SLAPP suits in a uniform way is important for several reasons. One significant reason for uniformity is because it will prevent "libel tourism." Libel tourism is a type of forum shopping by which a plaintiff who has choices among the states in which to bring a libel action—the most common type of "SLAPP" suit—will file in a state that does not have an anti-SLAPP law or has a "weak" or

narrow one. Given the significant differences among state statutes—which, aside from scope, include differing burdens of proof assigned to the parties, different rules relating to discovery, and different remedies for prevailing parties—uniformity is sorely needed. The adoption of a uniform act among the states will not only reduce the incidence of and the motivation for forum shopping, but it will clarify to all what kinds of protections citizens have when they choose to participate in public discourse.

Key Features of HB 5788

HB 5788 includes the following key features:

1. Creates a specific vehicle for filing a motion to dismiss/strike early in the litigation process;
2. Requires an expedited hearing on the motion, coupled with a stay or limitation of discovery until after the motion is heard;
3. Requires the plaintiff to demonstrate the case has some degree of merit;
4. Imposes cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry its burden; and
5. Allows for an interlocutory appeal of a decision to deny the defendant's motion.

Support for HB 5788

Many stakeholders shared their expertise and participated in the drafting of this uniform act. Stakeholders included participants from government and industry, First Amendment advocates, the Motion Picture Association of America, Inc., the National Center for State Courts, the Public Participation Project, the American Association for Justice, and the American College of Real Estate Lawyers. UPEPA has enjoyed wide, bipartisan support across the states. Attached is a support letter from nearly 30 organizations in support of the bill. UPEPA has been enacted in eight states so far: Hawaii, Kentucky, Maine, Minnesota, New Jersey, Oregon, Utah, and Washington. UPEPA legislation has also been introduced in Delaware, Idaho, Iowa, Missouri, Nebraska, Ohio, Pennsylvania, South Carolina, and West Virginia this year.

Thank you for your consideration of House Bill 5788. The bill would provide Michigan citizens much needed protection for their Constitutional rights to fully participate in governmental proceedings and exercise their rights to freedom of speech, freedom of the press, and petition the government, without fear of frivolous litigation.

Thank you for your time and consideration of HB 5788, and I urge a favorable vote.

Respectfully Submitted,

Kaitlin Wolff

Kaitlin Wolff
ULC Legislative Program Director

An Open Letter in Support of the Uniform Law Commission's Uniform Public Expression Protection Act

The undersigned organizations represent an array of views across the political spectrum, which often results in disagreements on certain issues. Yet protection from meritless lawsuits to punish speech, known as Strategic Lawsuits Against Public Participation ("SLAPP"), is one principle that we all agree on. Our organizations strongly support robust anti-SLAPP laws modeled after the Uniform Law Commission's ("ULC") Uniform Public Expression Protection Act ("UPEPA").

The First Amendment protects our right to freedom of speech, press, assembly, and petition, which are fundamental to free expression, liberty, and democracy. Some individuals and entities seek to suppress or punish speakers, artists, or publishers through SLAPPs. Such unscrupulous litigants will start expensive and meritless litigation in an effort to intimidate and harass a speaker into silence.

Anti-SLAPP laws protect the public from frivolous lawsuits that arise from speech on matters of public concern. These laws protect speakers by providing special procedures for defendants to defeat weak or meritless claims. The stronger the statute, the more deterrence there is against filing SLAPP lawsuits.

Already, 33 states have anti-SLAPP statutes, though most could be significantly improved by adopting some or all of the UPEPA's language. Every state should adopt an anti-SLAPP law that follows the provisions in the UPEPA to provide national uniformity against abusive litigation that undermines First Amendment-protected freedom of expression.

The following six features in the UPEPA are necessary for an effective anti-SLAPP law:

1. Protection of all expression on matters of public concern.

Strong anti-SLAPP statutes protect a wide spectrum of speech. The best statutes protect all speech on matters of public concern in any forum, as the UPEPA does.

2. Minimization of litigation costs by allowing defendants to file an anti-SLAPP motion in court.

Under the UPEPA, the filing of an anti-SLAPP motion automatically halts discovery and all other proceedings until the court rules on the motion. Discovery, which includes document production and depositions, imposes expensive and invasive burdens on defendants. Instructing courts to rule promptly on the anti-SLAPP motion minimizes the cost of meritless lawsuits that harm free expression rights.

3. Requiring plaintiffs to show they have a legitimate case early in the litigation.

The UPEPA puts the burden of proof on the plaintiff when responding to an anti-SLAPP motion to "establish a prima facie case as to each essential element" of the lawsuit. It forces plaintiffs to substantiate their claims, and demonstrate that they can overcome any applicable First Amendment protection, at an early stage of the litigation. Alternatively, the defendant can win the anti-SLAPP motion by showing that the plaintiff "failed to state a claim" or that "there is no genuine issue as to any material fact and the [defendant] is entitled to judgment as a matter of law." If the court approves the anti-SLAPP motion, the case is dismissed.

4. The right to an immediate appeal of an anti-SLAPP motion ruling.

The UPEPA and strong anti-SLAPP statutes also reduce the coercive and punitive nature of litigation by providing the defendant with the right to immediately appeal a denial of an anti-SLAPP motion. This is important because lower courts can err in judgment, and a successful appeal of a ruling denying an anti-SLAPP motion can avoid an expensive and stressful trial that would burden a speaker's First Amendment rights.

5. Award of costs and attorney fees.

Strong anti-SLAPP statutes, like the UPEPA, require the court to award costs and reasonable attorney's fees to a prevailing defendant. This is a vital deterrent against SLAPP lawsuits. Without an award, a defendant might win the lawsuit, but still suffer financial devastation from costs owed to their lawyers. Every state should reduce the punishment that unscrupulous litigants can mete out to their critics and adversaries. Automatic costs and attorney's fee awards do just that. Importantly, such fee-shifting also enables more attorneys to represent those with limited means fighting a SLAPP.

6. Broad judicial interpretation of anti-SLAPP laws to protect free speech.

The UPEPA and several state anti-SLAPP statutes instruct judges to read the statute broadly and/or liberally to protect free expression rights.

We appreciate the work of the Uniform Law Commission to craft the UPEPA and support its passage in states across the country with weak or no anti-SLAPP laws. Please share this letter with those working to enact or improve anti-SLAPP laws. Our organizations are ready and willing to lend support to such efforts.

Sincerely,

Organizing Signers:

American Civil Liberties Union
Institute for Free Speech
Institute for Justice
Public Participation Project
Reporters Committee for Freedom of the Press

Joined by:

American Society of Journalists and Authors
Americans for Prosperity
Authors Guild
Center for Biological Diversity
Center for Individual Freedom
Comic Book Legal Defense Fund
Competitive Enterprise Institute
Defending Rights & Dissent
Electronic Frontier Foundation
Foundation for Individual Rights and Expression
International Association of Better Business Bureaus
James Madison Center for Free Speech
League of Conservation Voters
Motion Picture Association, Inc.
National Association of Broadcasters
National Coalition Against Censorship
National Right to Life Committee
National Taxpayers Union
News Leaders Association
News Media Alliance
PEN America
R Street Institute
Society of Professional Journalists
Woodhull Freedom Foundation

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM PUBLIC EXPRESSION PROTECTION ACT (2020)

The purpose of the Uniform Public Expression Protection Act (UPEPA) is to protect the public's right to engage in activities protected by the First Amendment without abusive, expensive legal retaliation. Specifically, the UPEPA combats the problem of strategic lawsuits against public participation, also called "SLAPPs." A SLAPP may come in the form of a defamation, invasion of privacy, nuisance, or other claim, but its real goal is to entangle the defendant in expensive litigation and stifle the ability to engage in constitutionally protected activities. Below are just a few benefits of the uniform act:

- ***The UPEPA has a broad scope.*** Unlike earlier anti-SLAPP statutes, the UPEPA has a broad scope. The act protects communication in governmental proceedings and communication about an issue under consideration in governmental proceedings. The UPEPA also specifically protects exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association guaranteed by the United States constitution or the state Constitution, on a matter of public concern.

- ***The UPEPA promotes the early and efficient resolution of SLAPPs.*** Section 3 of the uniform act provides for filing the anti-SLAPP motion early in the litigation. The court must expedite a hearing on the motion unless an exception applies. Section 8 likewise requires the court to rule on the motion on an expedited basis.

- ***The UPEPA aims to prevent litigation tourism.*** Though most states have adopted an anti-SLAPP law, these statutes vary greatly, leading to confusion among plaintiffs, defendants, and courts. The lack of uniformity also leads to "litigation tourism," a type of forum shopping by which a plaintiff chooses to bring a lawsuit in a state without a strong anti-SLAPP law. Adoption of the uniform act across the states will ensure comprehensive statutory protections for citizens no matter where they are located.

- ***The UPEPA includes a mandatory award provision.*** Under the act, a party that files an anti-SLAPP motion and prevails on it obtains costs, attorney's fees, and expenses. The mandatory nature of the award will help deter parties from filing SLAPPs in the first place.

For more information about the UPEPA, please contact ULC Legislative Program Director Kaitlin Wolff at (312) 450-6615 or kwolff@uniformlaws.org.

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-NINTH YEAR
JULY 10–15, 2020

WITH PREFATORY NOTE AND COMMENTS

October 2, 2020

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 129th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following:

LANE SHETTERLY	Oregon, *Chair*
JERRY L. BASSETT	Alabama
JAMES BOPP JR.	Indiana
EFFIE V. BEAN COZART	Tennessee
ELENA J. DUARTE	California
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WILLIAM J. QUINLAN	Illinois
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D. JOE WILLIS	Oregon
CARL H. LISMAN	Vermont, *President*
THOMAS S. HEMMENDINGER	Rhode Island, *Division Chair*

OTHER PARTICIPANTS

ROBERT T. SHERWIN	Texas, *Reporter*
LAURA L. PRATHER	Texas, *American Bar Association Advisor*
JAY D. ADKISSON	Nevada, *American Bar Association Section Advisor*
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UNIFORM PUBLIC EXPRESSION PROTECTION ACT

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UNIFORM PUBLIC EXPRESSION PROTECTION ACT

Prefatory Note

Special Thanks. The Committee wishes to thank Thomas R. Burke, Stanley W. Lamport, Ben Sheffner, and Ashley H. Verdon, all of whom served as Observers during the drafting process, for their steady and valued input and expertise.

Introduction. In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief for harm or to vindicate one's legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions "Strategic Lawsuits Against Public Participation," or SLAPPs.

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

Anti-SLAPP Laws in the United States. To limit the detrimental effects SLAPPs can have, 32 states, as well as the District of Columbia and the Territory of Guam, have enacted laws to both assist defendants in seeking dismissal and to deter vexatious litigants from bringing such suits in the first place. An Anti-SLAPP law, at its core, is one by which a legislature imposes external change upon judicial procedure, in implicit recognition that the judiciary has not itself modified its own procedures to deal with this specific brand of abusive litigation. Although procedural in operation, these laws protect *substantive rights*, and therefore have *substantive effects*. So, it should not be surprising that each of the 34 legislative enactments have been performed statutorily—*none* are achieved through civil-procedure rules. The states that have passed anti-SLAPP legislation, in one form or another, are:

Arizona (2006) (Ariz. Rev. Stat. Ann. § 12-752) (2006)
Arkansas (2005) (Ark. Code Ann. § 16-63-501 through § 16-63-508) (2005)
California (1992) (Cal. Civ. Proc. Code § 425.16 through § 425.18)
Colorado (2019) (Col. Rev. Stat. Ann. § 13-20-1101)
Connecticut (2018) (Conn. Gen. Stat. Ann. § 52-196a)
Delaware (1992) (Del. Code Ann. tit. 10, § 8136, through § 8138)
District of Columbia (2012) (D.C. Code § 16-5501 through § 16-5505)
Florida (2004, 2000) (Fla. Stat. Ann. §§ 720.304, 768.295)
Georgia (1996) (Ga. Code. Ann. § 9-11-11.1)
Guam (1998) (Guam Code Ann. tit. 7, § 17101 through § 17109)

Hawaii (2002) (Haw. Rev. Stat. § 634F-1 through § 634F-4)
Illinois (2007) (735 Ill. Comp. Stat. 110/15 through 110/99)
Indiana (1998) (Ind. Code § 34-7-7-1 through § 34-7-7-10)
Kansas (2016) (Kan. Stat. Ann § 60-5320)
Louisiana (1999) (La. Code Civ. Proc. Ann. art. 971)
Maine (1995) (Me. Rev. Stat. Ann. tit. 14, § 556)
Maryland (2004) (Md. Code Ann., Cts. & Jud. Proc. § 5-807)
Massachusetts (1994) (Mass. Gen. Laws ch. 231, §59H)
Minnesota (1994) (Minn. Stat. § 554.01 through § 554.06) (Held unconstitutional by *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn. 2017))
Missouri (2004) (Mo. Rev. Stat. § 537.528)
Nebraska (1994) (Neb. Rev. Stat. § 25-21,243 through § 25-21,246)
Nevada (1997) (Nev. Rev. Stat. § 41.635 through 41.670)
New Mexico (2001) (N.M. Stat. § 38-2-9.1 through § 38-2-9.2)
New York (1992) (NY. Civ. Rights Law § 70-a and § 76-a)
Oklahoma (2014) (Okla. Stat. tit. 12, § 1430 through § 1440)
Oregon (2001) (Or. Rev. Stat. § 31.150 through § 31.155)
Pennsylvania (2000) (27 Pa. Consol. Stat. § 8301 through § 8305, and § 7707)
Rhode Island (1993) (R.I. Gen. Laws § 9-33-1 through § 9-33-4)
Tennessee (2019, 1997) (Tenn. Code. Ann. § 20-17-101 through § 20-17-110; § 4-21-1001 through § 4-21-1004)
Texas (2011) (Tex. Civ. Prac. & Rem. Code § 27.001 through § 27.011)
Utah (2008) (Utah Code § 78B-6-1401 through § 78B-6-1405)
Vermont (2005) (Vt. Stat. Ann. tit. 12 § 1041)
Virginia (2007) (Va. Code Ann. § 8.01-223.2)
Washington (2010, 1989) (Wash. Rev. Code § 4.24.500 through § 4.24.525) (Held unconstitutional by *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015))

Many early anti-SLAPP statutes were narrowly drawn by limiting their use to particular types of parties or cases—for example, to lawsuits *brought by* public applicants or permittees, or to lawsuits *brought against* defendants speaking in a particular forum or on a particular topic. More recently, however, legislatures have recognized that narrow anti-SLAPP laws are ineffectual in curbing the many forms of abusive litigation that SLAPPs can take. To that end, most modern statutory enactments have been broad with respect to the parties that may use the acts and the kinds of cases to which the acts apply.

