Agenda
Public Policy Committee
June 11, 2025 – 2:00 p.m. to 3:30 p.m.
Via Zoom Meetings

Public Policy Committee……Lisa J. Hamameh, Chairperson

1. Reports
1.1. Approval of April 23, 2025 minutes
1.2 Public Policy Report

2. Court Rule Amendments
2.1. ADM File No. 2023-35: Proposed Amendments of MCJC 3 and MRPC 6.5
The proposed amendments of MCJC 3 and MRPC 6.5 would incorporate the ABA Model Code of Judicial Conduct Canon 2, Rule 2.3 into Michigan's code and rule to prohibit bias, prejudice, and harassment.
Status: 07/01/25 Comment Period Expires.
Referred: 03/10/25 Access to Justice Policy Committee; Judicial Ethics Committee; Professional Ethics Committee.
Comments: Access to Justice Policy Committee; Judicial Ethics Committee/Professional Ethics Committee; Justice Initiatives Committee.
Comments submitted to the Court and SBM are included in the materials.
Liaison: Ashley E. Lowe

2.2. ADM File No. 2019-40: Proposed Adoption of AO 2025-X, Proposed Rescission of AO 2012-7, and Proposed Amendment of MCR 2.407
The proposed administrative order would clarify when, from where, and how a judicial officer may participate remotely, subject to their chief judge's approval. If adopted, a related amendment of MCR 2.407 would strike a reference to AO 2012-7 being suspended and that administrative order would be rescinded.
Status: 07/01/25 Comment Period Expires.
Referred: 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; Negligence Law Section.
Comments submitted to the Court are included in the materials.
Liaison: Aaron V. Burrell

2.3. ADM File No. 2025-03: Proposed Amendment of MCR 1.111
The proposed amendment of MCR 1.111 would prohibit reimbursement for interpreter services in criminal cases, update the definitions for "interpret," "certified foreign language interpreter," and "qualified foreign language interpreter," and add a new definition for a "registered interpreter firm."
Status: 08/01/25 Comment Period Expires.
Referred: 04/23/25 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: Douglas B. Shapiro

2.4. ADM File No. 2025-04: Proposed Amendment of MCR 3.613
The proposed amendment of MCR 3.613 would realign the rule with recent amendments of MCL 711.1 and MCL 711.3 regarding name change proceedings.
Status: 08/01/25 Comment Period Expires.
Referred: 04/23/25 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section; LGBTQ+ Law Section.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison: Lori A. Buiteweg

2.5. ADM File No. 2023-10: Proposed Amendment of MCR 6.008
The proposed amendment of MCR 6.008 would incorporate the People v Cramer, 511 Mich 896 (2023) holding by clarifying that circuit courts can remand misdemeanor charges to the district court following the dismissal of all felony charges that were bound over.
Status: 08/01/25 Comment Period Expires.
Referred: 04/23/25 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Danielle Walton

2.6. ADM File No. 2023-38: Proposed Amendments of Subchapters MCR 9.100 and MCR 9.200 and MRPC 1.12 and MRPC 3.5
The proposed amendments would replace the term "master" or "special master" with "neutral arbiter" or add the term "neutral arbiter" to a definition.
Status: 08/01/25 Comment Period Expires.
Referred: 04/23/25 Civil Procedure & Courts Committee; Professional Ethics Committee.
Comments: Civil Procedure & Courts Committee.
Liaison: Silvia A. Mansoor

3. Legislation
3.1. HB 4434 (Meerman) Courts: juries; one-person grand jury provisions; repeal. Repeals secs. 3, 4, 5, 6, 6a & 6b, ch. VII of 1927 PA 175 (MCL 767.3 et seq.).
Status: 05/06/25 Referred to House Committee on Judiciary.
Referred: 05/12/25 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Patrick J. Crowley

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

M Crim JI 15.14, M Crim JI 15.14a, and M Crim JI 15.15
The Committee proposes amending M Crim JI 15.14 (Reckless Driving), M Crim JI 15.14a (Reckless Driving Causing Death or Serious Impairment of a Body Function), and M Crim JI 15.15 (Moving Violation Causing Death or Serious Impairment of a Body Function) for improved readability and greater consistency with the statutes defining these offenses. The proposed changes were inspired by Footnote 7 in *People v Fredell*, ___ Mich ___ (December 26, 2024) (Docket No. 164098).

M Crim JI 20.24

The Committee proposes amending M Crim JI 20.24 (Definition of Sufficient Force) in response to *People v Levran*, ___ Mich App ___ (December 3, 2024) (Docket No. 370931). The Court of Appeals held in *Levran* that the fifth paragraph of the current instruction did not accurately reflect how MCL 750.520b(1)(f)(*iv*) defines "force or coercion" for purposes of criminal sexual conduct committed during a medical exam or treatment. The proposed amendment would remedy this defect.

M Crim JI 37.11

The Committee proposes amending M Crim JI 37.11 (Removing, Destroying or Tampering with Evidence) to add a missing *mens rea* element. MCL 750.483a(5)(a) makes it a crime to "[k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding." While the current instruction addresses the requirement that the defendant act "intentionally," it does not address the requirement that the defendant act "knowingly." The Court of Appeals has indicated that "the word 'knowingly' in the statute likely includes knowledge of an official proceeding." *People v Walker*, 330 Mich App 378, 388 (2019). The proposed amendment would add that element and make other stylistic changes.

MINUTES
Public Policy Committee
April 23, 2025

Committee Members: Lori A. Buiteweg, Aaron V. Burrell, Lisa J. Hamameh, Ashley E. Lowe, Silvia A. Mansoor, John W. Reiser, III, Douglas B. Shapiro, Judge Cynthia D. Stephens (Ret'd), Danielle Walton
SBM Staff: Peter Cunningham, Nathan Triplett, Carrie Sharlow
GCSI Staff: Marcia Hune, Samanatha Zandee

A. Reports

1. Approval of March 5, 2025 minutes – The minutes were unanimously approved.
2. Public Policy Report – Nathan Triplett provided a verbal report.

B. Court Rule Amendments

1. ADM File No. 2023-12: Proposed Amendment of MCR 3.602

The proposed amendment of MCR 3.602(A) would clarify the applicability of MCR 3.602 and the Michigan Uniform Arbitration Act, MCL 691.1681 et seq.
The following entities offered comments for consideration: Civil Procedure & Courts Committee; Alternative Dispute Resolution Section.
The committee voted unanimously (9) to support ADM File No. 2023-12 as drafted.

2. ADM File No. 2022-34: Proposed Amendment of MCR 3.991

The proposed amendment of MCR 3.991 would clarify the process for judicial reviews of referee recommendations in juvenile cases by allowing the parties to waive judicial review, limiting a judge's ability to conduct an early review, and requiring a judge to conduct a requested review in all cases within 21 days of the request.
The following entities offered comments for consideration: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section.
The committee voted unanimously (9) to support with amendments recommended by the Children's Law Section.

3. ADM File No. 2023-22: Proposed Amendment of MRPC 6.1

The proposed amendment of MRPC 6.1 would clarify and expand the scope of pro bono service.
The following entities offered comments for consideration: Access to Justice Policy Committee; Justice Initiatives Committee.
The committee voted unanimously (9) to support with amendments recommended by the Justice Initiatives Committee and the Access to Justice Policy Committee.

C. Legislation

1. HB 4174 (Wegela) Juveniles: other; presumption of admissibility for a juvenile's self-incriminating responses obtained through deceptive police practices; modify. Amends sec. 1, ch. XIIA of 1939 PA 288 (MCL 712A.1) & adds sec. 17e to ch. XIIA.
The following entities offered comments for consideration: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section.
The committee voted 5 to 4 that the legislation is *Keller* permissible in that it affects the functioning of the courts.
The committee voted 6 to 3 to support HB 4174.

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 13.1 and 13.2

The Committee proposes amending M Crim JI 13.1 (Assaulting, Resisting, or Obstructing a Police Officer or Person Performing Duties) and M Crim JI 13.2 (Assaulting or Obstructing Officer or Official Performing Duties) to place more emphasis on the requirement that the jury receive instructions on the legal framework for assessing whether the officers' actions were lawful. See People v Carroll, ___ Mich ___; 8 NW3d 576 (July 19, 2024) (Docket No. 166092). For each instruction, the proposed amendments would move the information currently conveyed in Use Note 4 into the body of the instruction. Deletions are in strikethrough, and new language is underlined.

2. M Crim JI 20.6 and 20.16

The Committee proposes amending M Crim JI 20.6 (Aiders and Abettors –Complainant Mentally Incapable, Mentally Incapacitated, or Physically Helpless) and M Crim JI 20.16 (Complainant Mentally Incapable, Mentally Incapacitated, or Physically Helpless) to reflect a recent change to the statutory definition of "mentally incapacitated." See MCL 750.520a(k), as amended by 2023 PA 65. Deletions are in strikethrough, and new language is underlined.

3. M Crim JI 43.1, 43.1a, 43.2a, 43.3, and 43.3a

The Committee proposes new jury instructions for six election-related crimes found in MCL 168.931(1) and MCL 168.932(a): M Crim JI 43.1 (Offering an Incentive to Influence Voting), M Crim JI 43.1a (Bribing or Menacing an Elector), M Crim JI 43.2 (Accepting or Agreeing to Accept an Incentive Regarding Voting), M Crim JI 43.2a (Seeking an Incentive from a Candidate), M Crim JI 43.3 (Voter Coercion – Employment Threat), and M Crim JI 43.3a (Voter Coercion – Religious Threat). These instructions are entirely new.

The Consent Agenda was supported.

Order

Michigan Supreme Court
Lansing, Michigan

March 6, 2025

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas,
Justices

ADM File No. 2023-35

Proposed Amendments of
Canon 3 of the Michigan
Code of Judicial Conduct
and Rule 6.5 of the Michigan
Rules of Professional Conduct

On order of the Court, this is to advise that the Court is considering amendments of Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 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.]

Michigan Code of Judicial Conduct

Canon 3. A Judge Should Perform the Duties of Office Impartially and Diligently.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities:

(1)-(13) [Unchanged.]

(14) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity,

disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.~~Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should required staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court.~~

(15) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment as provided in MRPC 6.5.

(16) The restrictions of paragraphs (14) and (15) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

B.-D. [Unchanged.]

Michigan Rules of Professional Conduct

Rule 6.5. Professional Conduct

(a) A lawyer shall not, by words or conduct manifest bias or prejudice for or against any person involved in the legal process, or engage in harassment against any person involved in the legal process, based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation, and~~A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic.~~ t~~T~~o the extent possible, a lawyer shall not permit~~require~~ subordinate lawyers and nonlawyer assistants to do so~~provide such courteous and respectful treatment~~.

(b) A lawyer serving as an adjudicative officer, shall not, by words or conduct manifest bias or prejudice for or against any person, or engage in harassment against any person, based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation, and~~A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and~~

~~respect.~~ t~~T~~o the extent possible, the lawyer shall not permit~~require~~ staff and others who are subject to the adjudicative officer's direction and control to do so~~provide such fair, courteous, and respectful treatment~~ to persons who have contact with the adjudicative tribunal.

Comment:

Duties of the Lawyer.

[Paragraph 1 unchanged.]