The recent trend further evidences a shift toward statutes that achieve their goals by generally employing at least **five mechanisms:**

1. Creating specific vehicles for filing motions to dismiss or strike early in the litigation process;
2. Requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard;
3. Requiring the plaintiff to demonstrate the case has some degree of merit;
4. Imposing cost-shifting sanctions that award attorney's fees and other costs when the

plaintiff is unable to carry its burden; and

5. Allowing for an interlocutory appeal of a decision to deny the defendant's motion.

The Need for a Uniform Anti-SLAPP Act. Although there is certainly a movement toward broad statutes that utilize the five tools described above, the precise ways in which different states have constructed their laws are far from cohesive. This degree of variance from state to state—and an absence of protection in 18 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also contributes to what can be called "litigation tourism"; that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a state that lacks strong and clear anti-SLAPP protections. Several recent high-profile examples of this type of forum shopping have made the need for uniformity all the more evident.

The Uniform Public Expression Protection Act seeks to harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner. In doing so, the Act actually serves two purposes: protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

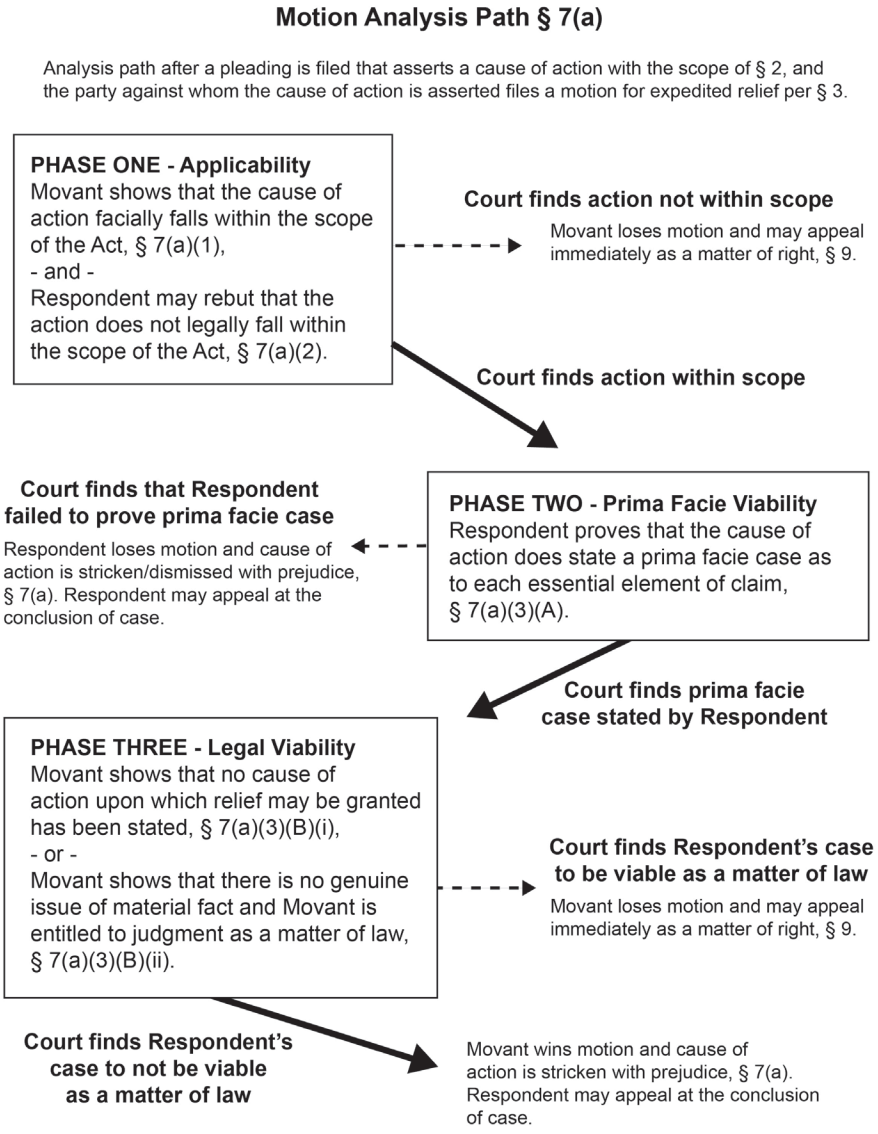
The Uniform Public Expression Protection Act, Generally. The Uniform Public Expression Protection Act follows the recent trend of state legislatures to enact broad statutory protections for its citizens. It does so by utilizing all five of the tools mentioned above in a motion practice that carefully and clearly identifies particular burdens for each party to meet at particular phases in the motion's procedure.

The general flow of a motion under the Act employs a three-phase analysis seen in many states' statutes. Upon the filing of a motion, all proceedings—including discovery—between the moving party and responding party are stayed, subject to a few specific exceptions. In the **first phase**, the court effectively decides whether the Act applies. It does so by first determining if the responding party's (typically the plaintiff's) cause of action implicates the moving party's (typically the defendant's) right to free speech, petition, or association. The burden is on the moving party to make the initial showing that the Act applies. If the court holds that the moving party *has not* carried that burden, then the motion is denied, the stay of proceedings is lifted, and the parties proceed to litigate the merits of the case (subject to the ability of the moving party to interlocutorily appeal the motion's denial). If the court determines that the moving party *has* carried its burden, then the responding party can show its cause of action fits within one of the three exceptions to the Act. If it carries that burden—for example, by showing that its cause of action is against an agent of a governmental unit acting or purporting to act in an official capacity—then the Act does not apply, and the motion is denied. If it fails to carry that burden, then the court proceeds to the second step of the analysis.

In the **second phase**, the court determines if the responding party has a viable cause of action from a prima-facie perspective. In this phase, the burden is on the responding party to establish a prima-facie case for each essential element of the cause of action challenged by the motion. If the court holds that the responding party *has not* carried its burden to establish a

prima-facie case, then the motion is granted, and the responding party's cause of action is terminated with prejudice to refiling. The moving party is entitled to its costs, attorney's fees, and expenses. If the court holds that the responding party *has* carried its burden, then—and only then—the court proceeds to the third step of the analysis.

In the **third phase**, the court determines if the responding party has a *legally* viable cause of action. In this phase, the burden shifts *back* to the moving party to show either that the responding party failed to state a cause of action upon which relief can be granted (for example, a claim that is barred by res judicata, or preempted by some other law), or that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (for example, if the cause of action, while perhaps factually viable, is time-barred by limitations). If the moving party makes such a showing, the motion is granted; if it fails to make such a showing, the motion is denied.



UNIFORM PUBLIC EXPRESSION PROTECTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Public Expression Protection Act.

Comment

Although "SLAPP"—an acronym for "Strategic Lawsuit Against Public Participation"—does not appear in the Act's title, the Uniform Public Expression Protection Act should be considered an anti-SLAPP act. Although "[t]he paradigm SLAPP is a suit filed by a large developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans," SLAPPs "are by no means limited to environmental issues, nor are the defendants necessarily local organizations with limited resources." *Hupp v Freedom Commc'ns*, 163 Cal. Rptr. 3d 919, 922 (Cal. Ct. App. 2013). "[W]hile SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Id.*

SECTION 2. SCOPE.

(a) In this section:

(1) "Goods or services" does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(2) "Governmental unit" means a public corporation or government or governmental subdivision, agency, or instrumentality.

(3) "Person" means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(b) Except as otherwise provided in subsection (c), this [act] applies to a [cause of action] asserted in a civil action against a person based on the person's:

(1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or

(3) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or [cite to the state's constitution], on a matter of public concern.

(c) This [act] does not apply to a [cause of action] asserted:

(1) against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;

(2) by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety; or

(3) against a person primarily engaged in the business of selling or leasing goods or services if the [cause of action] arises out of a communication related to the person's sale or lease of the goods or services.

Legislative Note: *If a state does not use the term "cause of action", the state should use its comparable term, such as "claim for relief" in subsections (b) and (c). The state also should substitute its comparable term for the term "[cause of action]" in Sections 3, 4(f), 7, 13, and 14.*

Comments

1. Most courts explain the resolution of anti-SLAPP motions in terms of either a three- or two-pronged procedure. *E.g.*, *Younkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018) ("Reviewing a[n anti-SLAPP] motion to dismiss requires a three-step analysis."); *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 713 (Cal. 2019) ("A court evaluates an anti-SLAPP motion in two steps."). Section 2 of the Act constitutes the **first step** of that procedure, where the moving party (typically the defendant) must show that the responding party's (typically the plaintiff's) cause of action arises from the movant's exercise of First Amendment rights on a matter of public concern. This step focuses on the *movant's activity*, and whether the movant can show that it has been sued for that activity. *See, e.g.*, *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) ("The anti-SLAPP statute's definitional focus is not [on] the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning." (emphasis original)). If the movant cannot

satisfy the first step—in other words, cannot show that the cause of action is linked to First Amendment activity on a matter of public concern—then the court will deny the motion without ever proceeding to the second or third step. THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 1.2 (2019). Further discussion of how a court adjudicates the first step, including the parties' burdens and the materials a court should review, appears in Comments 2 and 3 to Section 7.

2. Although the Act operates in a procedural manner—specifically, by altering the typical procedure parties follow at the outset of litigation—the *rights* the act protects are most certainly *substantive* in nature. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-973 (9th Cir. 1999) (applying California's anti-SLAPP law to diversity actions in federal court because the statute was "crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"). Otherwise stated, the Act's procedural features are designed to prevent substantive consequences: the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit. *Williams v. Cordillera Comms., Inc.*, No. 2:13–CV–124, 2014 WL 2611746, at * 1 (S.D. Tex. June 11, 2014). As stated by one California court, "[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (4th Dist. 2004).

3. The statute is only applicable to civil actions. It has no applicability in criminal proceedings.

4. The term "civil action" should be construed consistently with Fed. R. Civ. P. 1.

5. The term "cause of action" refers to a group of operative facts that give rise to one or more bases for recovery in a civil action. The term contemplates that in one civil action, a party seeking relief may assert multiple causes of action that invoke different facts and theories for relief. In some jurisdictions, other terms of art, such as "claim for relief," "ground of action," "right of action," or "case theory," might be more appropriate than "cause of action." *See, e.g.*, *Baral v. Schnitt*, 376 P.3d 604, 616 (Cal. 2016) (holding that when the California Legislature used the term "cause of action" in its anti-SLAPP statute, "it had in mind *allegations* of protected activity that are asserted as grounds for relief" (emphasis original)). Regardless of the term used by a state, the Act can be utilized to challenge part or all of a single cause of action, or multiple causes of action in the same case. *See id.* at 615 ("A single cause of action . . . may include more than one instance of alleged wrongdoing."). Otherwise stated, a single civil action can contain both a cause of action subject to the Act and one not subject to the Act.

6. Sections 2(b)(1) and (2) apply to a cause of action brought against a person based on the person's communication. "Communication" should be construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word."); *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (holding that conduct constitutes "communication" when it is accompanied by an intent to convey a particularized message and, given the surrounding circumstances, the likelihood is great that the message will

be understood by those who view it); *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47, 65-66 (2006); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969). Conduct is not specifically mentioned in the Act so as to avoid parties from attempting to use it to shield themselves from liability for *nonexpressive* conduct that nevertheless tangentially relates to a matter of public concern. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). But the Act *is* intended to protect *expressive* conduct. For example, a person's work on behalf of a political campaign might include constitutionally protected expressive conduct, such as putting up campaign signs or organizing a rally. The Act would protect that conduct. But a person who damages another candidate's campaign signs or physically threatens attendees at an opposing rally would not be engaging in expressive conduct, and therefore should not be able to utilize the Act, even though the conduct tangentially relates to matters of public concern.

7. Sections 2(b)(1)-(3) identify three different instances in which the Act may be utilized. Section 2(b)(1) protects communication that occurs before any legislative, executive, judicial, administrative, or other governmental proceeding—effectively, any speech or expressive conduct that would implicate one's right to petition the government. Section 2(b)(2) operates similarly, but extends to speech or expressive conduct *about* those matters being considered in legislative, executive, judicial, administrative, or other governmental proceedings—the speech or conduct need not take place *before* the governmental body. Section 2(b)(3) operates differently than (1) and (2) and provides the broadest degree of protection; it applies to *any* exercise of the right of free speech or press, free association, or assembly or petition, so long as that exercise is on a matter of public concern.

8. The terms "freedom of speech or of the press," "the right to assemble or petition," and "the right of association" should all be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court.

9. The term "matter of public concern" should be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (holding that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (citations omitted)); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."). "The [matter-of-public-concern] inquiry turns on the 'content, form, and context' of the speech." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). The term should also be construed consistently with terms like "public issue" and "matter of public interest" seen in some state statutes. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (employing the terms "public issue" and "issue of public interest"); *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1164-65 (Cal. 2019).

The California Supreme Court breaks "matter of public concern" (or in its statute, "public issue" or "issue of public interest") into a two-part analysis. *FilmOn.com*, 439 P.3d at 1165.

"First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful." *Id.* (citation omitted). The court observed that the first step is typically not difficult for the movant: "[V]irtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest." *Id*. But the second step is where many movants fail. The inquiry "demands 'some degree of closeness' between the challenged statements and the asserted public interest." *Id.* (citation omitted). As other California courts have noted, "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Cal. Ct. App. 2004); *see also Dyer v. Childress*, 55 Cal. Rptr. 3d 544, 548 (2007) ("The fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not enough." (citation omitted)).

The California Supreme Court explains that what it means to "contribute to the public debate" "will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." *FilmOn, Inc.*, 439 P.3d at 1166.

Further discussion of how a court adjudicates whether a cause of action is based on the moving party's exercise of First Amendment rights on a matter of public concern, including the movant's burden and the materials a court should review, appears in Comment 2 to Section 7.

10. Section 2(c) provides a list of exemptions, or situations to which the Act does not apply. It is the burden of the responding party to establish the applicability of one or more exemptions. Thus, even if a movant can show the Act applies under Section 2(b), the Act may nevertheless *not* apply if the non-movant can show the cause of action is exempt. Further discussion of how a court adjudicates whether a cause of action is exempt, including the responding party's burden and the materials a court should review, appears in Comment 3 to Section 7.

11. The term "governmental unit or an employee or agent of a governmental unit acting in an official capacity" includes any private people or entities working as government contractors, to the extent the cause of action pertains to that government contract.

12. The term "dramatic, literary, musical, political, journalistic, or artistic work" used in Section (a)(3) should be construed broadly to include newspapers, magazines, books, plays, motion pictures, television programs, video games, or Internet websites or other electronic mediums.

13. Section 2(c)(3) carves out from the scope of the Act "communication[s] related to [a] person's sale or lease of [ ] goods or services" when that person is primarily engaged in the selling, leasing, or licensing of those goods or services. In other words, "commercial speech" is

exempted from the protections of the Act. By way of illustration, if a mattress store is sued for false statements made in its advertising of mattresses—whether by an aggrieved consumer or a competitor—the mattress store would not be able to avail itself of the Act. But if the same mattress store were sued for tortious interference for organizing a petition campaign to oppose the building of a new school, its activity would not be related to the sale or lease of goods or services, and it could use the Act for protection of its First Amendment conduct.