A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The prohibition against manifesting bias or prejudice or engaging in harassment~~The obligation to treat persons with courtesy and respect~~ is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly biased, prejudicial, or harassing~~rude~~. A lawyer's professional judgment must be employed here with care and discretion.

[Paragraphs 3-4 unchanged.]

A supervisory lawyer should make every reasonable effort to ensure that subordinate lawyers and nonlawyer assistants, as well as other agents, avoid biased, prejudicial, or harassing~~discourteous or disrespectful~~ behavior toward persons involved in the legal process. Further, a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm on the basis of the attributes identified in the rule~~race, gender, or other protected personal characteristic~~. See Rules 5.1 and 5.3.

Duties of Adjudicative Officers. [Unchanged.]

Staff Comment (ADM File No. 2023-35): The proposed amendments of MCJC 3 and MRPC 6.5 would incorporate the ABA Model Code of Judicial Conduct Canon 2, Rule 2.3 into Michigan's code and rule to prohibit bias, prejudice, and harassment.

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 July 1, 2025 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. 2023-35. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ZAHRA, J., would have declined to publish the proposal for comment.

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.

March 6, 2025

Clerk

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 493 **July 15, 2020**

Model Rule 8.4(g): Purpose, Scope, and Application

This opinion offers guidance on the purpose, scope, and application of Model Rule 8.4(g). The Rule prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of various categories, including race, sex, religion, national origin, and sexual orientation. Whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is found harmful will be grounds for discipline. [1]

Rule 8.4(g) covers conduct related to the practice of law that occurs outside the representation of a client or beyond the confines of a courtroom. In addition, it is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context. However, and as this opinion explains, conduct that violates paragraph (g) will often be intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.

The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit a lawyer's speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.

Besides being advocates and counselors, lawyers also serve a broader public role. Lawyers "should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[2] *Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole.*[3]

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] MODEL RULES OF PROF'L CONDUCT Scope [14] (2019) [hereinafter MODEL RULES].

[3] As explained in this opinion, events in the legal profession and in the broader community influenced the development of Rule 8.4(g) and demonstrated the necessity for its adoption. The police-involved killing of George Floyd and the unprecedented social awareness generated by it and other similar tragedies have brought the subject of racial justice to the forefront, further underscoring the importance of Rule 8.4(g) and this opinion.

I. Introduction

In August 2016, the ABA House of Delegates adopted Model Rule 8.4(g).[4] The Rule prohibits a lawyer from "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[5] Adoption of paragraph (g) followed years of study and debate within the ABA. This opinion offers guidance on the Rule's purpose, scope, and application.

The conduct addressed by Rule 8.4(g) harms the legal system and the administration of justice. As one court emphasized in sanctioning a male lawyer for disparagingly referring to his female adversary as "babe" and making other derogatory, sexual comments during a deposition,

> [The lawyer's] behavior . . . was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of "sexual [deposition] tactics." . . . "These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors."[6]

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[4] *See Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision* (Aug. 8, 2016), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/ (summarizing events at the House of Delegates meeting). The provision was adopted by voice vote, with no one speaking in opposition. *See* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 197 (2017).

[5] MODEL RULES R. 8.4(g).

[6] Mullaney v. Aude, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999) (quoting trial judge in the case); *see also* Principe v. Assay Partners, 586 N.Y.S.2d 182, 185 (Sup. Ct. 1992) ("[D]iscriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession. . . . 'The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual. . . . Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. . . .' While the conduct here falls under the heading of sexist, the same principle applies to any professional discriminatory conduct involving any of the variations to which human beings are subject, whether it be religion, sexual orientation, physical condition, race, nationality or any other difference.") (quoting Preamble to the Code of Professional Responsibility)); Cruz-Aponte v. Caribbean Petroleum Corp., 123 F. Supp. 3d 276, 280 (D.P.R. 2015) ("When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice."); *In re* Thomsen, 837 N.E.2d 1011, 1012 (Ind. 2005) ("Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole."); *In re* Charges of Unprofessional Conduct, 597 N.W.2d 563, 568 (Minn. 1999) (maintaining that "it is especially troubling" when a lawyer engages in "race-based misconduct" and, if not addressed, "undermines confidence in our system of justice").

On June 4, 2020, the Washington Supreme Court issued an open letter regarding the issues raised by the George Floyd situation, forcefully embracing the cause of racial justice: "We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism. . . . We go by the title of "Justice" and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative." Supreme Court of Washington, *Open Letter to the Judiciary and the Legal Community* (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

Comment [3] to the prior version of Rule 8.4 explained that some of the same behavior subjected a lawyer to discipline when the behavior was prejudicial to the administration of justice.[7] Other rules prohibit similar conduct in contexts related to the representation of a client.[8] Rule 8.4(g) is

[7] MODEL RULES R. 8.4(d) cmt. [3] (1998). In particular, the Comment stated:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) *when such actions are prejudicial to the administration of justice*. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Id. (emphasis added).

[8] *See, e.g.*, MODEL RULES R. 3.5(d) (prohibits "conduct intended to disrupt a tribunal"); MODEL RULES R. 4.4(a) (prohibits using "means that have no substantial purpose other than to embarrass, delay, or burden a third person" when "representing a client").

The Model Code of Judicial Conduct has long contained a provision prohibiting judges from engaging in this sort of discriminatory and harassing conduct and requiring that judges ensure that lawyers appearing before them adhere to the same restrictions. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2011). The pertinent portion of the Rule provides:

> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

MODEL RULES R. 2.3(B) & (C); *see also* Gillers, *supra* note 4, at 209-11 (discussing adoption of CJC Rule 2.3 and its relationship to Model Rule 8.4(g)). In addition, in 2015, the ABA revised its *Standards for Criminal Justice: Prosecutorial Function and Defense Function* to add anti-bias provisions for both prosecutors and defense counsel. For example, the Defense Function standard provides:

> (a) Defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel's authority.
>
> (b) Defense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in *all of counsel's work*. A public defense office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the defense office's jurisdiction, and eliminate those impacts that cannot be properly justified.

more expansive, also forbidding harassment and discrimination in practice-related settings beyond the courtroom and in contexts that may not be connected to a specific client representation.[9] Such breadth was necessitated by evidence that sexual harassment, in particular, occurs outside of court-related and representational situations—for example, in non-litigation matters or at law firm social events or bar association functions.[10]

Furthermore, Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace.[11] Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate paragraph (g),[12] the reverse may not be true. For example, a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g).[13] The isolated nature of the conduct, however, could be a mitigating factor in the disciplinary process.[14]

CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Std. 4-1.6 (4th ed. 2017) (emphasis added). *See also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Std. 3-1.6 (4th ed. 2017) (setting forth the same standard for prosecutors).

[9] Some jurisdictions have limited their antidiscrimination and anti-harassment rules to conduct related to the representation of a client. *See, e.g.*, COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2020) (conduct "in the representation of a client"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2020) (conduct "in appearing in a professional capacity before a tribunal"); MO. RULES OF PROF'L CONDUCT R. 4-8.4(g) (2020) (conduct "in representing a client"); NEB. RULES OF PROF'L CONDUCT § 3-508.4(d) (2020) (conduct when "a lawyer is employed in a professional capacity").

[10] *See generally* Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. DET. MERCY L. REV. 579 (2019). *See also* STANDING COMMITTEE ON ETHICS & PROF'L RESPONSIBILITY, ET AL., REPORT TO THE HOUSE OF DELEGATES ON REVISED RESOLUTION 109, at 10 (Aug. 2016); *infra* note 31 and accompanying text; *Standing Committee on Ethics and Professional Responsibility Hearing on Model Rule 8.4(g)*, at 39, 61-62 (Feb. 2016) (Wendy Lazar testifying that "so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation"; former ABA president Laura Bellows testifying about anecdotal evidence of sexual harassment, such as, at a "Christmas party"), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf.

[11] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (2019). *See also* Bostock v. Clayton County, 590 U.S. ___ (2020) (recognizing that discrimination and harassment based on sexual orientation and gender identity are prohibited by Title VII as components of "sex," one of the protected categories listed in the statute). Sexual orientation and gender identity are expressly included among Model Rule 8.4(g)'s categories.

[12] *See* MODEL RULES R. 8.4(g) cmt. [3] (noting that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)").

[13] *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."); Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 533 (7th Cir. 1993) (observing that "'relatively isolated' instances of non-severe misconduct will not support a hostile environment claim") (quoting Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333, 337 (7th Cir. 1993); Martinelli v. Bancroft Chophouse, LLC, 357 F. Supp. 3d 95, 102 (D. Mass. 2019) (finding that "[a] single, isolated incident of harassment . . . is ordinarily insufficient to establish a claim for hostile work environment unless the incident was particularly egregious and the employee must demonstrate how his or her ability to work was negatively affected").

[14] Whether discipline is imposed for any particular violation of Rule 8.4(g) will depend on a variety of factors, including, for example: (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed. For a full discussion of factors that influence the imposition of discipline imposed, see ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2d ed. 2019).

Rule 8.4(g) does not regulate conduct unconnected to the practice of law, as do some other rules of professional conduct.[15] Nevertheless, it does impose a higher standard on lawyers than that expected of the general public.[16] As the Preamble to the Model Rules states, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[17] Harassment and discrimination damage the public's confidence in the legal system and its trust in the profession.

Section II of this opinion elaborates further on the scope of Rule 8.4(g) and explains in more detail how it safeguards the integrity of the legal system and the profession. Section III contains hypotheticals that illustrate the Rule's application.

II. Analysis

Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[18]

Comment [3] to Rule 8.4(g) addresses the meaning of "discrimination" and "harassment" and emphasizes that such conduct "undermine[s] confidence in the legal profession and the legal

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[15] The most noteworthy example is Rule 8.4(c). Indeed, the misconduct addressed in that rule—dishonesty, fraud, deceit, and misrepresentation—has traditionally been viewed as unacceptable by the legal profession, whether it occurs in the courtroom or on the street. Other Model Rules that subject lawyers to discipline for conduct not necessarily connected with the practice of law include Model Rules 8.2.(a) (prohibiting statements by lawyers about judges or other legal officials known to be false or in reckless disregard as to their truth), and 8.4(b) (misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness). *See also* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 67 (2018) (noting that "the bar readily considers conduct completely unconnected to the practice of law when such conduct is either deceptive or otherwise reflective on fitness, with some jurisdictions requiring and others omitting the element that the conduct in question be criminal").

[16] *See, e.g.*, MODEL RULES R. 3.6(a) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."); MODEL RULES R. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person . . .."); MODEL RULES R. 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .."). *See also* Hess, *supra* note 10, at 596 ("Rather than having lawyers escape accountability for their sexually harassing conduct that might not meet Title VII's high bar, the legal profession can instead take the opportunity to hold itself to a higher standard of professionalism.").

[17] MODEL RULES Preamble [1].

[18] MODEL RULES R. 8.4(g).

system."[19] It defines "discrimination" to include "harmful verbal or physical conduct that manifests bias or prejudice towards others."[20] Harassment includes "derogatory or demeaning verbal or physical conduct."[21] "Sexual harassment" is more specifically described as "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[22] The Comment also indicates that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."[23]

The existence of the requisite harm is assessed using a standard of objective reasonableness. In addition, a lawyer need only know or reasonably should know that the conduct in question constitutes discrimination or harassment.[24] Even so, the most common violations will likely involve conduct that is intentionally discriminatory or harassing.