But the "commercial-speech exemption" does not apply to the creation, dissemination, exhibition, or advertisement of a dramatic, literary, musical, political, journalistic, or artistic work. This is consistent with the holdings of most courts that the contents of works protected by the First Amendment are not considered "goods or services," even if sold for profit. *See*, *e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (ideas and expressions in a book are not a product); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 239 (Tex. 1993) ("We conclude that the ideas, thoughts, words, and information conveyed by the magazine . . . are not products."). This ensures that claims targeting those in the business of making and selling works protected by the First Amendment are not denied the ability to invoke the Act. *See Dyer v. Childress*, 147 Cal. App. 4th 1273, 1283 (2007) (expressive works exception to the commercial speech exemption was "intended to 'exempt the news media and other media defendants (such as the motion picture industry) from the [commercial-speech exemption] when the underlying act relates to news gathering and reporting to the public with respect to the news media or to activities involved in the creation or dissemination of any works of a motion picture or television studio.'" (citations omitted)).

SECTION 3. SPECIAL MOTION FOR EXPEDITED RELIEF. Not later than [60] days after a party is served with a [complaint] [petition], crossclaim, counterclaim, third-party claim, or other pleading that asserts a [cause of action] to which this [act] applies, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to [dismiss] [strike] the [cause of action] or part of the [cause of action].

Legislative Note: *A state should use the term "complaint" or "petition", or both, to describe any procedural means by which a cause of action may be asserted.*

A state should title its motion one to "dismiss" or "strike" in accordance with its procedures and customs. The state also should substitute its term for the term "[dismiss] [strike]" in Section 7(a).

A state may need to amend its statutes or rules of civil procedure to prevent a motion under this section from being considered a first pleading or motion that waives a defense or precludes the filing of another pleading or motion.

Comments

1. Unlike a defense under Fed. R. Civ. P. 12(b), the motion need not be filed prior to other pleadings in the case, and a party should not be estopped from filing a motion by taking any other actions in the case.

2. The Act should apply not just to initial claims brought by a plaintiff against a defendant, but to *any* claim brought by *any* party who seeks to punish or intimidate another party for the exercise of its constitutional rights. In this connection, initial defendants frequently use their ability to bring counterclaims and crossclaims for abusive purposes, and the Act should be available to seek dismissal of such claims.

3. The terms "complaint" and "petition" are intended to include any amended pleadings that assert a cause of action for the first time in a case.

4. "Crossclaim" means a cause of action asserted between co-plaintiffs or co-defendants in the same civil action.

5. "Counterclaim" means a cause of action asserted by a party against an opposing party after an original claim has been made by that opposing party. The term should be construed synonymously with terms like "counteraction," "countersuit," and "cross-demand."

6. "Third-party" claim should be construed in accordance with Fed. R. Civ. P. 14.

7. "Good cause" means a reason factually or legally sufficient to appropriately explain why the motion was not brought within the prescribed deadline. This section should not be construed to require a party to seek leave of court prior to filing a motion later than the prescribed deadline. Instead, a court should make any good-cause determination as part of its ruling on the motion under Section 8.

8. Some states may choose to title their special motion one to "dismiss," while others may title it one to "strike." The choice of title is not substantive in nature and does not affect uniformity or construction of the statute.

SECTION 4. STAY.

(a) Except as otherwise provided in subsections (d) through (g), on the filing of a motion under Section 3:

(1) all other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed; and

(2) on motion by the moving party, the court may stay a hearing or motion

involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the motion under Section 3.

(b) A stay under subsection (a) remains in effect until entry of an order ruling on the motion under Section 3 and expiration of the time under Section 9 for the moving party to appeal the order.

(c) Except as otherwise provided in subsections (e), (f), and (g), if a party appeals from an order ruling on a motion under Section 3, all proceedings between all parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

(d) During a stay under subsection (a), the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under Section 7(a) and the information is not reasonably available unless discovery is allowed.

(e) A motion under Section 10 for costs, attorney's fees, and expenses is not subject to a stay under this section.

(f) A stay under this section does not affect a party's ability voluntarily to [dismiss] [nonsuit] a [cause of action] or part of a [cause of action] or move to [sever] a [cause of action].

(g) During a stay under this section, the court for good cause may hear and rule on:

(1) a motion unrelated to the motion under Section 3; and

(2) a motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

Legislative Note: *In subsection (f), a state should use the term "dismiss" or "nonsuit" in accordance with its procedures and customs. The state also should substitute its term for the term "[dismiss] [nonsuit]" in Section 7(b) and (c).*

If a state does not use the term "sever" to describe a motion to sever, the state should use its comparable term in subsection (f).

Comments

1. Section 4 furthers the purpose of the Act by protecting a moving party from the burdens of litigation—which include not only discovery, but responding to motions and other potentially abusive tactics—until the court adjudicates the motion and the moving party's appellate rights with respect to the motion are exhausted.

2. Section 4(a)(1) provides that the stay only applies to proceedings between the parties to the motion, but Section 4(a)(2) allows the moving party to seek a stay of proceedings and discovery between *other* parties if there are legal or factual issues at play in those proceedings that are material to the party's motion. Otherwise stated, if a defendant moves to dismiss a plaintiff's cause of action, that motion should not stay proceedings or discovery between the plaintiff and *other* defendants—or between other defendants themselves—unless those proceedings involve legal or factual issues that are material to the motion, or the discovery is relevant to the motion.

By way of illustration, a candidate for political office sues two defendants—his opponent, for defamation over comments made about the plaintiff during the campaign, and his opponent's campaign manager, for hacking into the plaintiff's campaign's computer files and erasing valuable donor lists and other data. Only the plaintiff's opponent moves to dismiss under the Act; the campaign manager does not. In that case, the plaintiff could still proceed with discovery and dispositive motions against the campaign manager, because the claim concerning the hacking is entirely unrelated to the defamation claim. The moving defendant has no interest that would be affected by the hacking claim. But under slightly altered facts, a different outcome might exist: The plaintiff alleges that (1) the opposing campaign manager violated the plaintiff's privacy rights by stealing sensitive personal information in the hacking incident; and (2) the opposing candidate violated the plaintiff's privacy rights by disclosing that sensitive personal information in a speech. Again, the opposing candidate moves to dismiss under the Act; the campaign manager does not. In that case, the causes of action are so interrelated that the moving defendant would not be able to protect his interests without participating in the case against his co-defendant—something he would not have to do if he prevails on the motion. In such an example, the court should grant a request to stay the proceedings as between the plaintiff and non-moving defendant, because the moving defendant would have no way of protecting his interests without participating in the case.

3. Section 4(c) provides that *all* proceedings between all parties in the case are stayed if a party appeals an order under the Act. This subsection protects a moving party from having to battle related claims—some of which might be subject to a motion under the Act and some which are not—at the same time in two different courts. For example, if two plaintiffs file causes of action against a single defendant, and the defendant only moves to dismiss against one plaintiff but not the other, the defendant should be able to appeal a denial of that motion without also having to simultaneously defend related causes of action (albeit ones not subject to the Act) in the trial court brought by the other plaintiff.

By way of illustration, multiple plaintiffs—all contestants on a reality TV show contest—sue one defendant—the TV producer—in a single case for their negative treatment on the show. Each plaintiff's claim is distinct and centers on separate statements. The defendant files a motion to dismiss under the Act against only one plaintiff. The motion is denied; the defendant appeals under Section 9. At that point, *all* the proceedings are stayed, because the defendant should not be required to try claims in the trial court while appealing other claims from the same case in the appellate court.

To the extent any party not subject to the motion desires to move forward in the trial court on what it believes are unrelated causes of action while the appeal of the motion's order is pending, it retains the right under Section 4(f) to request a severance of those causes of action.

4. Section 4(d) provides the court with discretion to permit a party to conduct specified, limited discovery aimed at the sole purpose of collecting enough evidence to meet its burden or burdens under Section 7(a) of the Act. This provision recognizes that a party may not have the evidence it needs—for example, evidence of another individual's state of mind in a defamation action—prior to filing or responding to a motion. The provision allows the party to attempt to obtain that evidence without opening the case up to full-scale discovery and incurring those burdens and costs.

5. Section 4(g) serves the ultimate purpose of the Act: to allow a party to avoid the expense and burden of frivolous litigation until the court can determine that the claims are not frivolous. In that connection, a court should be free to hear any motion that does not affect the moving party's right to be free from an abusive cause of action, including a motion to conduct discovery on causes of action unrelated to the cause of action being challenged under the Act, and motions for preliminary injunctive relief seeking to protect against an imminent threat to public health or safety.

SECTION 5. HEARING.

(a) The court shall hear a motion under Section 3 not later than [60] days after filing of the motion, unless the court orders a later hearing:

(1) to allow discovery under Section 4(d); or

(2) for other good cause.

(b) If the court orders a later hearing under subsection (a)(1), the court shall hear the motion under Section 3 not later than [60] days after the court order allowing the discovery, unless the court orders a later hearing under subsection (a)(2).

Comments

1. Section 5 should not be construed to prevent the parties from agreeing to a later hearing date and presenting that agreement to the court with a request to find "other good cause" for a later hearing. Nevertheless, the court, and not the parties, is responsible for controlling the pace of litigation, and the court should affirmatively find that good cause does exist independent of a mere agreement by the parties to a later hearing date.

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

3. State law and local customs of the jurisdiction should dictate the consequences for a court failing to comply with the timelines set forth in this section.

SECTION 6. PROOF. In ruling on a motion under Section 3, the court shall consider the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under [cite to the state's statute or rule governing summary judgment].

Comments

1. The Act establishes a procedure that shares many attributes with summary judgment. *See Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019) (describing the California statute as a "summary-judgment-like procedure"); *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 312-13 (Fla. Dist. Ct. App. 2019) (equating a motion under Florida's law to one for summary judgment). So, consistent with summary-judgment practice, parties should submit admissible, competent evidence—such as affidavits, deposition testimony, or tangible evidence—for the court to consider. *See Sweetwater Union High Sch. Dist.*, 434 P.3d at 1157 ("There are important differences between [anti-SLAPP motions and motions for summary judgment]. Chief among them is that an anti-SLAPP motion is filed much earlier and before discovery. However, to the extent both schemes are designed to determine whether a suit should be allowed to move forward, both schemes should require a showing based on evidence potentially admissible at trial presented in the proper form."). A court should use the parties' pleadings to frame the issues in the case, but a party should not be able to rely on its *own* pleadings as substantive evidence. *See id.*; *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 636, 637 (Cal. Ct. App. 1996), disapproved of on another point in *Equilon Enters. v. Consumer Cause, Inc.*, 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002). A party may rely on an *opposing party's* pleadings as substantive evidence, consistent with the general rule that an opposing party's pleadings constitute admissible admissions. *See Faiella v. Fed. Nat'l Mortg. Ass'n*, 928 F.3d 141, 146 (1st Cir. 2019) ("A party ordinarily is bound by his representations to a court"); *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984) ("[S]tipulations and admissions in the pleadings are generally binding on the parties and the Court.").

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

SECTION 7. [DISMISSAL OF] [STRIKING] CAUSE OF ACTION IN WHOLE OR PART.

(a) In ruling on a motion under Section 3, the court shall [dismiss] [strike] with prejudice a [cause of action], or part of a [cause of action], if:

(1) the moving party establishes under Section 2(b) that this [act] applies;

(2) the responding party fails to establish under Section 2(c) that this [act] does not apply; and

(3) either:

(A) the responding party fails to establish a prima facie case as to each essential element of the [cause of action]; or

(B) the moving party establishes that:

(i) the responding party failed to state a [cause of action] upon which relief can be granted; or

(ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the [cause of action] or part of the [cause of action].

(b) A voluntary [dismissal] [nonsuit] without prejudice of a responding party's [cause of action], or part of a [cause of action], that is the subject of a motion under Section 3 does not affect a moving party's right to obtain a ruling on the motion and seek costs, attorney's fees, and expenses under Section 10.

(c) A voluntary [dismissal] [nonsuit] with prejudice of a responding party's [cause of action], or part of a [cause of action], that is the subject of a motion under Section 3 establishes

for the purpose of Section 10 that the moving party prevailed on the motion.

Comments

1. Section 7(a) recognizes that a court can strike or dismiss a part of a cause of action—for example, certain operative facts or theories of liability—and deny the motion as to other parts of the cause of action. *E.g.*, *Baral v. Schnitt*, 376 P.3d 604, 615 (Cal. 2016) (holding that California's statute can be utilized to challenge all or only part of a single cause of action, because a single cause of action may rely on multiple instances of conduct, only some of which may be protected).

2. Section 7(a)(1) establishes "Phase One" of the motion's procedure—applicability. In this phase, the party filing the motion has the burden to establish the Act applies for one of the reasons identified in Section 2(b). To use the Act, a movant need not prove that the responding party has violated a constitutional right—only that the responding party's suit arises from the movant's constitutionally protected activity. THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 3.2 (2019). Nor does the moving party need to show that the responding party *intended* to chill constitutional activities (motivation is irrelevant to the phase-one analysis) or prove that the responding party *actually* chilled the movant's protected activities. *Id*. But "[t]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail it [as] one arising from such." *Navellier v. Sletten*, 52 P.3d 695, 708-09 (Cal. 2002). Rather, the Act is available to a moving party if the conduct underlying the cause of action was "itself" an "act in furtherance" of the party's exercise of First Amendment rights on a matter of public concern. *See City of Cotati v. Cashman*, 52 P.3d 695, 701 (2002). The moving party meets this burden by demonstrating two things: first, that it engaged in conduct that fits one of the three categories spelled out in Section 2(b); and second, that the moved-upon cause of action is premised on that conduct. *See id.* In short, the Act's "definitional focus is not the form of the [non-movant's] cause of action but, rather, the [movant's] activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier*, 52 P.3d at 711.

In many instances, the moving party will be able to carry its burden simply by using the responding party's pleadings. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) ("When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."). As pointed out in Comment 2 to Section 6, a party is always free to use an opposing party's pleadings as stipulations and admissions, and when the Complaint spells out the cause of action and the activity underlying that cause of action, the moving party will be able to satisfy its burden rather easily. For example, if a defendant is sued by a public official for defamation, and the Complaint identifies the allegedly defamatory statement made by the defendant, then the defendant should need to do no more than attach the Complaint as an exhibit to its motion—the Complaint itself would clearly demonstrate that the defendant is being sued for speaking out about a public official (undoubtedly a matter of public concern).

In other instances, the moving party will have to attach evidence to its motion to establish that the cause of action is based on the exercise of protected activity. That's because a creative

plaintiff can disguise what is actually a SLAPP as a "garden variety" tort action. "Thus, a court must look past how the plaintiff characterizes the defendant's conduct to determine, based on evidence presented, whether the plaintiff's claims are based on protected speech or conduct." BURKE, *supra* at § 3.4.