Comment [4] identifies the scope of "conduct related to the practice of law," listing such activities as: "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law."[25]

Comment [5] describes specific circumstances that do not violate paragraph (g). For example, a judge's determination that a lawyer has utilized peremptory challenges in a discriminatory manner, alone, will not subject the lawyer to discipline.[26] Furthermore, limiting one's practice to providing representation to underserved populations, consistent with the rules of professional conduct and other law, will not constitute a violation.[27]

Finally, Rule 8.4(g) specifically excludes from its scope "[l]egitimate advice or advocacy consistent with these Rules." Thus, the Rule covers only conduct for which there is no reasonable justification. Common usage and Rule 8.4(g)'s Comments reinforce this point by elucidating the type of harassing or discriminatory conduct that is disciplinable.

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[19] *Id.* cmt. [3].
[20] *Id.*
[21] *Id.*
[22] *Id. See also* MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. [4] (noting that "[s]exual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome").
[23] MODEL RULES R. 8.4(g) cmt. [3].
[24] "Knows" and "reasonably should know" are defined terms in the Model Rules. *See* MODEL RULES R. 1.0(f) & (j).
[25] MODEL RULES R. 8.4 cmt. [4].
[26] *See id.* cmt. [5].
[27] *See id.* The balance of the Comment notes some additional actions that will not violate Rule 8.4(g):

> A lawyer may charge and collect reasonable fees and expenses for a representation. . . . Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. . . . A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.

Id. (citations omitted).

A. "Harassment"

Harassment is a term of common meaning and usage under the Model Rules.[28] It refers to conduct that is aggressively invasive, pressuring, or intimidating.[29] Rule 8.4(g) addresses harassment in relation to the practice of law that targets others on the basis of their membership in one or more of the identified categories.[30]

Preventing sexual harassment is a particular objective of Rule 8.4(g).[31] As Comment [3] makes clear, sexual harassment encompasses "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[32] This type of behavior falls squarely within the broader, plain meaning of harassment and is consistent with the term's application throughout the Model Rules.

Model Rule 3.5(c)(3), for example, prohibits lawyers from communicating with jurors or prospective jurors following their discharge if "the communication involves misrepresentation, coercion, duress or *harassment*."[33] Here, the term "harassment," as in Rule 8.4(g), refers to conduct that is aggressively invasive, pressuring, or intimidating, including that which is reasonably perceived to be demeaning or derogatory, as demonstrated in *In re Panetta*.[34] In *Panetta*, the respondent was disciplined for sending an email to another lawyer who had served as the jury foreperson in a trial the respondent had lost several years earlier. The message was insulting, badgering, and threatening. Its subject line read, "ALL THESE YEARS LATER I WILL NEVER FORGET … THE LIAR" and went on to state, among other things: "After numerous multi-million dollar verdicts and success beyond anything you will attain in your lifetime, I will never forget you: the bloated Jury [Foreperson] that I couldn't get rid of and that misled and hijacked my jury." He ended the message with "Well you should get attacked you A-hole. Good Luck in Hell."[35] The

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[28] *See, e.g.*, MODEL RULES R. 3.5(c)(3) & 7.3(c)(2) (both discussed in the text). *See also* MODEL RULES Preamble [5] ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.").

[29] *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY 790 (3d ed. 2010) (defining "harassment" as "aggressive pressure or intimidation"); MERRIAM-WEBSTER DICTIONARY (defining "harass" as meaning "to annoy persistently"; "to create an unpleasant or hostile situation for, especially by uninvited and unwelcome verbal or physical conduct"), https://www.merriam-webster.com/dictionary/harass (last visited June 23, 2020).

[30] Consistent with the guiding principle that the Model Rules are rules of reason and "should be interpreted with reference to the purposes of legal representation and of the law itself," the term "harassment" in Rule 8.4(g) must be construed and applied in a reasonable manner. *See* MODEL RULES Scope [14].

[31] *See* Gillers, *supra* note 4, at 200 (noting that decisions and surveys cited overwhelmingly "disclose that the targets [of bias and harassment] are predominantly women"); Hess, *supra* note 10, at 582 (noting conservatively that an estimated "25% of women in the legal workplace have reported unwanted sexual harassment"); Chuck Lundberg, *#MeToo in the Law Firm*, BENCH & BAR MINN., Vol. 75, No. 3, at 16, 17 (Mar. 2018) (noting that in speaking to many male and female "bar leaders, judges, present and former ethics partners and managing partners at large law firms," the author learned from the men that they had observed or heard about a "broad spectrum of workplace conduct" of a sexual nature, including "some pretty egregious sexual misconduct"; as for the women with whom the author spoke, "[t]o a person, they were able to relate multiple instances of such behaviors—in law firms, law schools, court chambers, and other legal workplaces").

[32] MODEL RULES R. 8.4(g) cmt. [3].

[33] MODEL RULES R. 3.5(c)(3) (emphasis added).

[34] 127 A.D.3d 99 (N.Y. 2d Dept. 2015).

[35] *Id.* at 101.

court easily found that this conduct was intended to harass the former jury foreperson and adversely reflected on the respondent's fitness as a lawyer.[36]

Model Rule 7.3(c)(2) also prohibits "harassment." It forbids "solicitation that involves coercion, duress or *harassment*."[37] As with other uses of "harassment" in the Model Rules, a rational reading of the term includes badgering or invasive behavior, as well as conduct that is demeaning or derogatory. Similarly, Model Rule 4.4(a) subjects lawyers to discipline for using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."[38] While it does not expressly use the word "harassment," the conduct prohibited is clearly of the same sort that comes within that word's definition.

B. "Discrimination"

Discrimination "includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[39] Bias or prejudice can be exhibited in any number of ways, some overlapping with conduct that also constitutes harassment. Use of a racist or sexist epithet with the intent to disparage an individual or group of individuals demonstrates bias or prejudice.

For example, in *In re McCarthy*,[40] a lawyer was suspended for a minimum of thirty days for sending an email message that was deeply offensive and undoubtedly evinced racial bias. In connection with a real estate title dispute, the secretary of the seller's agent sent a message to the lawyer demanding that he take certain action. The lawyer responded, by stating, among other things, that "I am here to tell you that I am neither you [sic] or [your boss's] n****r."[41] The Indiana Supreme Court found that such remarks "serve only to fester wounds caused by past discrimination and encourage future intolerance."[42] Similarly, the same court found that a lawyer engaged in conduct manifesting bias or prejudice in relation to a personal bankruptcy proceeding by distributing flyers that referred to other counsel in the matter as "'bloodsucking shylocks' who were part of a 'heavily Jewish [sic] . . . reorganization cartel.'"[43]

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[36] *Id.* at 102. *See also* Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Advisory Op. 91-52 (1991) (finding that it was permissible for a lawyer's paralegal to conduct post-trial interviews of jurors, provided that no intimidation or pressure was used).

[37] MODEL RULES R. 7.3(c)(2) (emphasis added).

[38] MODEL RULES R. 4.4(a).

[39] MODEL RULES R. 8.4(g), cmt. [3] (emphasis added). In addition, "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law" may serve as a guide in applying paragraph (g). *Id.*

[40] 938 N.E.2d 698 (Ind. 2010).

[41] *Id.*

[42] *Id.* (quoting *In re* Thomsen, 837 N.E.2d 1011, 1012 (Ind. 2005)).

[43] *In re* Dempsey, 986 N.E.2d 816 (Ind. 2013). *See also In re* Thomsen, 837 N.E.2d 1011 (Ind. 2005) (publicly reprimanding lawyer for filing a petition in a divorce action arguing that couple's children were put in "harm's way" by wife's association with an African-American man); *In re* Charges of Unprofessional Conduct, 597 N.W.2d 563 (Minn. 1999) (prosecutor disciplined for filing motion seeking to prohibit defendant's counsel from including a lawyer of color as part of the defense team "for the sole purpose of playing upon the emotions of the jury"); People v. Sharpe, 781 P.2d 659, 660, 661 (1989) (prosecutor disciplined for exhibiting racial prejudice against Latinos by stating, in reference to two Latino defendants, that he did not "believe either one of those chili-eating bastards").

As many courts have emphasized, such behavior is unacceptable generally but especially when engaged in by members of the bar. In *In re Charges of Unprofessional Conduct*,[44] for instance, the Minnesota Supreme Court expressed this general judicial perspective: "When any individual engages in race-based misconduct it undermines the ideals of society founded on the belief that all people are created equal. When the person who engages in this misconduct is an officer of the court, the misconduct is especially troubling."[45] Rule 8.4(g) embodies this principle.

C. Rule 8.4(g) and the First Amendment

The Committee does not address constitutional issues, but analysis of Rule 8.4(g), as with our analysis of other rules, is aided by constitutional context.[46] For Rule 8.4(g), two important constitutional principles guide and constrain its application. First, an ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden. Second, the rule must not be overbroad such that it sweeps within its prohibition conduct that the law protects. Identifying the proper balance between freedom of speech or religion and laws against discrimination or harassment is not a new problem, however. The scope of Rule 8.4(g) is no more or less reducible to a precise verbal formula than any number of regulations of lawyer speech or workplace speech that have been upheld and applied by courts.[47]

Courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment challenge. For example, in addressing the constitutional authority of a court of appeals to discipline a lawyer for "conduct unbecoming a member of the bar of the court," the Supreme Court observed that a lawyer's court-granted license "requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice."[48] More recently, the Kentucky Supreme Court echoed this message in an opinion concerning Rule 8.2(a), which generally prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judicial or other legal official, stating that regulation of lawyer speech "is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of '[t]he license granted by the court.'"[49]

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[44] 597 N.W.2d 563 (Minn. 1999).

[45] *Id.* at 567-68.

[46] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 490 (2020) (discussing ability-to-pay inquiries required by the due process and equal protection clauses, as interpreted in *Bearden v. Georgia*, 461 U.S. 669 (1983) and its progeny); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 486, at 9 (2019) (discussing Sixth Amendment Right to Counsel rooted "[i]n a series of cases beginning with Argersinger v. Hamlin," 407 U.S. 25 (1972)); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) (discussing obligations based on Brady v. Maryland, 373 U.S. 83 (1963)).

[47] For a discussion of workplace speech limitations upheld against a First Amendment challenge, see Aviel, *supra* note 15, at 48-50. For a discussion of lawyers' speech and Rule 8.4(g), see Robert N. Weiner, *"Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUBLIC POLICY 125 (2018). *See also infra* note 49.

[48] *In re Snyder*, 472 U.S. 634, 644-45 (1985).

[49] Ky. Bar Ass'n v. Blum, 404 S.W.3d 841, 855 (Ky. 2013) (*quoting In re* Snyder) (observing that while a lawyer does not surrender First Amendment rights in exchange for a law license, once admitted, "he must temper his criticisms in accordance with professional standards of conduct") (quoting *In re* Sandlin, 12 F.3d 861, 866 (9th Cir. 1993)). There are also other Model Rules that curtail attorney speech but are uniformly understood as proper regulatory measures, including, for example, the following: Rule 1.6 (generally prohibiting disclosure of "information relating to the representation of a client"); Rule 3.5(d) (prohibiting a lawyer from "engag[ing] in conduct intended to disrupt a tribunal"); Rule 3.6 (restricting a lawyer's ability to comment publicly about an investigation or litigation matter in which the lawyer is participating or has participated when the lawyer knows or

Rule 8.4(d)'s prohibition of conduct that is prejudicial to the administration of justice has likewise withstood constitutional challenges based on vagueness and overbreadth arguments, with one court observing that: "The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."[50] Similarly, in rejecting a vagueness challenge to the prohibition against conduct prejudicial to the administration of justice, the Fifth Circuit stated:

> The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." . . . The particular context in which a regulation is promulgated therefore is all important. . . . *The regulation at issue herein only applies to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession*."[51]

There is wide and longstanding acceptance of these principles, given lawyers' status as members of the bar. For example, in upholding the constitutionality of DR 1-102(A)(6), which prohibited a lawyer from engaging "in any other conduct that adversely reflects on [the lawyer's] fitness to practice law," the New York Court of Appeals noted: "As far back as 1856, the Supreme Court acknowledged that 'it is difficult if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed'. . .. Broad standards governing professional conduct are permissible and indeed often necessary."[52]

Furthermore, the fact that it is possible to construe a rule's language to reach conduct protected by the First Amendment is not fatal to its application to unprotected conduct. As observed by Justice Scalia in *Virginia v. Hicks*:

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct". . . . For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally

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reasonably should know that the comments "have a substantial likelihood of materially prejudicing an adjudicative proceeding"); Rule 4.1 (prohibiting a lawyer from "knowingly mak[ing] a false statement of material fact or law to a third person"); and Rule 7.1 (limiting communications about a lawyer or a lawyer's services to those that are truthful and not otherwise misleading).

[50] *In re* Keiler, 380 A.2d 119, 126 (D.C. 1977), *overruled on other grounds, by In re* Hutchinson, 534 A.2d 919 (D.C. 1987) (upholding against a vagueness challenge DR 1-102(A)(5), Rule 8.4(d)'s predecessor).

[51] Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988) (emphasis added); *see also* Attorney Grievance Comm'n of Maryland v. Korotki, 569 A.2d 1224, 1235 (1990) (observing that a professional conduct rule for lawyers need not "meet the standards of clarity that might be required for rules governing the conduct of laypersons") (citations omitted).

[52] *In re* Holtzman, 577 N.E.2d 30, 33 (N.Y. 1991) (quoting *Ex Parte* Secombe, 60 U.S. [19 How.] 9, 14 (1857) (citing *In re* Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 395 (Minn. 1985), appeal dismissed, 474 U.S. 976 (1985)); *see also In re* Knutson, 405 N.W.2d 234, 238 (Minn. 1987).

> unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications . . . before applying the "strong medicine" of overbreadth invalidation.[53]

Rule 8.4(g) promotes a well-established state interest by prohibiting conduct that reflects adversely on the profession and diminishes the public's confidence in the legal system and its trust in lawyers.[54]

Numerous judicial opinions confirm the significance and legitimacy of a state's regulatory interest in this area. For instance, the Minnesota Supreme Court has noted that "racially-biased actions" engaged in by lawyers "not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based."[55] Similarly, in affirming the public reprimand of a lawyer who made racially disparaging accusations in a court filing, the Indiana Supreme Court stressed that "[i]nterjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole."[56] The New Jersey Supreme Court expressed the same opinion in *Matter of Vincenti*, observing that:

> Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, be it based on race or color, . . . or . . . on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.[57]

Rule 8.4(g) protects specific categories of victims from identified harm, and a violation can only take place when the offending conduct engaged in is "related to the practice of law" and the lawyer knows or reasonably should know that it constitutes harassment or discrimination.

Using these various interpretative principles and applying them in an objectively reasonable manner, a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law. For example, in a case referenced earlier, under Indiana's version of Rule 8.4(g), a lawyer received a three-year suspension for distributing flyers in relation to personal litigation depicting his

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[53] 539 U.S. 113, 119-20 (2003) (emphasis in original) (citations omitted); *see also* Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988) ("Assuming for the argument that [the rule prohibiting conduct prejudicial to the administration of justice] might be considered vague in some hypothetical, peripheral application, this does not, as this Court [has] observed, . . . warrant throwing the baby out with the bathwater. To invalidate the regulation in toto, . . . we would have to hold that it is impermissibly vague in all of its applications.") (citations omitted).

[54] *See supra* note 6 and accompanying text.

[55] *In re* Charges of Unprofessional Conduct, 597 N.W.2d 563, 568 (Minn. 1999).

[56] *In re* Thomsen, 837 N.E.2d 1011, 1012 (Ind. 2005).

[57] 554 A.2d 470, 474 (N.J. 1989).

adversaries as "slumlords," calling their counsel "bloodsucking shylocks," and making various derogatory remarks about Jews generally.[58] Another Indiana lawyer representing a husband in a custody dispute violated that state's version of Rule 8.4(g) by filing a petition in which he alleged that the wife associated herself "in the presence of a black male, and such association [caused] and [placed] the children in harm's way."[59] Similarly, a Colorado lawyer was disciplined for disparagingly referring to a female judge as a "c**t" in the course of negotiating a plea deal with prosecutors.[60]

Each of these examples would likewise violate Model Rule 8.4(g), even if the conduct occurred outside of a court-related setting. It need only take place in a context related to the practice of law, as Comment [4] explains.

III. Application of Rule 8.4(g) to Hypotheticals

To further illustrate the scope and application of Rule 8.4(g), this section discusses several representative situations.

(1) A religious organization challenges on First Amendment grounds a local ordinance that requires all schools to provide gender-neutral restroom and locker room facilities.[61] Would a lawyer who accepted representation of the organization violate Rule 8.4(g)?

No. This situation does not involve the type of conduct covered by Rule 8.4(g). The blackletter text underscores this by explaining that the "paragraph does not limit the ability of a lawyer to *accept*, decline or withdraw from a representation in accordance with Rule 1.16."[62] In addition, the provision's next sentence further emphasizes that it "does not preclude legitimate advice or advocacy consistent with these Rules." Though individuals may disagree with the position the lawyer in the hypothetical would be defending, that would not affect the legitimacy of the representation.

(2) A lawyer participating as a speaker at a CLE program on affirmative action in higher education expresses the view that rather than using a race-conscious process in admitting African-American students to highly-ranked colleges and universities, those students would be better off attending lower-ranked schools where they would be more likely to excel. Would the lawyer's remarks violate Rule 8.4(g)?

No. While a CLE program would fall within Comment [3]'s description of what constitutes "conduct related to the practice of law," the viewpoint expressed by the lawyer would not violate Rule 8.4(g). Specifically, the lawyer's remarks, without more, would not constitute "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . race." A general point of

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[58] *In re* Dempsey, 986 N.E.2d 816, 817 (Ind. 2013) (court specifically found that "none of these violations are based on any communication that falls within Respondent's broad constitutional right to freedom of speech and expression").
[59] *Thomsen*, 837 N.E.2d at 1012.
[60] People v. Gilbert, 2011 WL 10PDJ067, *10-11 (Colo. O.P.D.J. Jan. 14, 2011).
[61] *Cf.* Texas Att'y Gen. Op. KP-0123 (Dec. 20, 2016).
[62] MODEL RULES R. 8.4(g) (emphasis added).

view, even a controversial one, cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g). The fact that others may find a lawyer's expression of social or political views to be inaccurate, offensive, or upsetting is not the type of "harm" required for a violation.

(3) A lawyer is a member of a religious legal organization, which advocates, on religious grounds, for the ability of private employers to terminate or refuse to employ individuals based on their sexual orientation or gender identity.[63] Will the lawyer's membership in this legal organization constitute a violation of Rule 8.4(g)?

No. As with the prior hypothetical, Rule 8.4(g) does not forbid a lawyer's expression of his or her political or social views, whether through membership in an organization or through oral or written commentary. Furthermore, to the extent that such conduct takes the form of pure advocacy it would not qualify as sufficiently "harmful" or targeted. Moreover, even though the Supreme Court has now recognized that discrimination based on sexual orientation and gender identity violates Title VII,[64] it is not a violation of Rule 8.4(g) to express the view that the decision is wrong.

(4) A lawyer serving as an adjunct professor supervising a law student in a law school clinic made repeated comments about the student's appearance and also made unwelcome, nonconsensual physical contact of a sexual nature with the student. Would this conduct violate Rule 8.4(g)?

Yes. This is an obvious violation and demonstrates the importance of making the scope of the provision broad enough to encompass conduct that may not necessarily fall directly within the context of the representation of a client.[65]

(5) A partner and a senior associate in a law firm have been tasked with organizing an orientation program for newly-hired associates to familiarize them with firm policies and procedures. During a planning session, the partner remarked that: "Rule #1 should be never trust a Muslim lawyer. Rule #2 should be never represent a Muslim client. But, of course, we are not allowed to speak the truth around here." Do the partner's remarks violate Rule 8.4(g)?

Yes. Even if one assumes that the associate was not Muslim, the comments violate Rule 8.4(g).[66] The partner's remarks are discriminatory in so far as they are harmful and manifest bias and prejudice against Muslims. Furthermore, the partner surely knew or reasonably should have known this. In addition, the fact that the comments may not have been directed at a specific individual would not insulate the lawyer from discipline; though, in many instances, the offending conduct will be targeted towards

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[63] *See Cf.* Texas Att'y Gen. Op. KP-0123 (Dec. 20, 2016).
[64] *See* Bostock v. Clayton County, 590 U.S.__ (2020); *see also supra* note 11.
[65] *See In re* Griffith, 838 N.W.2d 792 (Minn. 2013) (lawyer suspended for ninety days and required to petition for reinstatement for engaging in unwelcome verbal and physical sexual advances towards a student the lawyer was supervising in a law school clinic); *see also id.* at 793-96 (Lillenhaug, J., dissenting) (maintaining that more severe discipline was warranted in light of the egregious nature of the misconduct).
[66] *Cf. In re* McCarthy, 938 N.E.2d 698 (Ind. 2010); *see also supra* text accompanying notes 40-42.

someone who falls within a protected category. Because the remarks were made within the law firm setting, they were "related to the practice of law." Moreover, given the supervisory-subordinate nature of the partner's relationship to the associate, the remarks may influence how similarly-situated firm lawyers treat clients, opposing counsel, and others at the firm who are Muslim.

IV. Conclusion

Model Rule 8.4(g) prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassing or discriminatory. Whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is found harmful will be grounds for discipline.

Rule 8.4(g) covers conduct that occurs outside the representation of a client or beyond the confines of a courtroom. In addition, it is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context. However, and as this opinion explains, conduct that violates paragraph (g) will often be intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.

The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit in any way a lawyer's speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.

Besides being advocates and counselors, lawyers also serve a broader public role. Lawyers "should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[67] Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole.

Abstaining: Hon. Goodwin Liu.

[67] MODEL RULES Preamble [6].

Public Policy Position
ADM File No. 2023-35: Proposed Amendments of MCJC 3 and MRPC 6.5

Support

Explanation

The Committee voted unanimously to support ADM File No. 2023-35 to more closely align Canon 3 of the Michigan Code of Judicial Conduct with Model Rule 2.3 of the ABA's Model Code of Judicial Conduct and make complimentary amendments to the Michigan Rules of Professional Conduct.