But the fact that the movant's burden must be carried with evidence—whether that be the responding party's pleadings or evidence the movant presents—does not mean the inquiry is a factual one. On the contrary, the motion is legal in nature, and the burden is likewise legal. Thus, the court should not impose a factual burden on the moving party—like "preponderance of the evidence" or "clear and convincing evidence"—typically seen in fact-finding inquiries. Rather, like other legal rulings, the court should simply make a determination, based on the evidence produced by the moving party, whether a cause of action brought against the moving party is based on its (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding; (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or (3) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, on a matter of public concern. It should do so without weighing the parties' evidence against each other, but instead by determining whether the evidence put forth by the movant establishes the legal standard. If the moving party fails to prove the Act applies, the motion must be denied.

3. Section 7(a)(2) is also part of "Phase One" of the motion's procedure. Even if the Act applies for one of the reasons identified in Section 2(b), the Act may nevertheless *not* apply if the party against whom the motion is filed can establish the applicability of an exemption identified in Section 2(c). A party seeking to establish the applicability of an exemption bears the burden of proof on that exemption. Like establishing applicability under Section 2(b), the burden to establish *non-applicability* under Section 2(c) is legal, and not factual. The responding party may use the moving party's motion, or affidavits or any other evidence admissible in a summary-judgment proceeding, to carry its burden. And like the Section 2(b) analysis, the court should decide whether the cause of action is exempt from the act without weighing the evidence against that of the moving party, but instead by determining whether the evidence produced by the responding party establishes the applicability of an exemption. If the responding party so establishes, the motion must be denied. If the moving party proves the Act applies *and* the responding party *cannot* establish the applicability of an exemption, the court moves to "Phase Two" of the motion's procedure.

4. Section 7(a)(3)(A) establishes "Phase Two" of the motion's procedure—prima-facie viability. Anti-SLAPP laws "do not insulate defendants from *any* liability for claims arising from protected rights of petition or speech. [They] only provide[] a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019) (emphasis original) (citations omitted). Phase Two (as well as Phase Three) is where that "weeding out" occurs.

In this phase, the party against whom the motion is filed has the burden to show its case has merit by establishing a prima-facie case as to *each* essential element of the cause of action being challenged by the motion. *See Baral v. Schnitt*, 376 P.3d 604, 613 (Cal. 2016) (holding

that a responding party cannot prevail on an anti-SLAPP motion by establishing a prima-facie case on any *one* part of a cause of action). The moving party has no burden in this phase. "Prima facie" means evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376-77 (Tex. 2019) (prima-facie evidence "is 'the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true'"); *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002) ("[T]he plaintiff must demonstrate that the complaint is [ ] supported by a sufficient prima-facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.").

Precisely how the responding party carries its burden to establish a prima-facie case "will vary from case to case, depending on the nature of the complaint and the thrust of the motion." *Baral*, 376 P.3d at 614. But the responding party should be afforded "a certain degree of leeway" in carrying its burden "due to 'the early stage at which the motion is brought and heard and the limited opportunity to conduct discovery.'" *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 44 Cal. Rptr. 3d 517, 529 (2006) (citations omitted). California courts have "repeatedly described the anti-SLAPP procedure as operating like an early summary judgment motion." THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 5.2 (2019). "[A] plaintiff's burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment." *Yu v. Signet Bank/Virginia*, 126 Cal. Rptr. 2d 516, 530 (Cal. Ct. App. 2002) (disapproved of on other grounds by *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 413 P.3d 650 (Cal. 2018)).

Accordingly, all a responding party must do to satisfy its burden under Phase Two is produce evidence that, if believed, would satisfy each element of the challenged cause of action. A court may not weigh that evidence, but rather must take it as true and determine whether it meets the elements of the moved-upon cause of action. *Sweetwater Union High Sch. Dist.*, 434 P.3d at 1157. If the responding party cannot establish a prima-facie case, then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the responding party *does* establish a prima-facie case, then (and only then) the court moves to "Phase Three" of the motion's procedure.

5. Section 7(a)(3)(B) establishes "Phase Three" of the motion's procedure—legal viability. Even if a responding party makes a prima-facie showing under Section 7(a)(3)(A), the moving party may still prevail if it shows that the responding party failed to state a cause of action upon which relief can be granted *or* that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law—in other words, that the cause of action is not *legally* sound. In this phase, the burden shifts back to the moving party. If the moving party makes a showing under Section 7(a)(3)(B), then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the moving party does not make such a showing—and the responding party successfully established a prima-facie case in "Phase Two"—then the motion must be denied.

For example, a plaintiff desiring to build a "big box" store sues a defendant for tortious interference based on the defendant's efforts to organize a public campaign adverse to the plaintiff. The defendant moves to dismiss under the Act and establishes that the suit targets her

First Amendment activity on a matter of public concern. Thus, the motion moves to Phase Two. In that phase, the plaintiff is able to establish a prima-facie case on each essential element of its tortious interference cause of action. Thus, the motion moves to Phase Three. But in that final phase, the defendant shows that the claim is barred by limitations. In such an instance, the court must grant the motion, because the defendant showed itself to be entitled to judgment as a matter of law.

Although Phase Three uses traditional summary judgment and Fed. R. Civ. P. 12(b)(6) language, it does not serve as a replacement for those vehicles. On the contrary, summary judgment and other dismissal mechanisms remain options for defendants who cannot establish that they have been sued for protected activity. In other words, to get to Phase Three—and be entitled to the Act's sanctions under Section 10—a movant must first prevail under Phase One by showing the Act's applicability. But by employing a legal-viability standard, the Act recognizes that a SLAPP plaintiff can just as easily harass a defendant with a *legally* nonviable claim as it can with a *factually* nonviable one.

6. Sections 7(b) and (c) recognize that a party may desire to dismiss or nonsuit a cause of action after a motion is filed in order to avoid the sanctions that accompany a dismissal under Section 10. Both sections serve to maintain the moving party's ability to seek attorney's fees and costs—even though the offending cause of action has been dismissed—because the filing of a motion under the Act is costly, and many plaintiffs refuse to voluntarily dismiss their claims until a motion has been filed. But a prudent moving party should take efforts to inform opposing parties that it intends to file a motion under the Act, so as to give them an opportunity to voluntarily dismiss offending claims before a motion is filed. Courts may take a moving party's failure to do so into account when calculating the reasonableness of the moving party's attorney's fees.

7. Section 7(b) protects a moving party from the gamesmanship of a responding party who dismisses a cause of action after the filing of a motion, only to refile the offending cause of action after the motion is rendered moot by the claim's dismissal.

8. Once a motion has been filed, a voluntary dismissal or nonsuit of the responding party's cause of action does not deprive the court of jurisdiction.

9. State law should dictate the effect of a dismissal of only part of a cause of action.

SECTION 8. RULING. The court shall rule on a motion under Section 3 not later than [60] days after a hearing under Section 5.

Comment

State law and local customs of the jurisdiction should dictate the consequences for a court not complying with the timelines set forth in this section.

SECTION 9. APPEAL. A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under Section 3. The appeal must be filed not later than [21] days after entry of the order.

Legislative Note: *A state should insert a time to appeal consistent with other interlocutory appeals.*

This section may require amendment of a state's interlocutory appeal statute or court rule.

Comments

1. "If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. Thus, [anti-SLAPP statutes] protect the defendant from the burdens of trial, not merely from ultimate judgments of liability." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (superseded by statute on unrelated grounds as stated in *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL 3124258, at *2 (9th Cir. June 12, 2020)).

2. This section should not be construed to foreclose an interlocutory appeal of an order granting, in whole or in part, a motion under Section 3, if state law would otherwise permit such an appeal.

3. This section is not intended to affect any separate writ procedure a state may have.

4. This section is not intended to prevent a court from entering an order certifying a question or otherwise permitting an immediate appeal of an order that dismisses only part of a claim.

5. A party who chooses not to interlocutorily appeal under this section should not be foreclosed from filing an ordinary, non-interlocutory appeal of a court's denial of a motion under Section 3 following the entry of a final, appealable judgment.

SECTION 10. COSTS, ATTORNEY'S FEES, AND EXPENSES. On a motion under Section 3, the court shall award court costs, reasonable attorney's fees, and reasonable litigation expenses related to the motion:

(1) to the moving party if the moving party prevails on the motion; or

(2) to the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

Comments

1. The mandatory nature of the relief provided for by this section is integral to the uniformity of the Act. States that do not impose a mandatory award upon dismissal of a cause of action will become safe havens for abusive litigants. Without the prospect of having to financially reimburse a successful moving party, SLAPP plaintiffs will be able to file their frivolous suits in such states with impunity, knowing that, at worst, their claims will only be dismissed. But because moving parties would be financially responsible for the expense of obtaining that dismissal, the effect of the abusive cause of action is nevertheless achieved. The only way to assure a truly uniform application of the Act is to require the award of attorney's fees to successful moving parties.

2. Nothing in this section should be construed to prevent a court, in appropriate circumstances, from awarding sanctions under other applicable law or court rule against a party, the party's attorney, or both. For instance, many states have adopted court rules analogous to Fed. R. Civ. P. 11, and the constricted breadth of Section 10 should not act as a shield or restriction against the imposition of such sanctions where they would be otherwise warranted.

3. The term "costs" includes filing fees, as well as other monetary amounts a state may define as a "cost."

4. The term "attorney's fees" means the fees paid to the attorney to compensate for his or her time and effort in the prosecution or defense of the motion.

5. The term "litigation expenses" means the hard costs an attorney incurs in the prosecution or defense of the motion. Typical expenses in a case can include copies and faxes, postage, couriers, expert witnesses, consultants, private court reporters, and travel.

SECTION 11. CONSTRUCTION. This [act] must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or [cite to the state's constitution].

Comment

Similar expressions of intent by states that their anti-SLAPP statutes be broadly construed have been pivotal to courts' interpretations of those statutes. *See, e.g.*, *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (recognizing that the Texas Legislature "has instructed that the [statute] 'shall be construed liberally to effectuate its purpose and intent fully'"); *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 573 (Cal. 1999) ("The Legislature's 1997 amendment of [California's anti-SLAPP statute] to mandate that it be broadly construed apparently was prompted by judicial decisions . . . that had narrowly construed it. . . . That the Legislature added its broad construction proviso . . . plainly indicates these decisions

were mistaken in their narrow view of the relevant legislative intent.").

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. TRANSITIONAL PROVISION. This [act] applies to a civil action filed or [cause of action] asserted in a civil action on or after [the effective date of this [act]].

[SECTION 14. SAVINGS CLAUSE. This [act] does not affect a [cause of action] asserted before [the effective date of this [act]] in a civil action or a motion under [cite to the state's current anti-SLAPP law] regarding the [cause of action].]

Legislative Note: A state should include this section if the state has an existing procedure for a special motion for expedited relief that is being repealed because this act replaces it.

[SECTION 15. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

[SECTION 16. REPEALS; CONFORMING AMENDMENTS.

(a) . . .

(b) . . .

(c) . . .]

Legislative Note: *Section 9 may require amendment of a state's interlocutory appeal statute or court rule.*

A state may need to amend its statutes or rules of civil procedure to prevent a motion under this act from being considered a first pleading or motion that waives a defense or precludes the filing of another pleading or motion.

SECTION 17. EFFECTIVE DATE. This [act] takes effect . . . .

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: SB 810 – Personal Protection Order Expiration Date

Background
SB 810 would amend the Revised Judicature Act, 1961 PA 236, to require that a personal protection order ("PPO"), other than an ex parte PPO, have an expiration date that is not later than five years after the date of the order's entry. The bill would permit the court to renew a PPO for an additional five years. Finally, the bill would permit a court to enter a permanent PPO in two circumstances:

- When the restrained individual has been convicted of a felony or misdemeanor that constitutes domestic violence; or
- When the restrained individual has been determined by a court to have violated the terms of a PPO on more than one occasion.

SB 810 was introduced by Senator Sue Shink and referred to the Seante Committee on Civil Rights, Judiciary & Public Safety.

***Keller* Considerations**
Current law requires that a PPO include an expiration date, which must be stated clearly on the face of the order. By establishing that the expiration date must be not later than five years after the order's entry, SB 810 limits the courts' discretion as to the effective duration of an order. A defined expiration date will also necessarily impact when a PPO must be brought back before the court for termination or renewal. Additionally, the legislation establishes the limited circumstances under which a permanent PPO may be entered. Each of these changes to the existing procedures governing the issuance of PPOs will impact the manner in which courts function in these independent actions. As such, SB 810 is reasonably related (germane) to the functioning of the courts and therefore *Keller*-permissible.

The Access to Justice Policy and Civil Procedure & Courts Committees reviewed SB 810. Both Committees concluded that the bill was reasonably related to the improvement of the functioning of the courts and therefore *Keller*-permissible. However, both also recommended that SBM not take a position on the legislation at this time to allow other stakeholders who are more directly impacted by the proposal to work with the bill sponsor on their concerns. Should a substitute bill be adopted before the adjournment of the current legislature or in the future, SBM would have the opportunity to reevaluate the new bill language.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	**Improvement in Quality of Legal Services**
Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
Ethics	Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

SB 810 is reasonably related to the functioning of the courts and therefore *Keller*-permissible. The bill may be considered on its merits.

SENATE BILL NO. 810

April 09, 2024, Introduced by Senators SHINK, BAYER, CHANG, WOJNO and MCMORROW and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 2950 (MCL 600.2950), as amended by 2018 PA 146.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2950. (1) Except as otherwise provided in subsections ~~(26) and~~ (27) **and (28),** by commencing an independent action to obtain relief under this section, by joining a claim to an action, or by filing a motion in an action in which the petitioner and the individual to be restrained or enjoined are parties, an individual

may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner from doing 1 or more of the following:

(a) Entering onto premises.

(b) Assaulting, attacking, beating, molesting, or wounding a named individual.

(c) Threatening to kill or physically injure a named individual.

(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

(e) Purchasing or possessing a firearm.

(f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

(g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.

(h) If the petitioner is a minor who has been the victim of sexual assault, as that term is defined in section 2950a, by the respondent and if the petitioner is enrolled in a public or nonpublic school that operates any of grades K to 12, attending school in the same building as the petitioner.

(i) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address.

(j) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

(k) Any of the following with the intent to cause the petitioner mental distress or to exert control over the petitioner with respect to an animal in which the petitioner has an ownership interest:

(*i*) Injuring, killing, torturing, neglecting, or threatening to injure, kill, torture, or neglect the animal. A restraining order that enjoins conduct under this subparagraph does not prohibit the lawful killing or other use of the animal as described in section ~~50(11)~~ **50(12)** of the Michigan penal code, 1931 PA 328, MCL 750.50.

(*ii*) Removing the animal from the petitioner's possession.

(*iii*) Retaining or obtaining possession of the animal.

(*l*) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

(2) If the respondent is a person who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment, a police officer licensed or certified by the Michigan commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.615, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the

normal course of his or her employment, the petitioner shall notify the court of the respondent's occupation before issuance of the personal protection order. This subsection does not apply to a petitioner who does not know the respondent's occupation.

(3) A petitioner may omit his or her address of residence from documents filed with the court under this section. If a petitioner omits his or her address of residence, the petitioner shall provide the court with a mailing address.

(4) The court shall issue a personal protection order under this section if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1). In determining whether reasonable cause exists, the court shall consider all of the following:

(a) Testimony, documents, or other evidence offered in support of the request for a personal protection order.

(b) Whether the individual to be restrained or enjoined has previously committed or threatened to commit 1 or more of the acts listed in subsection (1).

(5) A court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1)(a) if all of the following apply:

(a) The individual to be restrained or enjoined is not the spouse of the moving party.

(b) The individual to be restrained or enjoined or the parent, guardian, or custodian of the minor to be restrained or enjoined has a property interest in the premises.

(c) The moving party or the parent, guardian, or custodian of a minor petitioner has no property interest in the premises.

(6) A court shall not refuse to issue a personal protection order solely because of the absence of any of the following:

(a) A police report.

(b) A medical report.

(c) A report or finding of an administrative agency.

(d) Physical signs of abuse or violence.

(7) If the court refuses to grant a personal protection order, it shall state immediately in writing the specific reasons it refused to issue a personal protection order. If a hearing is held, the court shall also immediately state on the record the specific reasons it refuses to issue a personal protection order.

(8) A court shall not issue a mutual personal protection order. Correlative separate personal protection orders are prohibited unless both parties have properly petitioned the court under subsection (1).

(9) A personal protection order is effective and immediately enforceable anywhere in this state after being signed by a judge. Upon service, a personal protection order may also be enforced by another state, an Indian tribe, or a territory of the United States.

(10) The issuing court shall designate a law enforcement agency that is responsible for entering a personal protection order into the law enforcement information network as provided by the C.J.I.S. policy council act, 1974 PA 163, MCL 28.211 to 28.215.

(11) A personal protection order must include all of the following, to the extent practicable in a single form:

(a) A statement that the personal protection order has been entered to restrain or enjoin conduct listed in the order and that violation of the personal protection order will subject the

individual restrained or enjoined to 1 or more of the following:

(*i*) If the respondent is 17 years of age or older, immediate arrest and the civil and criminal contempt powers of the court and, if he or she is found guilty of criminal contempt, imprisonment for not more than 93 days and a fine of not more than $500.00.

(*ii*) If the respondent is less than 17 years of age, immediate apprehension or being taken into custody and the dispositional alternatives listed in section 18 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18.

(*iii*) If the respondent violates the personal protection order in a jurisdiction other than this state, the enforcement procedures and penalties of the state, Indian tribe, or United States territory under whose jurisdiction the violation occurred.

(b) A statement that the personal protection order is effective and immediately enforceable anywhere in this state after being signed by a judge and that, upon service, a personal protection order also may be enforced by another state, an Indian tribe, or a territory of the United States.

(c) A statement listing the type or types of conduct enjoined.

(d) An expiration date, **consistent with subsection (23),** stated clearly on the face of the order.

(e) A statement that the personal protection order is enforceable anywhere in this state by any law enforcement agency.

(f) The name of the law enforcement agency designated by the court to enter the personal protection order into the law enforcement information network.

(g) For ex parte orders, a statement that the individual restrained or enjoined may file a motion to modify or rescind the personal protection order and request a hearing within 14 days

after the individual restrained or enjoined has been served or has received actual notice of the order and that motion forms and filing instructions are available from the clerk of the court.

(12) A court shall issue an ex parte personal protection order without written or oral notice to the individual restrained or enjoined or his or her attorney if it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued.

(13) A personal protection order issued under subsection (12) is valid for not less than 182 days. The individual restrained or enjoined may file a motion to modify or rescind the personal protection order and request a hearing under the Michigan court rules. A motion to modify or rescind the personal protection order must be filed within 14 days after the order is served or after the individual restrained or enjoined has received actual notice of the personal protection order unless good cause is shown for filing the motion after the 14 days have elapsed.

(14) Except as otherwise provided in this subsection, the court shall schedule a hearing on a motion to modify or rescind the ex parte personal protection order within 14 days after the motion is filed. If the respondent is a person described in subsection (2) and the personal protection order prohibits him or her from purchasing or possessing a firearm, the court shall schedule a hearing on the motion to modify or rescind the ex parte personal protection order within 5 days after the motion is filed.

(15) The clerk of the court that issues a personal protection

order shall do all of the following immediately upon issuance and without requiring a proof of service on the individual restrained or enjoined:

(a) File a true copy of the personal protection order with the law enforcement agency designated by the court in the personal protection order.

(b) Provide the petitioner with 2 or more true copies of the personal protection order.

(c) If the respondent is identified in the pleadings as a law enforcement officer, notify the officer's employing law enforcement agency, if known, about the existence of the personal protection order.

(d) If the personal protection order prohibits the respondent from purchasing or possessing a firearm, notify the county clerk of the respondent's county of residence about the existence and contents of the personal protection order.

(e) If the respondent is identified in the pleadings as a department of corrections employee, notify the state department of corrections about the existence of the personal protection order.

(f) If the respondent is identified in the pleadings as being a person who may have access to information concerning the petitioner or a child of the petitioner or respondent and that information is contained in friend of the court records, notify the friend of the court for the county in which the information is located about the existence of the personal protection order.

(16) The clerk of the court shall inform the petitioner that he or she may take a true copy of the personal protection order to the law enforcement agency designated by the court under subsection (10) to be immediately entered into the law enforcement information

network.

(17) The law enforcement agency that receives a true copy of a personal protection order under subsection (15) or (16) shall immediately and without requiring proof of service enter the personal protection order into the law enforcement information network as provided by the C.J.I.S. policy council act, 1974 PA 163, MCL 28.211 to 28.215.

(18) A personal protection order issued under this section must be served personally or by registered or certified mail, return receipt requested, delivery restricted to the addressee at the last known address or addresses of the individual restrained or enjoined or by any other manner allowed by the Michigan court rules. If the individual restrained or enjoined has not been served, a law enforcement officer or clerk of the court who knows that a personal protection order exists may, at any time, serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined of the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order. If the respondent is less than 18 years of age, the parent, guardian, or custodian of the individual must also be served personally or by registered or certified mail, return receipt requested, delivery restricted to the addressee at the last known address or addresses of the parent, guardian, or custodian. A proof of service or proof of oral notice must be filed with the clerk of the court issuing the personal protection order. This subsection does not prohibit the immediate effectiveness of a personal protection order or its immediate enforcement under subsections ~~(21) and~~ (22) **and (23).**

(19) The clerk of the court that issued the personal protection order shall immediately notify the law enforcement agency that received the personal protection order under subsection (15) or (16) if either of the following occurs:

(a) The clerk of the court receives proof that the individual restrained or enjoined has been served.

(b) The personal protection order is rescinded, modified, or extended by court order.

(20) The law enforcement agency that receives information under subsection (19) shall enter the information or cause the information to be entered into the law enforcement information network as provided by the C.J.I.S. policy council act, 1974 PA 163, MCL 28.211 to 28.215.

(21) Subject to subsection (22), a personal protection order is immediately enforceable anywhere in this state by any law enforcement agency that has received a true copy of the order, is shown a copy of it, or has verified its existence on the law enforcement information network as provided by the C.J.I.S. policy council act, 1974 PA 163, MCL 28.211 to 28.215.

(22) If the individual restrained or enjoined has not been served, a law enforcement agency or officer responding to a call alleging a violation of a personal protection order shall serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined of the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order. The law enforcement officer shall enforce the personal protection order and immediately enter or cause to be entered into the law enforcement

information network that the individual restrained or enjoined has actual notice of the personal protection order. The law enforcement officer also shall file a proof of service or proof of oral notice with the clerk of the court issuing the personal protection order. If the individual restrained or enjoined has not received notice of the personal protection order, the individual restrained or enjoined must be given an opportunity to comply with the personal protection order before the law enforcement officer makes a custodial arrest for violation of the personal protection order. The failure to immediately comply with the personal protection order is grounds for an immediate custodial arrest. This subsection does not preclude an arrest under section 15 or 15a of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15 and 764.15a, or a proceeding under section 14 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.14.

(23) A personal protection order, other than an ex parte personal protection order, must have an expiration date that is not later than 5 years after the date the order is entered. A personal protection order may be renewed for an additional 5 years. The court may enter a permanent personal protection order, without an expiration date, if the court determines that either of the following apply:

(a) The restrained individual has been convicted of a felony or a misdemeanor that constitutes domestic violence, as that term is defined in section 1 of 1978 PA 389, MCL 400.1501.

(b) The restrained individual has been determined by a court on more than 1 occasion to have violated the terms of a personal protection order.

(24) ~~(23)~~ An individual who is 17 years of age or older and

who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, must be imprisoned for not more than 93 days and may be fined not more than $500.00. An individual who is less than 17 years of age and who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in section 18 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18. The criminal penalty provided under this section may be imposed in addition to a penalty that may be imposed for another criminal offense arising from the same conduct.

(25) ~~(24)~~ An individual who knowingly and intentionally makes a false statement to the court in support of his or her petition for a personal protection order is subject to the contempt powers of the court.

(26) ~~(25)~~ A personal protection order issued under this section is also enforceable under section 15b of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15b, and chapter 17.

(27) ~~(26)~~ A court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1) if any of the following apply:

(a) The respondent is the unemancipated minor child of the petitioner.

(b) The petitioner is the unemancipated minor child of the respondent.

(c) The respondent is a minor child less than 10 years of age.

(28) ~~(27)~~ If the respondent is less than 18 years of age, issuance of a personal protection order under this section is

subject to chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(29) ~~(28)~~ A personal protection order that is issued before March 1, 1999 is not invalid on the ground that it does not comply with 1 or more of the requirements added by 1998 PA 477.

(30) ~~(29)~~ For purposes of subsection (1)(k), a petitioner has an ownership interest in an animal if 1 or more of the following are applicable:

(a) The petitioner has a right of property in the animal.

(b) The petitioner keeps or harbors the animal.

(c) The animal is in the petitioner's care.

(d) The petitioner permits the animal to remain on or about premises occupied by the petitioner.

(31) ~~(30)~~ As used in this section:

(a) "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(b) "Federal law enforcement officer" means an officer or agent employed by a law enforcement agency of the United States government whose primary responsibility is the enforcement of laws of the United States.

(c) "Neglect" means that term as defined in section 50 of the Michigan penal code, 1931 PA 328, MCL 750.50.

(d) "Personal protection order" means an injunctive order issued by the family division of circuit court restraining or enjoining activity and individuals listed in subsection (1).

Public Policy Position
SB 810

No Position

Explanation
The Committee voted unanimously to recommend that the State Bar take no position on SB 810 at this time.

The Committee voiced a number of concerns about the legislation as drafted (e.g., judges defaulting to the new 5-year limit and domestic violence stakeholder opposition due to the fact that limits on the duration of a PPO, the number of times it can be renewed, and the criteria for a permanent PPO may unnecessarily restrict the discretion of judges), but believed that the Bar should permit other stakeholders the opportunity to work with the sponsor on this legislation and defer weighing in until an updated version of the bill is potentially available for review.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

***Keller* Permissibility Explanation**
The Committee voted unanimously that SB 810 is *Keller*-permissible because it is reasonably related to the improvement of the functioning of the courts.

Contact Persons:
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Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
SB 810

No Position

Explanation
The Committee voted to support the position adopted by the Access to Justice Policy Committee:

> The Committee voted unanimously to recommend that the State Bar take no position on SB 810 at this time.
>
> The Committee voiced a number of concerns about the legislation as drafted (e.g., judges defaulting to the new 5-year limit and domestic violence stakeholder opposition due to the fact that limits on the duration of a PPO, the number of times it can be renewed, and the criteria for a permanent PPO may unnecessarily restrict the discretion of judges), but believed that the Bar should permit other stakeholders the opportunity to work with the sponsor on this legislation and defer weighing in until an updated version of the bill is potentially available for review.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 3
Did not vote (absence): 9

Keller Permissibility Explanation:
The Committee voted unanimously that SB 810 is *Keller*-permissible because it is reasonably related to the improvement of the functioning of the courts.

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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: SB 914 – In-Custody Informants in Criminal Proceedings

Background

In September 2022, as the 101st Legislature was nearing *sine die* adjournment, the Board of Commissioners considered legislation (2022 HB 6356) that would have created procedural safeguards for the use of in-custody informants—colloquially known as "jailhouse informants"—in criminal investigations and court proceedings. The testimony of in-custody informants—who are often incentivized to testify with offers of leniency in their own criminal matters—is notoriously unreliable. The Innocence Project has linked in-custody informant testimony to nearly one in five of 367 DNA-based exoneration cases.[1]

A divided Criminal Jurisprudence & Practice Committee ("CJAP") opposed 2022 HB 6356 as introduced. The Access to Justice Policy Committee ("ATJ") supported the bill in concept, but recommended that Board action be deferred to permit further evaluation of the legislation. The Public Policy Committee concurred with ATJ's recommendation, and the Board declined to adopt a public policy position at that time. The 2022 bill was never reported by the House Judiciary Committee.

SB 914 is a successor to 2022 HB 6356. While the bills are similar, there are notable, substantive differences between the two:

- The definition of "in-custody informant" has been expanded. 2022 HB 6356 required the informant's testimony to be based upon statements made by a defendant while housed together with the informant. SB 914 would also include scenarios where the informant and defendant were not in custody at the same time and location, but the informant is subsequently housed in custody because of their own charges.

- When a prosecutor intends to introduce testimony from an in-custody informant, 2022 HB 6356 required a reliability hearing. SB 914 eliminates the required hearing.

- SB 914 includes a 21-day deadline for certain disclosures required of a prosecutor under the bill. 2022 HB 6356 had only required such disclosures to be "timely" without further definition.

[1] The Innocence Project, *Informing Injustice: The Disturbing Use of Jailhouse Informants* <https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/> (accessed July 9, 2024).

- SB 914 requires prosecutors to provide specified information to the Department of Corrections and Michigan State Police. If the prosecutor fails to do so, they are precluded from using the information in a criminal prosecution until they comply with the requirement. 2022 HB 6356 did not include this provision.

SB 914 was introduced by Senator Sue Shink (the only lawyer-legislator presently serving in the Michigan Senate) and referred to the Senate Committee on Civil Rights, Judiciary & Public Safety for consideration.

Keller Considerations

In-custody informants are a regular, widely utilized feature in criminal proceedings in Michigan. By prescribing a range of procedures that must be used by prosecutors and courts in these proceedings, SB 914 has the potential to significantly impact the functioning of the courts.