Position Vote:

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

Contact Persons:

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

Joint Statement of the Standing Committee on Professional Ethics and the Standing Committee on Judicial Ethics

Proposed Amendments of Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct

SUPPORT WITH AMENDMENT

Explanation

The Standing Committee on Judicial Ethics and Standing Committee on Professional Ethics (the Committees) decline to support the proposed amendments to Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct, as published for comment.

The proposed amendments serve a noble purpose: promoting professionalism and civility in the legal field. The Committees support the objective of fostering professionalism and civility. However, the proposed amendments replace useful generalities with a proposed exhaustive list of protected categories. This approach inadvertently eliminates respect and courtesy for all parties. Moreover, the proposed rule is aspirational. Aspirational rules are difficult to enforce, thus diminishing the impact of the Rules and Canons as a whole.

The Committees believe the goal of the proposed amendments could be better achieved by including a reference to all persons and incorporating a reference to the Professionalism Principles produced by the Professionalism and Civility Committee in the commentary, rather than prohibiting specific conduct. This approach would preserve the generality and flexibility of Canon 3 and Rule 6.5 as they currently stand while promoting the standards of professionalism and civility that are vital to the integrity of the legal profession. Including the Professionalism Principles in the commentary would also provide valuable guidance to practitioners and disciplinary bodies alike, without creating enforceability concerns or the risk of excluding important but unspecified forms of bias.

Canon 3. A Judge Should Perform the Duties of Office Impartially and Diligently.

The proposed amendments remove the most operative and important clause in the Canon: "a judge should *treat every person fairly, with courtesy and respect*." Instead, the proposed revision creates an exclusive list of protected characteristics, removing any reference to "every person" and removing perhaps the most important word of all: "respect."

Moreover, the aspirational nature of and ambiguities in the proposed changes to the Canon could make it functionally unenforceable, as language such as "manifesting bias" is vague. The Committees believe that the language included in the original rule: "treat every person fairly, with courtesy and respect" is clearer and better understood.

The Committees recommend the following amendment to Canon 3:

> (14) A judge shall, in the performance of judicial duties, ~~without regard to a person's race, gender, or other protected personal characteristic, a judge should~~ treat every person fairly, with courtesy and respect. ~~To the extent possible, a judge should required staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous,~~

~~and respectful treatment to persons who have contact with the court.~~ A judge shall not, in the performance of judicial duties, by words or conduct, treat any person with discourtesy, disrespect, or prejudice for any reason including~~, or engage in harassment,~~ based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation~~, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so~~.

(15) A judge shall require lawyers in proceedings before the court to refrain from ~~manifesting bias or prejudice~~ treating any person with discourtesy, or engaging in harassment by words or conduct as provided in MRPC 6.5.

(16) The restrictions of paragraphs (14) and (15) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

Alternatively, the Committees recommend adding a comment to the Canon:

Comment: Judicial officers are encouraged to review the Professionalism Principles established in Administrative Order No, 2020-23 for guidance.

Rule 6.5. Professional Conduct.

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall not, by words or conduct, ~~manifest bias or prejudice for or against~~ treat any person involved in the legal process with discourtesy, or engage in harassment against any person involved in the legal process for any reason including based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation. ~~and. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic.~~ To the extent possible, a lawyer shall not permit ~~require~~ subordinate lawyers and nonlawyer assistants to do so~~provide such courteous and respectful treatment~~.

(b) A lawyer serving as an adjudicative officer shall~~, without regard to a person's race, gender, or other protected personal characteristic,~~ treat every person fairly, with courtesy and respect. A lawyer serving as an adjudicative officer, shall not, by words or conduct, ~~manifest bias or prejudice for or against~~ treat any person with discourtesy, or engage in harassment against any person, for any reason including based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation.~~, and t~~ To the extent possible, the lawyer shall ~~not permit~~require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

Comment:
[Paragraph 1 unchanged.]

A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly biased, prejudicial, or harassing ~~rude~~. A lawyer's professional judgment must be employed here with care and discretion.

[Paragraphs 3-4 unchanged.]

A supervisory lawyer should make every reasonable effort to ensure that subordinate lawyers and nonlawyer assistants, as well as other agents, avoid discourteous or disrespectful behavior toward persons involved in the legal process. Further, a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm on the basis of race, gender, or other protected personal characteristic. See Rules 5.1 and 5.3. Further, all lawyers are encouraged to review the Professionalism Principles established in Administrative Order No, 2020-23 for guidance.

* * *

The Committees encourage the Michigan Supreme Court to include a reference to the Professionalism Principles in the Commentary to the Rules and otherwise leave the Rule and Canon unchanged to allow for discretion by the disciplinary bodies.

Professional Ethics Committee:

Contact Persons:
Edward J. Hood
ehood@clarkhill.com

Judicial Ethics Committee:

Contact Persons:
Judge Terry L. Clark
d70-6@sagniawcounty.com

Public Policy Position
ADM File No. 2023-35: Proposed Amendments of MCJC 3 and MRPC 6.5

Support

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

Contact Persons:
Ashley E. Lowe alowe@lakeshorelegalaid.org

Member Name: *	William Wagner
E-mail: *	Prof.WWJD@gmail.com
Proposed Court Rule or Administrative Order Number:	ADM File No. 2023-35

Comment:

Public Policy Comment of Distinguished Professor Emeritus William Wagner

Before Public Policy Committee of the State Bar of Michigan

June 3, 2025

Thank you for providing me the opportunity to provide this public policy comment on ADM File No. 2023-35 – Proposed Amendments of Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct.

Introduction

My name is William Wagner, and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as senior assistant United States Attorney in the Department of Justice, and as a legal counsel in the United States Senate. I am also the Founding President of the Great Lakes Justice Center and the former chair of the Religious Liberty Law Section of the State Bar of Michigan.

In my personal capacity I share the following thoughts and concerns about the proposed amendments, opposing enactment as currently written.

Serious Policy Concerns

The proposed amendments are bad public policy that will cost this state millions of dollars in lawsuits it will lose when the law is inevitably unconstitutionally applied.

State and local governments frequently wield initiatives like those in the proposed amendments as a weapon to oppress religious people. The exponential expansion of government actions interfering with individuals' exercise of their sincere religious conscience and expression illustrate the point. The unprincipled characterizing of expression here as conduct is nothing less than the use of state power to manipulate the suppression of information with which the State disagrees. Allowing the State authority to deem the spoken word conduct empowers the regime to censure any kind of expression.

Amending Canon 3 and Rule 6.5 as currently proposed will inevitably collide with the constitutionally

protected conscience held by many religious people who know gender is immutable and grounded in biological scientific reality, (as distinct from secular progressive views grounded in self-determined fluidity). Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. Accordingly, a religious person's expression and exercise of religious conscience is not invidious bias, prejudice, or harassment. No sincere follower of Jesus would, therefore, ever discriminate, harass, or manifest bias or prejudice against a person based on who they are. Christian people are called, though, to adhere to a standard of behavior and beliefs and can never, then, concede their constitutionally protected right of religious conscience. Condemning invidious discrimination, harassment, and manifestations of bias or prejudice, I hold no animus toward anyone. I seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry, harassment, bias or prejudice. The unprincipled conversion of speech into misconduct here, though, diabolically empowers State bar and judicial authorities to suppress information of great public concern with which they disagree. The bench and bar cannot change the reality that what they really seek to regulate here is the expression of a person's viewpoint grounded in religious conscience. Indeed, the State's regulatory regime, in enforcing the rule, will inevitably examine the content of the person's statements and viewpoint to determine whether a violation of the rule occurred. Here the proposed amendments expressly ban "words" manifesting some vague notion of bias, prejudice, and harassment based upon religion, sex, gender identity or expression, and sexual orientation, yet allows words that manifest bias based on religious identity and religious orientation. The State thus enforces its irreligious and unscientific view that gender is not immutable, while chilling the legal counselor or judge from offering a different viewpoint consistent with her religious conscience. People of faith do not by their words manifest bias or prejudice or engage in harassment when, grounded in their sincere religious conscience, they express biologically accurate personal pronouns and refuse to lie. Chromosomes are not a social construct.

Nonetheless, if enacted, the proposed rules will likely result in government enforcement actions against Christian and other religious people in ways that violate:

1) the First Amendment constitutional freedoms of citizens (whose valid religious, moral, political, and cultural views necessarily conflict with a political agenda that denies biology, ignores Biblical teaching, and diminishes personal privacy); and

2) the fundamental constitutional liberty and equal protection interests judicially recognized by the U.S. Supreme Court in Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of citizens who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation). Indeed, as currently written, the proposed amendments constitute an unconstitutional regulation of speech because they are content-based, vague, and overbroad, and they violate both due process and the free exercise of religious conscience.

Conclusion

For these reasons, I recommend you table these proposed amendments until they can be rewritten in a way that accommodates the fundamental constitutional rights of all citizens, and not just those encouraging its passage.

Member Name: *	Jeffrey Paulsen
E-mail: *	jfp@paulsenlawfirm.com
Proposed Court Rule or Administrative Order Number:	ADM File No. 2023-35

Comment:

As a compelled mandatory dues paying 40+ year member of the State Bar of Michigan, I encourage the SBM Board of Commissioners to reject the proposed amendments of MCJC 3 and MRPC 6.5 as it is my belief that the suggested changes are of an ideological nature, do not support the State's interest in regulating the profession or improving the quality of legal services, and are in violation of Administrative Order 2004-1.

Administrative Order 2004-1 requires that all public policy matters comply with the following:

- The regulation and discipline of attorneys.
- The improvement of the functioning of the courts.
- The availability of legal services to society.
- The regulation of attorney trust accounts.
- The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

The proposed changes do not fall within any of the above enumerated categories and are motivated by ideological purposes that will alienate a significant percentage of SBM members.

Thank you for considering the above noted concerns prior to determining the SBM Board of Commissioners position on ADM File No. 2023-35.

Jeffrey F. Paulsen (P36758)

From: Anne Bachle Fifer
Date: May 13, 2025, at 7:55 PM
To: Nicholas Ohanesian
Cc: Thomas Murray
Subject: Re: ADM File No. 2023-35

Dear Mr. Murray and Mr. Ohanesian,

I'm writing to you as my District Commissioners. I understand from the State Bar that, at your June 13 meeting, you are going to consider ADM File No. 2023-35, a proposal to alter MRPC 6.5. I urge you to oppose this.

The Michigan Supreme Court is considering an amendment to MRPC 6.5, "Professional Conduct," that would remove the obligation to treat people “with courtesy and respect” and instead prohibit bias, prejudice, and harassment (ADM File No. 2023-35). I’m concerned that the proposed language is vague and over-broad, and could become in effect a speech code for lawyers. It’s based on ABA Model Rule 8.4(g), which has been adopted by some states for judges, but has been rejected by most states that have considered applying it to lawyers. My understanding is that only Vermont and New Mexico adopted ABA Model Rule 8.4(g) as originally drafted; New York adopted a modified version in June 2022. Several states found it unconstitutional, including Texas and South Carolina. Other states, including Idaho, Arizona, Pennsylvania and Tennessee, expressly declined to adopt some version of it.

I don’t know what problem Michigan is trying to fix, but I don’t think this rule is the answer. It is so broad and general that attorneys could unwittingly violate it in the course of appropriately practicing law. Its purpose is to prohibit discrimination and harassment in the practice of law, but, as one scholar noted, "it may violate lawyers’ First Amendment free speech rights, especially in relation to their religious beliefs or political views, and have a chilling effect on expression." Texie Montoya, "The Past, Present and Future of ABA Model Rule 8.4(g) in Other States and Idaho," 2023.

In this era when government is targeting lawyers for taking a position on controversial issues, it seems like we should be *supporting* lawyers’ right to free speech, not limiting it. How is the current rule inadequate? The current rule phrases the standard positively – here’s how we want lawyers to behave. The proposed rule is negative, sounding punitive rather than instructive. If the current MRPC 6.5 is deficient in some way, let's strengthen it -- but adopting ABA Model Rule 8.4(g) is not the way to do it.

Thank you for listening, and please let me know if you have any questions.

Yours,

Anne Bachle Fifer, P35699

Anne Bachle Fifer

616-365-9236

abfifer.com

From: Nicholas Ohanesian
Date: May 13, 2025 at 10:51 PM
To: Anne Bachle Fifer
Cc: Thomas Murray
Subject: Re: ADM File No. 2023-35

Dear Ms. Fifer,

Thank you for your input and for giving me something to think about. I have two questions:

1. May I share your email with my fellow commissioners?

2. What are your thoughts on the New York approach?

Sincerely,

Nick Ohanesian

From: Anne Bachle Fifer
Date: May 14, 2025 at 8:43:12 PM EDT
To: Nicholas Ohanesian
Cc: Thomas Murray
Subject: Re: ADM File No. 2023-35

Thank you for your prompt response!

1. Feel free to share my email with other commissioners.

2. a. Before considering the New York approach, it would be wise to understand the problem we're trying to fix. Are Michigan lawyers engaging in harassing behavior or harmful discriminatory speech that is beyond the reach of Rule 6.5? Has the ADB or the AGC complained about the inadequacy of our current Rule 6.5? It seems like you can't really determine whether other language will be more effective until you determine the drawbacks of the current Rule.

2.b. Regarding New York's version of Rule 8.4(g), it appears to be an improvement over the proposed language; however, I think it still ends up restraining free speech. As my colleagues at the Christian Legal Society have noted, " the New York rule is still vague, overbroad, and viewpoint discriminatory and will chill the speech of New York attorneys." It still defines "harassment" to include mere words ("verbal conduct"), and the comment in 5D about protecting free speech won't necessarily guarantee First Amendment protection. They note that the United States Supreme Court has issued three recent decisions that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys' speech -- Iancu v. Brunetti, 139 S. Ct. 2294 (2019); National Institute of Family and Life Advocates (NIFLA) v. Becerra, 138 S. Ct. 2361 (2018); and Matal v. Tam, 137 S. Ct. 1744 (2017). The Christian Legal Society has researched this topic extensively and I can send you a lot more information outlining their concerns with Model Rule 8.4(g) and the New York Rule if you would like.

Thank you for your interest in my concerns.

Anne

From: Nathaniel Kaleefey
To: ADMcomment
Subject: ADM File No. 2023-35 Comment
Date: Saturday, May 31, 2025 9:44:08 PM

To Whom It May Concern:

It would be a shame to remove the requirements that lawyers be courteous to everyone in the legal system and that judges maintain that requirement.

Attorneys can be nasty. They need to be courteous, they need to be told to be courteous, and they need to be held to this standard of conduct.

Requiring courteousness promotes civility. Courteousness is the minimum.

I do not believe it is enough to prohibit prejudice. I think it is impatient to impose the additional requirement courteousness. Biases on enumerated categories will not cover every situation where an attorney should be courteous.

I can't think of a good reason to remove the courteousness requirement. The provisions prohibiting bias could be added to the extent courtesy provisions.

Thanks,

Nathaniel J. Kaleefey, Principal
Verspoor Waalkes PC

From: robert bunger
To: ADMcomment
Subject: ADM File No. 2023 re lawyer conduct (Rule 8.4(d))
Date: Wednesday, May 7, 2025 3:51:59 PM

EXTERNAL EMAIL

I oppose adoption of the proposed amendments to Rule 6.5 because they threaten the First Amendment rights of Michigan attorneys. Existing Michigan Rule of Professional Conduct Rule 8.4(d) already adequately addresses prejudicial conduct. I respectfully request the court
reject the proposed amendments.
Robert Bunger
Attorney
Bar no. P25244

Name: Robert Magill Jr

Date: 05/07/2025

ADM File Number: 2023-35

Comment:
The proposed revision to MRPC 6.5 should be rejected. It will cause unnecessary confusion and complaints, it will be chilling for the profession, and it is unconstitutional.
The current 6.5 is sufficient -- if it is changed, the question will be: what new is added? And since the proposed language is both vague and overbroad, the answer to that question will be elusive and may vary. The ABA comment 4 to the model for this --ABA 8.4 (g)-- cites "social activities in connection with the practice of law." What does that include?
And what does "bias, prejudice, and harassment" include -- a lawyer's opinions or remarks on controversial topics- or even ad hominem remarks that are disfavored by the bar or offensive to the listener? I suggest this rule would clearly have a "chilling" effect on the freedom of expression for lawyers. Furthermore, the proposal is blatantly unconstitional as its drafters should know. See Matal v. Tam, 582 US 218 (2017) and Iancu v. Brunetti 588 US 388(2019)

Name: Wayne Wegner

Date: 05/12/2025

ADM File Number: 2023-35

Comment:
I've been a member of the bar for almost 50 years, and want to strongly object to the adoption of this proposed amendment. I believe it essentially creates a speech code for lawyers, and being ambiguously worded, without clear definitions of what speech would be prohibited, would allow the bar association to discipline lawyers if they say something that the bar disagrees with. Are we going to see the weaponizing of the State Bar to control the free speech of lawyers. Please decline to adopt this proposed rule.

Comment of
Distinguished Professor Emeritus William Wagner & Mr. Tim Denney, Esq.
(Former Chairs of the Religious Liberty Law Section) [1]

ADM File No. 2023-35

Before the Michigan Supreme Court
June 3, 2025

I. Introduction

Thank you for providing us the opportunity to provide this public policy comment on ADM File No. 2023-35 - Proposed Amendments of Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct.

In our personal capacities we share the following thoughts and concerns about the proposed amendments, opposing enactment as currently written.

Sexual Orientation Gender Identity (SOGI) speech censorship laws regulating professions (e.g., lawyers, physicians, pharmacists, counselors, etc.) substantially interfere with a Christian person's religious identity and expressive exercise of their religious conscience. Amending Canon 3 and Rule 6.5 to include SOGI speech censorship will inevitably collide with the constitutionally protected conscience held by many religious people who know gender is immutable and grounded in biological scientific reality, (as distinct from secular progressive views grounded in self-determined fluidity). If enacted, the proposed amendments will likely result in government enforcement actions against Christian and other religious people in ways that violate the First Amendment and the fundamental constitutional liberty and equal protection interests judicially recognized by the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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[1] William Wagner holds the title of Distinguished Professor Emeritus after serving on the faculty at the University of Florida Levin College of Law and Western Michigan University Cooley Law School, where he taught Constitutional Law and Professional Responsibility. He currently holds the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, he served as U.S. Magistrate Judge in the United States Courts, senior assistant United States Attorney in the Department of Justice, and as a legal counsel in the United States Senate. He is also the Founding President of the Great Lakes Justice Center and the former Chair of the Religious Liberty Law Section of the State Bar of Michigan.

Timothy W. Denney, Esq., is the Managing Partner at Rickard, Denney, Leichliter, Childers & Bosch in Lapeer, Michigan. He has practiced law in Michigan since graduating from the University of Michigan Law School in 1986. Mr. Denney is the former Chair of the Religious Liberty Law Section of the State Bar of Michigan.

II. The First Amendment Doubly Protects Religious Expression, Warranting the Strictest Scrutiny of Government Actions, Including the Proposed Rules Here.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech ...." U.S. Const. amend I. The Supreme Court holds liberty protected by the First Amendment applicable to the States via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech).

The liberty guaranteed by the First Amendment is, at its core, "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Indeed, "[t]he First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish." *303 Creative LLC v Elenis,* 600 U.S. 570, 603 (2023)

> The First Amendment protects "the freedom to think as you will and to speak as you think." *303 Creative*, 600 U.S. at 584 (cleaned up); *Boy Scouts of America v. Dale*, 530 U. S. 640, 660-661 (2000). The Supreme Court has long held that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided," *303 Creative,* 600 U.S. at 586 citing, *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 574 (1995) Undeniably, the First Amendment protects not just "speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive." *303 Creative,* 600 U.S. at 595. Indeed, "the government may not compel a person to speak its own preferred messages." *Id.* at 586 citing, *Tinker v. Des Moines Independent Community School Dist*., 393 U. S. 503 (1969) and *National Institute of Family and Life Advocates v. Becerra,* 585 U. S. 755, 766 (2018) (*NIFLA*)

Facing a credible threat of future enforcement, along with an ongoing injury caused by the proposed amendments' chilling effect on one's intention to exercise their rights under the First Amendment, expect lawyers and judges to challenge the constitutionality of the proposed SOGI speech censorship rules. The chill is especially fridged given the notorious history of state authorities' hostile and otherwise unconstitutional enforcement against Christian people. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 584 U.S. 617 (2018); *303 Creative*, 600 U.S. 570.

A. Strict Scrutiny and the Free Speech Clause

Reflecting an accurate historical understanding of the plain meaning of the Free Speech Clause, the Supreme Court stated in *Police Dep't of Chicago v Mosley*, 408 U.S. 92, 96 (1972)

> Our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. *Id.* (cleaned up).

A State, therefore, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. A State's "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Content-based regulation of expression by government authorities, therefore, faces strict scrutiny, the highest standard of review in constitutional analysis. *Turner,* 512 U.S. at 641; *Reed,* 576 U.S. at 163; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)

The proposed rules here depend on what is spoken. Because the rules regulate both the topic and viewpoint of the lawyer, they necessarily are content based. Here the State's rule "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641; *NIFLA,* 585 U.S. at 771.

The SOGI speech censorship amendments cleverly deem speech as conduct. Even if a rule "*generally* functions as a regulation of conduct" though, the U.S. Supreme Court requires heightened scrutiny if what the government is regulating (censoring) "under the statute consists of communicating a message." *Holder v Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). That is, a person's verbal communication does not magically convert into conduct when expressed while providing professional services. See, *NIFLA*, 585 U.S. at 767. Moreover, the Supreme Court has long prohibited state sponsored censorship "under the guise" of regulating conduct. *NAACP v. Button*, 371 U.S. 415, 439 (1963). The unprincipled characterizing of expression here as conduct is nothing less than the use of state power to manipulate the suppression of information with which the State disagrees. Allowing a state regime to deem the spoken word conduct empowers a regime to censure *any kind* of expression. The penchant for misbranding one viewpoint as *conduct,* as it relates to

a debated issue of great public concern, chronically enables it to pursue censorship of disfavored ideas and viewpoints. *303 Creative*, 600 U.S. at 588 (cleaned up).