While the Board did not take a position on 2022 HB 6356, ATJ, CJAP, and the Public Policy Committee all concurred at that time that the bill was *Keller*-permissible as germane to the functioning of the courts. SB 914 was reviewed by both ATJ and CJAP. Both again determined that the legislation was *Keller*-permissible as reasonably related to court functioning. ATJ recommended that the Board support the bill, while CJAP recommended that the Board adopt a position of supporting the legislation in concept only.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	**Improvement in Quality of Legal Services**
Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
Ethics	Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

Prescribing detailed procedures related to the use of in-custody informants in criminal proceedings is necessarily related to the functioning of the courts. Moreover, the impact of the proposed legislation is potentially significant to those proceedings. As such, SB 914 is *Keller*-permissible and may be considered on its merits.

SENATE BILL NO. 914

June 12, 2024, Introduced by Senators SHINK, GEISS, BAYER and SANTANA and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding sections 36a, 36b, 36c, 36d, 36e, 36f, and 36g to chapter VIII.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER VIII

Sec. 36a. As used in this section and sections 36b to 36g of this chapter:

(a) "Benefit" means any plea bargain, bail consideration,

reduction or modification of sentence, or any other leniency, immunity, financial payment, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, an in-custody informant's participation in any information-gathering activity, investigation, or operation, or in return for, or in connection with, the in-custody informant's testimony in a criminal proceeding in which the prosecuting attorney intends to call the in-custody informant as a witness.

(b) "In-custody informant" means an individual, other than a codefendant, percipient witness, accomplice, or co-conspirator, who provides testimony or information for use in the investigation or prosecution of a defendant based upon statements made by the defendant under 1 of the following circumstances:

(*i*) While the defendant and the in-custody informant were housed in the same correctional facility, county jail, local lockup, or other custodial facility, regardless of location.

(*ii*) While the defendant and the in-custody informant were not in custody and in the same location, and the in-custody informant is subsequently housed in a correctional facility, county jail, local lockup, or other custodial facility, regardless of location, because of the in-custody informants own charges.

(c) "Official" means an individual acting on behalf of the government during an investigation or prosecution of a misdemeanor or felony, including, but not limited to, a prosecuting attorney or a law enforcement officer.

(d) "Prosecuting attorney's office" includes the office of a county prosecuting attorney and the department of the attorney general.

Sec. 36b. (1) Each prosecuting attorney's office shall track

and, as provided under subsection (2), submit a record of the following information:

(a) The use of testimony or information provided to the prosecuting attorney's office by an in-custody informant against a defendant's interest.

(b) Any benefit offered or provided to an in-custody informant in exchange for testimony or information about a defendant.

(2) Each county prosecuting attorney's office shall provide the information described under subsection (1) to the department of corrections and the department of state police. If a prosecuting attorney's office fails to provide the information described under subsection (1), the information is precluded from use in criminal prosecution until the prosecuting attorney's office complies with this section.

(3) The department of corrections and the department of state police shall maintain a statewide record of the information collected under subsection (1).

(4) The information collected under subsection (1) is confidential and is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 36c. A prosecuting attorney shall disclose to the defense, during the course of discovery, no later than 21 days before trial or any pretrial hearing at which the in-custody informant's statements or testimony will be introduced, any information in the possession, custody, or control of the prosecution that is relevant to an in-custody informant's credibility, including, but not limited to, all of the following:

(a) A benefit that any official has extended or will extend in the future to the in-custody informant. This includes, but is not

limited to, a cooperation agreement with any official.

(b) The substance, time, and place of any statement allegedly given by the defendant to the in-custody informant.

(c) The substance, time, and place of any statement given by the in-custody informant to any official implicating the defendant in the crime charged.

(d) The complete criminal history of the in-custody informant.

(e) If the in-custody informant has previously testified or provided information in exchange for a benefit, all other cases in which the in-custody informant has done so, the content of the statements and testimony of the in-custody informant in those cases, and the specific benefit previously offered or received.

(f) Whether or not the in-custody informant modified or recanted the in-custody informant's testimony at any time and, if so, the time and place of the recantation or modification, the nature of the recantation or modification, and the name of any individual present at the recantation or modification.

Sec. 36d. A prosecuting attorney shall disclose no later than 21 days before trial or any pretrial hearing at which the in-custody informant's statements or testimony will be introduced the prosecution's intent to introduce the testimony of an in-custody informant. The same procedure for introducing the testimony of other fact witnesses that are applicable in this state applies to an in-custody informant's testimony.

Sec. 36e. If an in-custody informant testifies, the prosecuting attorney or defense counsel may elicit the information described under section 36c of this chapter during direct or cross-examination, respectively. If a written statement from the in-custody informant is admitted for any reason, including, but not

limited to, the unavailability of the in-custody informant, the information described under section 36c of this chapter must be included with the written statement.

Sec. 36f. If an in-custody informant receives a benefit related to a pending charge, a conviction, or a sentence in connection with offering or providing testimony against a defendant, the prosecuting attorney shall notify any victim in the in-custody informant's case of the benefit in a timely manner.

Sec. 36g. If the in-custody informant's testimony is admitted into evidence, a cautionary instruction must be provided to the jury. The jury instruction must include all of the following provisions:

(a) The testimony of an in-custody informant who provides evidence against a defendant must be examined and weighed with greater care than the testimony of an ordinary witness.

(b) The in-custody informant may expect, and in practice often receive, a benefit that has not been formally promised to the in-custody informant before trial.

(c) The reliability factors enumerated in section 36c of this chapter must be considered when determining whether the testimony of the in-custody informant has been influenced by interest in a benefit or prejudice against the defendant.

Last session, SBM reviewed HB 6356. CJAP voted (9-5) to oppose the bill as introduced. ATJ Policy voted (16-1) to support the bill in concept, but also to recommend that SBM not take a position on the bill to allow more time for feedback. Based on that feedback, the Public Policy Committee recommended deferring consideration of HB 6356 and the Board adopted no position. Note that last session's bill (2022 HB 6356) and this session's bill (2024 SB 914) are similar, but there are substantive differences between the bills.

HOUSE BILL NO. 6356

August 17, 2022, Introduced by Rep. Steven Johnson and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding sections 36a, 36b, 36c, 36d, 36e, 36f, 36g, and 36h to chapter VIII.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER VIII

Sec. 36a. As used in sections 36b to 36h of this chapter:

(a) "Benefit" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency,

immunity, financial payment, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, an in-custody informant's participation in any information-gathering activity, investigation, or operation, or in return for, or in connection with, the in-custody informant's testimony in a criminal proceeding in which the prosecuting attorney intends to call the in-custody informant as a witness.

(b) "In-custody informant" means an individual, other than a codefendant, percipient witness, accomplice, or co-conspirator, who provides testimony or information for use in the investigation or prosecution of a defendant based upon statements made by the defendant while the defendant and the in-custody informant were housed in the same correctional facility, county jail, local lockup, or other custodial facility.

Sec. 36b. (1) Each county prosecuting attorney's office shall track and maintain a record of the following information:

(a) The use of testimony or information provided to the prosecuting attorney's office by an in-custody informant against a defendant's interest.

(b) Any benefit offered or provided to an in-custody informant in exchange for testimony or information about a defendant.

(2) Each county prosecuting attorney's office shall provide the information described under subsection (1) to the department of the attorney general.

(3) The department of the attorney general shall maintain a statewide record of the information collected under subsection (1).

(4) The information collected under subsection (1) is confidential and is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 36c. A prosecuting attorney shall disclose to the defense in a timely manner before any evidentiary hearing or trial any information in the possession, custody, or control of the prosecution that is relevant to an in-custody informant's credibility, including, but not limited to, all of the following:

(a) Benefits that the prosecuting attorney has extended or will extend in the future to the in-custody informant.

(b) The substance, time, and place of any statement allegedly given by the defendant to the in-custody informant.

(c) The substance, time, and place of any statement given by the in-custody informant to law enforcement implicating the defendant in the crime charged.

(d) The complete criminal history of the in-custody informant.

(e) If the in-custody informant has previously testified or provided information in exchange for a benefit, the specific benefit previously offered or received.

(f) Whether or not the in-custody informant modified or recanted the in-custody informant's testimony at any time.

Sec. 36d. A prosecuting attorney shall timely disclose the prosecution's intent to introduce the testimony of an in-custody informant. The same procedure for introducing the testimony of other fact witnesses that are applicable in this state applies to an in-custody informant's testimony.

Sec. 36e. If an in-custody informant testifies, the prosecuting attorney or defense counsel may elicit the information described under section 36c of this chapter during direct or cross-examination, respectively. If a written statement from the in-custody informant is admitted for any reason, including, but not limited to, the unavailability of the in-custody informant, the

information described under section 36c of this chapter must be included with the written statement.

Sec. 36f. If an in-custody informant receives a benefit related to a pending charge, a conviction, or a sentence in connection with offering or providing testimony against a defendant, the prosecuting attorney shall notify any victim in the in-custody informant's case of the benefit.

Sec. 36g. (1) Unless the defendant waives the hearing required under this section, before a trial commences during which the prosecuting attorney intends to introduce the testimony of an in-custody informant, the court shall hold a hearing to assess the reliability of the informant and to determine if the prosecuting attorney can introduce evidence to corroborate the content of the in-custody informant's testimony relating to a crime.

(2) At a hearing conducted under this section, the court shall consider all of the information described under section 36c of this chapter.

(3) If the prosecution fails to show by a preponderance of the evidence that the in-custody informant's testimony is reliable, the court shall render the testimony inadmissible.

Sec. 36h. If the in-custody informant's testimony is admitted into evidence, a cautionary instruction must be provided to the jury. The jury instruction must include all of the following:

(a) The testimony of an in-custody informant who provides evidence against a defendant must be examined and weighed with greater care than the testimony of an ordinary witness.

(b) The in-custody informant may expect, and in practice often receive, a benefit that has not been formally promised to the in-custody informant before trial.

(c) The reliability factors enumerated in section 36c of this chapter must be considered when determining whether the testimony of the in-custody informant has been influenced by interest in a benefit or prejudice against the defendant.

Public Policy Position
HB 6356

Support HB 6356 in Concept

Explanation

The Committee voted to support HB 6356 in concept, as the use of "jailhouse informants" in Michigan's criminal legal system impacts a number of important access to justice issues.

However, the Committee also recommends that the Public Policy Committee defer action on this legislation at this time to allow members of the Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee to confer and provide more detailed feedback to the Public Policy Committee and the Board of Commissioners on this legislation at a future Committee/Board meeting prior to the adoption of a public policy position on the bill by the Bar.

Position Vote:

Voted For position: 16
Voted against position: 1
Abstained from vote: 4
Did not vote (absent): 6

***Keller* Permissibility Explanation:**

House Bill 6356 would significantly impact the procedures regarding the use of "jailhouse informants" in criminal proceedings, including the responsibility of courts and prosecutors in these settings, it is therefore reasonably related to the functioning of the courts and *Keller*-permissible.

Contact Persons:

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Public Policy Position
HB 6356

Opposed as Introduced

Explanation:
The Committee voted to oppose House Bill 6356 as introduced citing concerns regarding the legislation's interaction with the Rules of Evidence, provisions of the legislation constituting an unfunded mandate on prosecutors, and adding unduly burdensome procedural requirements on the use of informants in criminal proceedings.

Position Vote:
Voted For position: 9
Voted against position: 5
Abstained from vote: 0
Did not vote (absent): 10

***Keller*-Permissible Explanation:**
The Committee agreed that House Bill 6356 is *Keller*-permissible as the procedures regarding the use of informants in criminal proceedings is reasonably related to the functioning of the courts.

Contact Persons:
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Public Policy Position
SB 914

Support with Amendment

Explanation

The Committee voted to support SB 914 with an amendment to require the prosecuting attorney to provide the notification required under proposed Sec. 36f at least 21 days before the in-custody informant's trial. The Committee noted that it is common practice in criminal prosecutions for prosecuting attorneys to rely on testimony offered by incarcerated persons who are incentivized to testify against a defendant with promises of leniency or other benefits, and that such testimony has been widely documented to be unreliable. The procedural safeguards proposed by SB 914 strike the appropriate balance between a prosecuting attorney's interest in introducing potentially relevant evidence, the defendant's ability to test the credibility of such evidence, and courts' ability to police abusive use of in-custody informants.

Position Vote:

Voted For position: 11
Voted against position: 0
Abstained from vote: 2
Did not vote (absence): 11

***Keller* Permissibility Explanation**

The Committee voted unanimously that SB 914 is *Keller*-permissible as it would make a significant impact on the procedure for using informant testimony in a criminal case, including on the responsibility of courts and prosecutors. The bill is reasonably related to court functioning and therefore *Keller*-permissible.

Contact Persons:

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Public Policy Position
SB 914

Support in Concept But Oppose as Written

Explanation:
The Committee voted to support SB 914 in concept, but to oppose the legislation as currently written. There was broad agreement among Committee members that the use of in-custody informants had the potential for abuse that warranted procedural guardrails. At the same time, Committee members raised a number of concerns about the specific language of SB 914. For example, questions were raised about whether it was appropriate to require a prosecuting attorney to disclose a benefit extended by "any official," as opposed to just the prosecuting attorney. Some members questioned whether the statewide database should be operated by the Department of Attorney General, as opposed to MDOC and Michigan State Police. There were questions raised about the funding necessary to implement this legislation and whether or not it should be limited to only in-custody informants. Some members also questioned whether issues surrounding in-custody informants would be better addressed by a court rule, as opposed to legislation.

Position Vote:
Voted For position: 11
Voted against position: 4
Abstained from vote: 0
Did not vote (absent): 9

***Keller* Permissibility Explanation**
The Committee determined that the legislation is reasonably related to court functioning and therefore *Keller*-permissible.

Contact Persons:
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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: HB 4746/SB 916 – Outpatient Mental Health Treatment for Misdemeanor Offenders

Background

HB 4746 and SB 916 are identical bills that would amend the Mental Health Code, 1974 PA 258, by adding a new Chapter 10A concerning outpatient mental health treatment for individuals charged with misdemeanor offenses. HB 4746 was introduced by Representative Donni Stelle in June 2023. It was referred to the Criminal Jurisprudence & Practice Committee ("CJAP") and Access to Justice Policy Committee ("ATJ") for review. CJAP voted to support HB 4746 in July 2023, but ATJ requested additional time to evaluate the legislation and make a recommendation. Further action on the bill was deferred at that time. In June 2024, Senator Sylvia Santana introduced SB 916. Both bills are now before the Bar for consideration.

The new Chapter 10A proposed in HB 4746/SB 916 would permit a prosecuting attorney or the defendant/defense counsel to bring a motion seeking a mental health assessment if the defendant meets certain enumerated criteria. This procedure is intended as a substitute for the existing competency provisions found in Chapter 10 of the Act.

In the event that a defendant's motion is opposed by the prosecuting attorney, defendant, or defense counsel, the defendant may not be diverted into outpatient treatment and the standard competency provisions must be followed, as applicable.