A religious person's expression and exercise of religious conscience is not invidious discrimination, bias, prejudice, or harassment. Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. No sincere follower of Jesus would, therefore, ever truly discriminate, harass, or manifest bias or prejudice against a person based on who they are. Christian people are called, though, to adhere to a standard of behavior and beliefs and can never, then, concede their constitutionally protected right of religious conscience. We condemn true invidious discrimination, harassment, bias, and prejudice, and hold no animus toward anyone. We seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry. The State's proposed unprincipled conversion of religious speech into misconduct here, though, diabolically empowers it to suppress political and religious information related to matters of great public concern with which the State disagrees.

The bench and bar cannot change the reality that what it really seeks to regulate here is the expression of a person's viewpoint grounded in religious conscience. Indeed, the State's regulatory regime, in enforcing the SOGI speech censorship rule, must examine the content of the person's statements and viewpoint to determine whether a violation of the law occurred.

Here the proposed amendments expressly ban "words" that manifest some vague notion of bias, prejudice, and harassment based upon religion, sex, gender identity or expression, and sexual orientation, *yet allows words that manifest bias based on religious identity and religious orientation*. The State thus enforces its irreligious and unscientific view that gender is not immutable, while prohibiting the legal counselor from offering a different viewpoint consistent with his or her religious conscience.

When a state targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 829 (1995) citing *R.A.V.,* 505 U.S. at 391. "[N]o matter how controversial," the First Amendment protects all viewpoints. *303 Creative* at 603. Because viewpoint discrimination is so egregious, states "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger,* 515 U.S. at 829. Such speech is not unprotected merely because it is uttered by a professional (including legal counselors and judges). *NIFLA*, 585 U.S. at 767. Indeed, the First Amendment protects a professional's expression by constitutionally limiting the state from regulating "the content of professional speech," thus "preserv[ing] an uninhibited marketplace of ideas in which truth [ ] ultimately prevail[s]." *Id*., at 772 (cleaned up). Certainly, no state, including Michigan, holds the "unfettered power"

to reduce a group's First Amendment liberty "by simply imposing a licensing requirement." *Id.* at 773. The "danger of content-based regulations" in the fields of medicine and law is especially prevalent "where information can save lives." *Id.* at 771 (cleaned up).

Applying the strictest of scrutiny, the Supreme Court, in *Janus, R.A.V.*, and *Reed v Town of Gilbert* struck down government actions compelling speech and regulating expression in a content-based way (e.g., viewpoint or topic-based regulation). *Reed v Town of Gilbert*, 576 U.S. 155 (2015) (holding a town's content-based regulation failed strict scrutiny); *R.A.V.,* 505 U.S. at 382 (holding content-based law "presumptively invalid"); *Janus v. Amer Fed of State, County, and municipal Employees, Council 31, et a*l., 585 U.S. 878 (2018) (holding state's action violated speech rights of certain individuals by compelling them to subsidize private speech on matter of substantial public concern.)

B. Strict Scrutiny and the Free Exercise Clause

It is unconstitutional *per se* for the Michigan bench and bar to use its licensing scheme to forcibly change the religious views of its members. The Supreme Court has described the Free Exercise Clause as containing an "absolute prohibition of infringements on the 'freedom to believe.'" *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). See also, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."). Here, in two ways, the proposed rules use a licensing scheme to forcibly change, by force of law and punishment, the religious views of Michigan judges and counselors at law. First the State conditions its license to serve as on whether the counselor's utterances submit to an irreligious secular viewpoint hostile to the counselor's Christian faith. And second, the State cleverly misbrands religious expression as conduct, so that it may discipline and ultimately revoke a counsellor's license based upon what the counsellor *says,* as perceived by those in authority who do not share her religious viewpoint. The First Amendment absolutely forbids Michigan to do what it seeks to accomplish here: to change the religious views of its judges and attorneys.

Reflecting an accurate historical understanding of the plain meaning of the Free Exercise Clause, the Supreme Court, in *Sherbert v. Verner* and *Wisconsin v. Yoder,* struck down government actions that substantially interfered with a person's sincerely held religious beliefs. *Sherbert,* 374 U.S. 398 (1963) (denying unemployment benefits to a person who lost her job when she did not work on her Sabbath); *Yoder*, 406 U.S. 205 (1972) (overturning convictions for violations of state compulsory school attendance laws incompatible with sincerely held religious beliefs).

Under these decisions, a person's unalienable right to the free exercise of religious conscience appropriately required government to face the most rigorous scrutiny when seeking to justify its interference with such a fundamental liberty interest.

The Supreme Court has made clear that "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop,* 584 U.S. at 631 (citing *Obergefell* 576 U.S. 644, 679-80 (2015) and holding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.").

For Christian people in states like Michigan, though, that right continues to manifest as a mirage. In practice, state authorities elevate SOGI rights above all others, especially the free exercise of religious conscience. Theophobia has replaced homophobia, and the government has become the installer and enforcer of this new tyranny. Special preferences embodied in government SOGI classifications, and the SOGI speech censorship provisions in the proposed amendments, exalt a particular belief system of what is offensive over another and, by its very nature, signals official disapproval of a Christian person's religious identity, expression, and religious beliefs. "Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop,* 584 U.S. at 638 (internal quotations and citations omitted).

As the Supreme Court has so clearly stated:

> [T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.

Masterpiece Cakeshop, 584 U.S. at. 638 (citing Church of *Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (internal quotes omitted). It is worth noting that while the Court here characterized its analysis as addressing a lack of neutrality in the government's action, government imposition of SOGI preferences is unavoidably *always* hostile and can never be "neutral" toward the religious identity and beliefs of orthodox Christian people. Indeed, special SOGI preferences, like the SOGI conversation censorship law here, *necessarily* require Christian people to relinquish their religious identity and the freedom to express and exercise their religious

conscience. For the First Amendment to have meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

The government SOGI speech censorship amendments here substantially interfere with judges and counselors' religious identity and exercise of their religious conscience. Michigan's bench and bar ought not require its members to disavow their sincerely held religious beliefs to stay licensed. Here Michigan proposes to expressly require its judges and attorneys to renounce their religious character, identity, and sincerely held religious conscience, or face professional discipline. When a government action imposes a penalty on the free exercise of religious expression, that government action must face the "most rigorous" scrutiny. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 582 U.S. 449, 466 (2017); *Lukumi*, 508 U.S. at 546. "Under that stringent standard, only a state interest of the highest order can justify the government's discriminatory policy." *Trinity Lutheran,* 582 U.S. at 466 (citing *McDaniel*, 435 U.S. at 628 (cleaned up); *Fulton*, 593 U.S. at 541.

And as *Masterpiece Cakeshop* recognized, "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs," and without subjecting persons living a gay lifestyle to indignities "when they seek goods and services in an open market." 584 U.S. at 640.

In *Fulton*, the Supreme Court confirmed that when First Amendment religious liberty is at stake:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546 (cleaned up). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

593 U.S. at. 541

While the government action in *Fulton* was not generally applicable, nothing in the Court's holding suggests the fundamental nature of the constitutional protection ought to diminish where it is.

C. The Complimentary Purposes of the First Amendment Clauses Work in Tandem to Doubly Protect Religious Expression

In *Kennedy*, the Supreme Court confirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of

religious conscience. *Kennedy,* 597 U.S. at 523, 532. In such situations, *Kennedy* reaffirmed the application of strict scrutiny. *Id.*

Those proposing the SOGI speech censorship amendments fail to understand the complimentary purposes of the clauses, thereby failing to read these clauses in tandem -- where only those state interests of the *highest order* can justify state interference with a person freely expressing their religious conscience.

The proposed SOGI speech censorship amendments substantially interfere with judges' and counselors' expressive exercise of their religious conscience and identity. Here, the State proposes to expressly require judges and lawyers to renounce their religious expression, conscience, beliefs, and identity, or face professional discipline under the full force of law and punishment. When the government substantially interferes with a citizen's religious expression and conscience, that government action must face "strict scrutiny." *Kennedy,* 597 U.S. at 523, 532.

The First Amendment "is essential to our democratic form of government, and it furthers the search for truth. Whenever ... a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus*, 585 U.S. at 893. It bears repeating that such actions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641; *NIFLA,* 585 U.S. at 771.

Here a State authority "seeks to compel this speech in order to excise certain ideas or viewpoints from the public dialogue." 303 *Creative,* 600 U.S. at 588 citing *Turner*, 512 U.S. at 642 (cleaned up). Here the SOGI speech censorship rule coerces professionals to betray their conscience-based convictions. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, ... a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus,* 585 U.S. at 893 quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633 (1943); and see*, 303 Creative*, 600 U.S. at 589 (holding that "is enough, more than enough to represent an impermissible abridgment of the First Amendment's right....")(cleaned up).

The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all. The right to eschew association for expressive purposes is likewise protected." *Janus*, 585 U.S. at 892 (cleaned up). Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette,* 319 U.S. at 642; see also *303 Creative* 600 U.S. at 584-85. Likewise, "it is not, as the Court

has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *303 Creative,* 600 U.S. at 602 quoting, *Masterpiece Cakeshop,* 584 U.S. at 665. Will a judge or lawyer's membership in a church that believes marriage must be between one man and one woman be used as evidence in a disciplinary proceeding to establish manifest bias or prejudice?

The Michigan bench and bar's deliberate choice to elevate one view of what it finds offensive over another indicates the State's biased, non-neutral official disapproval of some of its member's religious beliefs.

The First Amendment "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy,* 597 U.S. at 524 citing A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). The Supreme Court has long recognized "in Anglo–American history, ... government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Kennedy,* 597 U.S. at 524 quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Bearing witness to the intolerant laws of seventeenth century England that persecuted individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a well-ordered central government. *See, e.g.*, Mark A. Knoll, *A History of Christianity in the United States and Canada* 25-65 (1992); F. Makower, *The Constitutional History and Constitution of the Church of England* 68-95 (photo. reprt. 1972) (1895). The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their freedoms but embrace the security and liberty only a pluralistic society affords. That is why the First Amendment protects expression of a religious person's viewpoints and ideas, subjecting a state to the strictest of scrutiny if it substantially interferes. See, e.g., *Masterpiece Cakeshop,* 584 U.S. at 663-664 (Thomas, J., concurring) (noting, the necessity of applying "the most exacting scrutiny" in a case where a state law penalized expression of cake designer) citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989); accord, *Holder,* 561 U.S. at 28; see also, *Reed*, 576 U.S. at 164.

In *Shurtleff v. Boston*, the Supreme Court unanimously reaffirmed that government "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination,'" 596 U.S. 243, 258 (2022) (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). See also, *Rosenberger*, 515 U.S. at 828-830.

The SOGI speech censorship amendments require involuntary acceptance of political policy preferences, by force of law and punishment and is especially wrong because the government action here substantially interferes with constitutionally protected liberty. Here, the proposed amendments, masquerading as a *neutral rule regulating conduct*, effectively censures the viewpoint of many judges and counselors, a religious viewpoint consistent with their conscience and inherent in their personal religious identity. Moreover, the SOGI speech censorship amendments seek to compel these professionals to engage in expression conflicting with it. The disturbing diminishment of First Amendment religious conscience and expression, as a practical matter, denudes any meaningful constitutional protection for liberty as a limit on the exercise of state power.