If the assessment conducted pursuant to a motion brought under the provisions of the new Chapter 10A determines that the defendant meets the criteria for outpatient treatment, the prosecuting attorney must file a petition for admission under MCL 330.1434(7). If such a petition is filed, HB 4746/SB 916 would permit a district court judge to request that SCAO assign a probate judge to hear the petition or direct the prosecuting attorney to file the petition in probate court. If either the prosecutor or defendant object to the entry of an order for outpatient treatment, the petition must be dismissed, and the case would then proceed under the competency provisions of Chapter 10. If there is no objection, the court shall enter the order for outpatient treatment. Such an order may provide for outpatient treatment for not more than 180 days.

HB 4746/SB 916 requires that the misdemeanor charges against the defendant remain pending until dismissed by the court for the purpose of enforcing conditions of release for outpatient treatment. Note that the conditions of release must be separate from compliance with the treatment plan and compliance with the treatment plan must not be made a condition of release. The bills also provide that a pending misdemeanor charge must be dismissed by the district court 90 days after the entry of an assisted outpatient treatment order. In the case of "serious misdemeanors," as defined in the

William Van Regenmorter Crime Victim's Rights Act, 1985 PA 87, the misdemeanor must be dismissed within 180 days of an assisted outpatient treatment order.

HB 4746 was referred to the House Health Policy Committee. SB 916 was referred to the Senate Health Policy Committee.

Keller Considerations

Historically, the Bar has deemed most legislation concerning diversion programs as *Keller*-permissible because diversions significantly impact both the procedure by which courts process impacted criminal cases and the volume of cases that come before the courts, with the attendant impact of judicial economy and court procedures. The most notable example of this approach is the Bar's longstanding view that legislation concerning the establishment and operation of various problem-solving courts is reasonable related to the functioning of the courts and is therefore *Keller*-permissible. Providing prosecuting attorneys, defendants/defense counsel, and courts with a detailed procedure by which a misdemeanor defendant may be diverted from criminal prosecution into outpatient mental health treatment functions similarly. HB 4746/SB 916 establishes specific parameters to guide diversion that must be adhered to by the courts. If its provisions were invoked, that would guide the application—or lack thereof—of traditional competency proceedings in certain misdemeanor cases. Like problem-solving courts, the diversion proposed in HB 4746/SB 916 would also impact the volume and nature of criminal cases ultimately heard and decided by Michigan courts. While legislation that simply made more mental health resources available to those in need would not pass the bar set by *Keller*, the type of deep entanglement between assessment, outpatient treatment, attorneys, and the courts, makes HB 4746/SB 916 reasonably related to the functioning of the courts and therefore, like other diversion legislation of this kind, *Keller*-permissible.

The two SBM committees that reviewed HB 4746 and SB 916 concurred. Both Access to Justice Policy and Criminal Jurisprudence & Practice determined unanimously that the legislation was *Keller*-permissible as reasonably related to improvement in the functioning of the courts

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	**Improvement in Quality of Legal Services**
Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
Ethics	Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

Legislation concerning diversion programs deeply enmeshed in the criminal legal system and involving the active involvement of the courts and their officers, such as HB 4746/SB 916, is reasonably related to the functioning of the courts. The bills are therefore *Keller*-permissible and may be considered on their merits.

SENATE BILL NO. 916

June 12, 2024, Introduced by Senators SANTANA, HERTEL, WOJNO and IRWIN and referred to the Committee on Health Policy.

A bill to amend 1974 PA 258, entitled

"Mental health code,"

by amending section 461 (MCL 330.1461), as amended by 2018 PA 593, and by adding section 1021 and chapter 10A.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 461. (1) ~~An~~ **For a petition filed under section 434(1) to (6), an** individual may not be found to require treatment unless at least 1 physician or licensed psychologist who has personally examined that individual testifies in person or by written deposition at the hearing.

(2) For a petition filed under section 434(7), ~~that does not seek hospitalization before the hearing,~~ an individual may ~~not~~ be found to require treatment ~~unless a psychiatrist who has personally examined that individual testifies. A psychiatrist's testimony is not necessary if a psychiatrist signs the petition. If a psychiatrist signs the petition, at least 1 physician or licensed psychologist who has personally examined that individual must testify.~~ **if a physician, psychologist, or a psychiatric nurse practitioner or physician assistant working under the supervision of a psychiatrist has personally examined the individual and testifies that the individual requires treatment.** The requirement for testimony may be waived by the subject of the petition. ~~If the testimony given in person is waived, a clinical certificate completed by a physician, licensed psychologist, or psychiatrist must be presented to the court before or at the initial hearing.~~

(3) The examinations required under this section for a petition filed under section 434(7) ~~shall~~ **must** be arranged by the court and the local community mental health services program or other entity as designated by the department.

(4) A written deposition may be introduced as evidence at the hearing only if the attorney for the subject of the petition was given the opportunity to be present during the taking of the deposition and to cross-examine the deponent. This testimony or deposition may be waived by the subject of a petition. An individual may be found to require treatment even if the petitioner does not testify, as long as there is competent evidence from which the relevant criteria in section 401 can be established.

Sec. 1021. Sections 1022 to 1044 do not apply to an individual charged with a misdemeanor offense who has been diverted to

assisted outpatient treatment under chapter 10A.

CHAPTER 10A

Sec. 1075. (1) At the time a misdemeanor offense is charged, or at any later time before trial, the prosecuting attorney, the defendant, or defense counsel may bring a motion seeking an assessment by a physician, psychologist, or, if working under the supervision of a psychiatrist, a psychiatric nurse practitioner or physician assistant to determine if the defendant meets the criteria for diversion to assisted outpatient treatment under this chapter.

(2) The defendant or defense counsel may oppose a motion made by the prosecuting attorney under subsection (1). The prosecuting attorney may oppose a motion made by the defendant or defense counsel under subsection (1).

(3) If a motion under subsection (1) is opposed by the prosecuting attorney, defendant, or defense counsel, the defendant must not be diverted into assisted outpatient treatment and the competency provisions of chapter 10 must be followed, as applicable.

(4) If, upon assessment under subsection (1), it is determined that the defendant meets the criteria for assisted outpatient treatment, the prosecuting attorney shall file a petition as provided for a person requiring treatment under section 434(7).

(5) If a petition is filed under subsection (4), the judge of the district court may request assignment from the state court administrative office as a probate judge to hear and determine the petition or direct the prosecuting attorney to file the petition in the probate court in the defendant's county of residence. If the petition is filed in the probate court as provided under this

subsection, the probate court shall hear and determine the petition.

(6) If, at the hearing on the petition for assisted outpatient treatment, the prosecuting attorney or the defendant objects to entry of the order for assisted outpatient treatment, the petition must be dismissed and the procedures under sections 1022 to 1044 apply to the case.

(7) If, at the hearing on the petition for assisted outpatient treatment, there is no objection to entry of the order for assisted outpatient treatment, the court shall enter the order.

(8) As used in this section, "person requiring treatment" means that term as defined in section 401.

Sec. 1076. (1) If diversion from criminal prosecution and into assisted outpatient treatment is ordered after a hearing on a petition under section 1075, the court that heard the petition shall enter an order providing for assisted outpatient treatment for not more than 180 days.

(2) If a defendant fails to comply with the terms of the assisted outpatient treatment order, the provisions under section 475 apply to the case. Any bond or bond conditions are separate from and not to be included in the determination of whether the defendant has complied with the assisted outpatient treatment order.

(3) If a designated community treatment program is not in compliance with delivery of services required by the assisted outpatient treatment order, the court shall conduct a hearing and determine whether to order the program to deliver services.

Sec. 1077. (1) The misdemeanor charges against a defendant receiving assisted outpatient treatment must remain pending until

dismissed by the district court for purposes of enforcing conditions of release. The conditions of release for a defendant receiving assisted outpatient treatment must be separate from compliance with the treatment plan. Compliance with the assisted outpatient treatment must not be a condition of release.

(2) All matters that concern noncompliance with the assisted outpatient treatment plan must be addressed in a civil proceeding under section 475.

(3) Except as otherwise provided in this subsection, a pending misdemeanor charge must be dismissed by the district court 90 days after the entry of the assisted outpatient treatment order. If the defendant was charged with a serious misdemeanor, the misdemeanor charge must be dismissed 180 days after the entry of the assisted outpatient treatment order.

(4) As used in this section, "serious misdemeanor" means that term as defined in section 61 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.811.

Sec. 1078. Upon the termination of the assisted outpatient treatment, the provider of the assisted outpatient treatment shall notify the prosecutor, district court, and probate court, as applicable, that the assisted outpatient treatment has been terminated.

HOUSE BILL NO. 4746

June 14, 2023, Introduced by Reps. Steele, Harris, Tisdel, Kuhn and BeGole and referred to the Committee on Health Policy.

A bill to amend 1974 PA 258, entitled

"Mental health code,"

by amending section 461 (MCL 330.1461), as amended by 2018 PA 593, and by adding section 1021 and chapter 10A.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 461. (1) ~~An~~ **For a petition filed under section 434(1) to (6), an** individual may not be found to require treatment unless at least 1 physician or licensed psychologist who has personally examined that individual testifies in person or by written deposition at the hearing.

(2) For a petition filed under section 434(7), ~~that does not seek hospitalization before the hearing,~~ an individual may ~~not~~ be found to require treatment ~~unless a psychiatrist who has personally examined that individual testifies. A psychiatrist's testimony is not necessary if a psychiatrist signs the petition. If a psychiatrist signs the petition, at least 1 physician or licensed psychologist who has personally examined that individual must testify.~~ **if a physician, psychologist, or a psychiatric nurse practitioner or physician assistant working under the supervision of a psychiatrist has personally examined the individual and testifies that the individual requires treatment.** The requirement for testimony may be waived by the subject of the petition. ~~If the testimony given in person is waived, a clinical certificate completed by a physician, licensed psychologist, or psychiatrist must be presented to the court before or at the initial hearing.~~

(3) The examinations required under this section for a petition filed under section 434(7) ~~shall~~ **must** be arranged by the court and the local community mental health services program or other entity as designated by the department.

(4) A written deposition may be introduced as evidence at the hearing only if the attorney for the subject of the petition was given the opportunity to be present during the taking of the deposition and to cross-examine the deponent. This testimony or deposition may be waived by the subject of a petition. An individual may be found to require treatment even if the petitioner does not testify, as long as there is competent evidence from which the relevant criteria in section 401 can be established.

Sec. 1021. Sections 1022 to 1044 do not apply to an individual charged with a misdemeanor offense who has been diverted to

assisted outpatient treatment under chapter 10A.

CHAPTER 10A

Sec. 1075. (1) At the time a misdemeanor offense is charged, or at any later time before trial, the prosecuting attorney, the defendant, or defense counsel may bring a motion seeking an assessment by a physician, psychologist, or, if working under the supervision of a psychiatrist, a psychiatric nurse practitioner or physician assistant to determine if the defendant meets the criteria for diversion to assisted outpatient treatment under this chapter.

(2) The defendant or defense counsel may oppose a motion made by the prosecuting attorney under subsection (1). The prosecuting attorney may oppose a motion made by the defendant or defense counsel under subsection (1).

(3) If a motion under subsection (1) is opposed by the prosecuting attorney, defendant, or defense counsel, the defendant must not be diverted into assisted outpatient treatment and the competency provisions of chapter 10 must be followed, as applicable.

(4) If, upon assessment under subsection (1), it is determined that the defendant meets the criteria for assisted outpatient treatment, the prosecuting attorney shall file a petition as provided for a person requiring treatment under section 434(7).

(5) If a petition is filed under subsection (4), the judge of the district court may request assignment from the state court administrative office as a probate judge to hear and determine the petition or direct the prosecuting attorney to file the petition in the probate court in the defendant's county of residence. If the petition is filed in the probate court as provided under this

subsection, the probate court shall hear and determine the petition.

(6) If, at the hearing on the petition for assisted outpatient treatment, the prosecuting attorney or the defendant objects to entry of the order for assisted outpatient treatment, the petition must be dismissed and the procedures under sections 1022 to 1044 apply to the case.

(7) If, at the hearing on the petition for assisted outpatient treatment, there is no objection to entry of the order for assisted outpatient treatment, the court shall enter the order.

(8) As used in this section, "person requiring treatment" means that term as defined in section 401.

Sec. 1076. (1) If diversion from criminal prosecution and into assisted outpatient treatment is ordered after a hearing on a petition under section 1075, the court that heard the petition shall enter an order providing for assisted outpatient treatment for not more than 180 days.

(2) If a defendant fails to comply with the terms of the assisted outpatient treatment order, the provisions under section 475 apply to the case. Any bond or bond conditions are separate from and not to be included in the determination of whether the defendant has complied with the assisted outpatient treatment order.

(3) If a designated community treatment program is not in compliance with delivery of services required by the assisted outpatient treatment order, the court shall conduct a hearing and determine whether to order the program to deliver services.

Sec. 1077. (1) The misdemeanor charges against a defendant receiving assisted outpatient treatment must remain pending until

dismissed by the district court for purposes of enforcing conditions of release. The conditions of release for a defendant receiving assisted outpatient treatment must be separate from compliance with the treatment plan. Compliance with the assisted outpatient treatment must not be a condition of release.

(2) All matters that concern noncompliance with the assisted outpatient treatment plan must be addressed in a civil proceeding under section 475.

(3) Except as otherwise provided in this subsection, a pending misdemeanor charge must be dismissed by the district court 90 days after the entry of the assisted outpatient treatment order. If the defendant was charged with a serious misdemeanor, the misdemeanor charge must be dismissed 180 days after the entry of the assisted outpatient treatment order.

(4) As used in this section, "serious misdemeanor" means that term as defined in section 61 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.811.

Sec. 1078. Upon the termination of the assisted outpatient treatment, the provider of the assisted outpatient treatment shall notify the prosecutor, district court, and probate court, as applicable, that the assisted outpatient treatment has been terminated.

Public Policy Position
SB 916 / HB 4746

Support with Amendments

Explanation

The Committee voted to support SB 916 and HB 4746 with suggested amendments to set forth the specific, required contents of the "assisted outpatient treatment order" envisioned by the bills. The Committee also suggested that greater clarity around where/how such an order fits in with a criminal proceeding. For example, is this a deferral? An administrative delay? Is the defendant on bond during the deferral period? Is a dismissal with or without prejudice? While many of these questions would inevitably be answered by the courts when called upon to implement the new statute, greater specificity about the Legislature's intent would likely be beneficial.

Position Vote:

Voted For position: 18
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 5

***Keller* Permissibility Explanation**

The Committee voted unanimously that the legislation is *Keller*-permissible. This legislation is reasonable related to improvement in the functioning of the courts because it will by prescribe and streamline the process by which individuals charged with misdemeanors can petition the courts for assisted outpatient mental health treatment.

Contact Persons:

Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
HB 4746

Support

Explanation:
The Committee voted to support House Bill 4746.

Position Vote:
Voted For position: 12
Voted against position: 2
Abstained from vote: 1
Did not vote: 11

***Keller* Permissibility Explanation:**
The Committee concluded that House Bill 4746 is *Keller*-permissible because establishing procedures for the diversion of certain defendants from criminal prosecution and into assisted outpatient mental health treatment, like other diversion programs that the Bar has previously taken a position on, is reasonably related to the functioning of the courts.

Contact Persons:
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Sofia V. Nelson snelson@sado.org

STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 16, 2024

Re: SB 936 – Prohibited Charges by Court Reporters

Background

SB 936 would amend the Revised Judicature Act, 1961 PA 236, to prohibit a court reporter, court recorder, stenomask reporter, or owner of a court reporting firm from (1) charging a processing or shipping fee for any copy that is transmitted electronically, (2) charging a party that was not responsible to notice or schedule a deposition an additional fee for the use of any remote or online format, (3) charging a party that was not responsible to notice a deposition any additional costs for support, processing, or convenience, unless the nonscheduling party is aware of and has consented to those costs in writing, or (4) charging more than 2/3 of the price of an original exhibit or other attachment for a copy of that exhibit or attachment.

The State Bar of Michigan has a long history with legislation related to the cost of transcripts. In 2005, the Board of Commissioners unanimously voted to support 2005 SB 33 in principle. That bill would have increased the fee for original transcripts to $3.00 per page and the fee for copies to $0.50 per page. The Board supported the bill "in principle" only, because its support was contingent upon the bill being amended to "provide relief for transcript fee costs for indigent parties and parties represented by pro bono counsel." 2005 SB 33 was never reported from the Senate Judiciary Committee. In the subsequent years, with similar legislation having been introduced in at least six legislative sessions, SBM has maintained its position of supporting an increase in transcript fees contingent upon the provision of a fee waiver for indigent parties in civil matters. Most recently, the Board voted to adopt a position of neutrality on HB 5036 and SB 514 due to the absence of a fee waiver for indigent parties and parties represented by pro bono counsel in civil matters. While SBM's prior positions were on legislation related to fees for transcripts themselves (not ancillary charges), the common thread is a concern about the access to justice implications of the costs associated with obtaining transcripts.

SB 936 was introduced by Senator Jeff Irwin and referred to the Senate Committee on Civil Rights, Judiciary, and Public Safety.

***Keller* Considerations**

As noted when the Board considered HB 5036 and SB 514 earlier this legislative session, the cost and timely availability of transcripts are issues necessarily related to both access to legal services and the functioning of the courts.

Some have argued that stagnant transcript fees have led to a shortage of court recorders and reporters in Michigan, causing delays in transcript production, which has negatively impacted the timeliness of appeals and other court proceedings. They would likely argue that restricting the charges a court

reporter or recorder can impose would likewise exacerbate the shortage of individuals willing to do these jobs. On the other hand, others argue that increased transcript fees and costs will negatively impact access to legal services by adding yet another unaffordable expense to the list of those borne by indigent parties in civil matters, thereby pricing them out of access to justice. Regardless of how one ultimately balances these interests and equities, with transcripts playing an essential role in nearly every civil and criminal proceeding, legislation implicating the cost and availability of transcripts has significant ramifications for the functioning of Michigan courts and access to legal services.

The Access to Justice Policy, Criminal Jurisprudence & Practice, and Civil Procedure & Courts Committees all reviewed SB 936 and concluded that the bill was *Keller*-permissible as reasonably related to both the functioning of the courts and access to legal services. All three also concurred in a recommendation that SBM should support the bill.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

Regulation of Legal Profession	**Improvement in Quality of Legal Services**
Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
Ethics	✓ Availability of legal services to society
Lawyer competency	
Integrity of the Legal Profession	
Regulation of attorney trust accounts	

Staff Recommendation

SB 936 is necessarily related to both access to legal services and the functioning of the courts. The bill is therefore *Keller*-permissible and may be considered on its merits

SENATE BILL NO. 936

June 20, 2024, Introduced by Senator IRWIN and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 1491 (MCL 600.1491), as added by 1998 PA 249.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1491. (1) A court reporter, court recorder, stenomask reporter, or owner of a court reporting firm shall not do either of the following:

(a) Enter into or arrange for any financial relationship that compromises the impartiality of court reporters, court recorders,

or stenomask reporters or that may result in the appearance that the impartiality of a court reporter, court recorder, or stenomask reporter has been compromised.

(b) Enter into a blanket contract with parties, litigants, attorneys, or their representatives unless all parties to the action are informed on the record in every deposition of the fees to be charged to all parties for original transcripts, copies of transcripts, and any other court reporting services to be provided. This subdivision does not apply to contracts for court reporting or recording services for the courts, agencies, or instrumentalities of local units of government, this state, or the United States.

(2) A court reporter, court recorder, stenomask reporter, or owner of a court reporting firm shall not do any of the following:

(a) Give, directly or indirectly, any incentive, reward, or anything else of value to attorneys, clients, or their representatives or agents, except for nominal items that do not exceed $25.00 per transaction or $100.00 in the aggregate per recipient each year.

(b) Charge more than 2/3 of the price of an original transcript, **exhibit, or other attachment** for a copy of that transcript, **exhibit, or other attachment.**

(c) Charge a processing or shipping fee for any copy that is transmitted electronically.

(d) Charge a party that was not responsible to notice or schedule a deposition an additional fee for the use of any remote and online format.

(e) Charge a party that was not responsible to notice or schedule a deposition any additional costs for support, processing, or convenience, unless the nonscheduling party is aware of and has

consented to those costs in writing.

Public Policy Position
SB 936

Support

Explanation
The Committee voted unanimously to support SB 936. The bill would improve access to justice and the availability of legal services by limiting the fees a court reporter and others may charge for providing legal documents or reporting services, thereby lowering the risk that cost will preclude citizens from being able to access the court system. The Committee noted that this position is consistent with the State Bar of Michigan's past positions on legislation related to transcript fees, which have historically been focused on ensuring that individuals and those represented from pro bono counsel are not burdened by excessive transcript fees and costs.

Position Vote:
Voted For position: 13
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 11

***Keller* Permissibility Explanation**
The Committee voted that SB 936 is *Keller*-permissible because the bill will improve the availability of legal services by enhancing access to legal documents and reporting services by limiting the fees that may be imposed to provide those documents and services.

Contact Persons:
Daniel S. Korobkin dkorobkin@aclumich.org
Katherine L. Marcuz kmarcuz@sado.org

Public Policy Position
SB 936

Support

Explanation
The Committee voted unanimously to support SB 936. The Committee believed that the court reporter, etc. charges prohibited by this legislation are an inappropriate workaround of statutory limits on the amount that may be changed for a transcript. The issue of court reporter, etc. compensation should be addressed, but these charges create a significant access to justice barrier and were even described by some Committee members as fraudulent.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

Keller Permissibility Explanation:
The Committee voted that SB 936 is *Keller*-permissible because the bill will improve the availability of legal services by enhancing access to legal documents and reporting services by limiting the fees that may be imposed to provide those documents and services.

Contact Person:
Marla Linderman Richelew lindermanrichelewm@michigan.gov

Public Policy Position
SB 936

Support

Explanation:
The Committee voted unanimously to support SB 936. While the Committee is concerned that stagnant compensation for court reporters, recorders, etc. is creating a personnel shortage resulting in lengthy wait times for transcripts, charging ancillary fees that create another barrier to access to justice is not an appropriate way to address the compensation issue. Such changes should be prohibited.

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 9

***Keller* Permissibility Explanation**
The Committee voted unanimously that this legislation is *Keller*-permissible because transcript costs are reasonably related to both the functioning of the courts and access to legal services.

Contact Persons:
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John A. Shea jashea@earthlink.net

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes a new instruction, M Crim JI 5.14a (screening of witness) where the court has permitted a witness to be screened from viewing the defendant at trial. The instruction is entirely new.

[NEW] M Crim JI 5.14a Screening of Witness

You [will hear / are about to hear / have heard] testimony from a witness who [will testify / has testified] with the use of a screen. The use of a screen in this manner is authorized by law, and you must disregard it when deciding this case. Your decision must be based solely on the evidence presented. You may not consider the witness's testimony to be any more or less credible because of the screen. You must not allow it to influence your decision in any way.

Use Note

By adopting this jury instruction, the Committee on Model Criminal Jury Instructions does not take any position whether the use of a screen outside of the provisions of MCL 600.2163a is authorized. (Where the court determines that procedures under MCL 600.2163a are allowed, this instruction would be unnecessary because there would be no change in the courtroom setup between witnesses pursuant to (19)(b) of the statute.) Some Michigan cases appear to implicitly permit the use of a screen. See *People v Rose*, 289 Mich App 499; 808 NW2d 301 (2010), finding no Confrontation Clause or Due Process Clause constitutional bar to the use of a screen, and allowing the use

of a screen under the court's inherent ability to control courtroom proceedings. However, no case involving the use of a screen has discussed MCL 763.1, the last phrase of which could be considered as prohibiting the use of a screen between a witness and a defendant (". . . the party accused shall be allowed to . . . meet the witnesses who are produced against him face to face.").

Public Policy Position
M Crim JI 5.14a

Support

Explanation:
The Committee voted to support the new Model Criminal Jury Instruction 5.14a.

The committee recognized that a substantial question exists whether a screen between witness and defendant is lawful, as the commentary to the proposed 5.14a acknowledges. However, until the Michigan Supreme Court resolves the issue, it believes that this instruction should be given when a trial court opts to permit a screen.

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 9

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
John A. Shea jashea@earthlink.net

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

==========

PROPOSED

The Committee proposes amending jury instruction M Crim JI 7.6 (Duress) to comport with discussions of the defense in *People v Reichard*, 505 Mich 81, 96 n 32 (2020), and *People v Lemons* 454 Mich 234, 248 n 21 (1997). A question remains which party bears the burden of proof relative to the defense of duress, so alternative paragraphs are provided. Deletions are in ~~strike-through~~, and new language is underlined. A "clean copy" without the struck language but including the added language is also provided (without the Use Note).

[AMENDED] M Crim JI 7.6 Duress

(1) The defendant says that [he / she] is not guilty because someone else's threatening behavior made [him / her] act as [he / she] did. This is called the defense of duress.

(2) The defendant is not guilty if [he / she] committed the crime while acting under duress. ~~Under the law, there was duress~~ The defendant acted under duress if ~~[~~four ~~/ five]~~ things were true:

(a) One, the threatening or forceful behavior would have made a reasonable person fear that he or she was facing immediate death or serious bodily harm~~;~~.

(b) Two, the defendant actually was afraid of death or serious bodily harm~~;~~

~~(c) Three, the defendant had this fear~~ at the time [he / she] acted~~;~~.

~~(d) Four~~ (c) Three, the defendant committed the act to avoid the threatened harm~~;~~.

~~[~~(e) ~~Five~~ (d) Four, the situation did not arise because of the defendant's fault or negligence.~~]~~[1]

(3) The defendant has forfeited the defense of duress if you find [he / she] did not take advantage of a reasonable opportunity to escape, without being exposed to death or serious bodily injury, or if [he / she] continued [his / her] conduct after the duress ended.

(4) In deciding whether duress made the defendant act as [he / she] did, think carefully about all the circumstances as shown by the evidence.

Think about the nature of any force or threats. Think about the background and character of the person who made the threats or used force. Think about the defendant's situation when [he / she] committed the alleged act. Could [he / she] have avoided the harm [he / she] feared in some other way than by committing the act? Think about how reasonable these other means would have seemed to a person in the defendant's situation at the time of the alleged act.[1]

[(5) The prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If [he / she] fails to do so, you must find the defendant not guilty.

Or

(5) You should consider the elements of duress separately. If you find that the defendant has proved all of these elements by a preponderance of the evidence, you must find [him / her] not guilty. If the defendant has failed to prove all of these elements or has forfeited the defense, [he / she] was not acting under duress.][2]

Use Note

This instruction should be used only when there is some evidence of the essential elements of duress.

~~1 Use (e) only where there is some evidence that the defendant found himself in the position of having to commit the crime through his own fault or negligence. Michigan law is unclear on whether a defendant can claim duress only where the defendant is completely free of fault.~~

~~2~~ 1. In escape cases, the special factors listed in M Crim JI 7.7 should also be given if they are supported by competent evidence.

2. The question whether the burden is on the defendant to establish duress by a preponderance of the evidence, or on the prosecutor to disprove duress beyond a reasonable doubt, was avoided by the Michigan Supreme Court in both *People v Reichard*, 505 Mich 81, 96 n32; 949 NW2d 64 (2020), and *People v Lemons* 454 Mich 234, 248 n21: 562 NW2d 447 (1997). Another affirmative defense – self-defense – places the burden of proof on the prosecutor to disprove the defense once evidence of self-defense has been introduced. The burden being on the defendant to establish an insanity defense is statutorily determined, but there is no statute relative to the duress defense. The Committee on Model Criminal Jury Instructions takes no position on the question of who has the burden of proof, but provides alternative paragraphs (5).

Clean copy:

[AMENDED] M Crim JI 7.6 Duress

(1) The defendant says that [he / she] is not guilty because someone else's threatening behavior made [him / her] act as [he / she] did. This is called the defense of duress.

(2) The defendant is not guilty if [he / she] committed the crime while acting under duress. The defendant acted under duress if four things were true:

(a) One, the threatening or forceful behavior would have made a reasonable person fear that he or she was facing immediate death or serious bodily harm~~;~~.

(b) Two, the defendant actually was afraid of death or serious bodily harm at the time [he / she] acted.

(c) Three, the defendant committed the act to avoid the threatened harm.

(d) Four, the situation did not arise because of the defendant's fault or negligence.

(3) The defendant has forfeited the defense of duress if you find [he / she] did not take advantage of a reasonable opportunity to escape, without being exposed to death or serious bodily injury, or if [he / she] continued [his / her] conduct after the duress ended.

(4) In deciding whether duress made the defendant act as [he / she] did, think carefully about all the circumstances as shown by the evidence.

Think about the nature of any force or threats. Think about the background and character of the person who made the threats or used force. Think about the defendant's situation when [he / she] committed the alleged act. Could [he / she] have avoided the harm [he / she] feared in some other way than by committing the act? Think about how reasonable these other means would have seemed to a person in the defendant's situation at the time of the alleged act.[1]

[(5) The prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If [he / she] fails to do so, you must find the defendant not guilty.

Or

(5) You should consider the elements of duress separately. If you find that the defendant has proved all of these elements by a preponderance of the evidence, you must find [him / her] not guilty. If the defendant has failed to prove all of these elements or has forfeited the defense, [he / she] was not acting under duress.][2]

Public Policy Position
M Crim JI 7.6

Support

Explanation:
The Committee voted to support the proposed amendments to Model Criminal Jury Instruction 7.6. While expressing some frustration that the Michigan Supreme Court had not provided greater clarity to the issue of duress as of yet, the Committee believes these proposed amendments will help provide trial courts with workable guidance until such time as the Court opts to act.

Position Vote:
Voted For position: 8
Voted against position: 5
Abstained from vote: 1
Did not vote (absent): 10

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