D. Significance of *Obergefell*

In *Obergefell v. Hodges*, the Supreme Court found in the Constitution a right of personal identity for all citizens. 576 U.S. 644 (2015). The Justices in the majority held that: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 651; *see also Masterpiece Cakeshop,* 584 U.S. 631. *Obergefell* affirmed, therefore, not just freedom to define one's belief system, but freedom to exercise one's conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case. 576 U.S. at 663. If the Supreme Court meant what it said in *Obergefell*, the right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define and express their identity via their religious beliefs.

Christian judges and lawyers find their identity in Jesus Christ and the ageless, sacred tenets of His Word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person, whose identity inheres in his or her religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. Proponents of initiatives like those here grievously err suggesting otherwise, cancelling a professional's humanity, dignity, and autonomy, demanding that they abandon their identity when expressing principles that are so central to their life and faith.

There can be no doubt that the Supreme Court's recently identified substantive due process right of personal identity protects against government authorities who

use public policy to persecute, oppress, and discriminate against Christian people.[2] Indeed, government must not use its power, irrespective of whether neutrally applied, in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm. *Masterpiece Cakeshop,* 584 U.S. at 631. "[R]eligious and philosophical objections" to SOGI issues are constitutionally protected *Id.* at 631, (citing *Obergefell*, 576 U.S. at 679-80). Certainly, government ought to protect, not impede, the free expression of religious conscience. *See, e.g., Trinity Lutheran,* 582 U.S. at 462 (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 719 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a religious school). State actions must uphold constitutionally protected freedoms, not grant special protections for some, while coercing others to engage in expression contrary to their religious identity and conscience.

Contrary to *Obergefell's* holding, the proposed amendments eviscerate the constitutional right to one's religious identity and religious expression.

E. Strict Scrutiny for Expression Grounded in Religious Conscience and Identity

Kennedy explains that the First Amendment Clauses "have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. 597 U.S. at 523, 532. *Obergefell* teaches that beyond the First Amendment's double protection for religious expression, a substantive due process right to personal identity also compels the Supreme Court to always provide religious people with the highest standard of constitutional protection. Government action not only must avoid interfering with a citizen's religious expression and free exercise of religious conscience, protected by the First Amendment, it must also refrain from violating their personal religious identity rights. In this light, therefore, the proposed amendments cannot stand. If they remain, government authorities will use such provisions to oppress religious members of the bench and bar under the guise professional misconduct regulation. Moreover, only if the Supreme Court restores full protection for First Amendment freedom of conscience, will other constitutional freedoms remain secured. The Michigan Supreme Court should,

[2] While we question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell,* we expect the government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

therefore, preserve the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the states through the Fourteenth Amendment.

III. The Proposed Rule Violates Due Process and is an Affront to Good Governance under the Rule of Law

A. Due Process: The Proposed Rule is Void for Vagueness.

The Due Process clauses of the United States Constitution and the Michigan Constitution require that the law provide predictability for all citizens. US Const, Am XIV; Const 1963, art 1, § 17. An unambiguously drafted rule affords prior notice to the citizenry of conduct proscribed. A fundamental principle of due process, embodied in the right to prior notice, is that a rule is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly. If a person must guess at what a rule means, or if the proscriptions are not clearly defined, then the rule cannot stand. See, e.g., *Grayned v City of Rockford*, 408 US 104 (1972).

> A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated. For example, in *Kolender v. Lawson*, the Court declared unconstitutional California's loitering law and declared that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. * * * In part, the vagueness doctrine is about fairness; it is unjust to punish a person without providing clear notice as to what conduct was prohibited. Vague laws also risk selective prosecution; under vague statutes and ordinances the government can choose who to prosecute based on their views or politics.

Erwin Chemerinsky, *Constitutional Law – Principles and Policies*, 3rd Ed, pgs. 941-942 (citing *Kolender v Lawson*, 461 US 352 (1983)).[3]

The Michigan Supreme Court has held at least three ways exist for a law may be found unconstitutionally vague:

[3] Erwin Chemerinsky has been cited numerous times by the United States Supreme Court for his constitutional analysis, amicus briefs, and treatises. See, e.g. *American National Red Cross v. S.G.*, 505 U.S. 247 (1992); *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*., 559 U.S. 393 (2010); *Duncan v. Walker*, 533 U.S. 167 (2001); *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998).

1. failure to provide fair notice of what conduct is prohibited,
2. encouragement of arbitrary and discriminatory enforcement, or
3. being overbroad and impinging on First Amendment freedoms.

People v Lino, 447 Mich 567, 575-576; 527 NW2d 434 (1994).

The United States Supreme Court has further explained the vagueness doctrine:

> As generally stated, the void-for-vagueness doctrine requires ... sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolender, 461 US at 357-358 (1983) (emphasis added) (internal citations omitted). If the bench and bar here fail to provide these minimal guidelines, a rule may permit "a standardless sweep" that allows government authorities "to pursue their personal predilections." *Id.*

The Supreme Court further held that "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v Fox*, 132 S Ct. 2307, 2317 (2012). The language of the proposed rules renders them unconstitutionally vague under all three vagueness doctrines. Of particular concern here, because the ambiguous language prevents notice of what constitutes misconduct, government authorities can arbitrarily define the offense *after* the commission of the expression.

B. An Affront to Good Governance Under the Rule of Law

Beyond the Due Process violations, arbitrarily enforcing vague provisions to suppress free expression of religious conscience undermines good governance under the rule of law. A principal precept of the rule of law is that it provides predictability for individuals in the conduct of their affairs. As discussed above, a vague provision provides no such predictability and opens the door for government authorities to decide what the law means after the conduct occurs. That which is prohibited becomes clear only after a government authority selectively enforces the vague rule against a citizen—based upon the authority's own morally relative construal of the ambiguous language. To be sure, the exercise of such discretion provides the means for an

authority to efficiently advance a political agenda. The insidious consequences of doing so, however, include the deterioration of fundamental democratic principles and good governance under the rule of law.

In the case of a vaguely worded rule, enforcement can, without prior notice of the conduct prohibited, lead to a citizen's loss of liberty interests. Moreover, if the rule vaguely regulates free expression, an ominous chill on the exercise of fundamental freedoms accompanies its promulgation. Compelled by the piercing chill of an unpredictable potential enforcement, citizen lawyers and judges cease exercising their basic liberties. Fearing loss of their license, they cease to assemble, pray, worship, or even speak.

In a pluralistic society, numerous conflicting points of view exist. Historically, therefore, the perpetuation of functional democracy requires free and open debate. Government enforcement actions against Christian professionals around the world and in the United States illustrate, however, just how efficiently government can use a vague law to suppress free expression and the free exercise of religious conscience.

IV. Conclusion

For the reasons discussed herein, we oppose the proposed amendments until they can be rewritten in a way that accommodates the fundamental constitutional rights of all citizens, and not just those encouraging its passage.

Order

Michigan Supreme Court
Lansing, Michigan

March 12, 2025

ADM File No. 2019-40

Proposed Adoption of Administrative Order No. 2025-X, Proposed Rescission of Administrative Order No. 2012-7, and Proposed Amendment of Rule 2.407 of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering adoption of an administrative order regarding a judicial officer's ability to appear remotely. The proposal also includes a proposed rescission of Administrative Order No. 2012-7 and a related proposed amendment of Rule 2.407 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.]

Administrative Order No. 2025-X – Adoption of Administrative Order Regarding a Judicial Officer's Remote Appearance

In accordance with this administrative order, judicial officers may preside remotely, in accordance with the applicable court rules governing the use of videoconferencing, in any proceeding that does not require the judicial officer's in-person presence.

The judicial officer who presides remotely must

(1) be physically present in a location required or authorized by statute or court rule,

(2) preside from a location that is free of personal distractions,

(3) have a stable internet connection,

(4) have their videoconferencing camera on at all times during the proceeding,

(5) display the flags of the United States and Michigan as provided in MCR 8.115(A), and

(6) wear a black robe.

For purposes of this administrative order, the judge may display digital representations of the United States and Michigan flags adjacent to the judge.

A judicial officer's remote participation is subject to the court's ability to produce a suitable recording of the proceeding for purposes of preparing a verbatim transcript in accordance with the Michigan court rules.

Before appearing remotely from a location other than their courthouse, a judicial officer must receive approval from their chief judge.

The State Court Administrative Office must report periodically to this Court regarding its assessment of judicial officers presiding remotely. Courts must cooperate with the State Court Administrative Office in monitoring the remote participation of judicial officers in court proceedings.

For purposes of this order:

- "Videoconferencing" means that term as defined in MCR 2.407.
- A "judicial officer" includes judges, district court magistrates, and referees.

Rule 2.407 Videoconferencing

(A)-(D) [Unchanged.]

~~(E) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended.~~

~~Administrative Order No. 2012-7 Adoption of Administrative Order to Allow State Court Administrative Office to Authorize a Judicial Officer's Appearance by Video Communication Equipment~~

~~The State Court Administrative Office is authorized, until further order of this Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties~~

~~under the Michigan Court Rules and statutes. Remote participation by judicial officers shall be limited to the following specific situations:~~

~~1) judicial assignments;~~

~~2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district;~~

~~3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district;~~

~~4) a multiple district plan in which a district court magistrate would have to travel to a different district.~~

~~The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area~~

~~For circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B). The local administrative order must describe how the program will be implemented and the administrative procedures for each type of hearing for which two-way interactive video technology will be used. The State Court Administrative Office shall either approve the proposed local administrative order or return it to the chief judge for amendment in accordance with requirements and guidelines provided by the State Court Administrative Office.~~

~~For judicial assignments, the assignment order will allow remote participation by judges as long as the assigned judge is physically present in a courthouse located within the judge's judicial circuit or district. A local administrative order is not required for assignments.~~

~~For multiple district plans, the plan will allow remote participation by district court magistrates as long as the magistrate is physically present in a courthouse located within the multiple district area. No separate local administrative order is required.~~

~~The State Court Administrative Office shall assist courts in implementing the technology, and shall report periodically to this Court regarding its assessment of the program. Those courts using the technology shall provide statistics and otherwise cooperate with the State Court Administrative Office in monitoring the use of video communication equipment~~.

Staff Comment (ADM File No. 2019-40): The proposed administrative order would clarify when, from where, and how a judicial officer may participate remotely, subject to their chief judge's approval. If adopted, a related amendment of MCR 2.407 would strike a reference to AO 2012-7 being suspended and that administrative order would be rescinded.

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 July 1, 2025 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. 2019-40. 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.

March 12, 2025

Clerk

Public Policy Position
ADM File No. 2019-40: Proposed Adoption of AO 2025-X, Proposed Rescission of AO 2012-7, and Proposed Amendment of MCR 2.407

Support with Amendment

Explanation

The Committee voted unanimously to support the ADM File No. 2019-40 with a recommendation that the Court provide further definition of a "location required or authorized by statute or court rule." The Committee was unaware of any statute or court rule on point. Without such definition, the Committee fears this provision of the proposal will be difficult to administer clearly and consistently across courts.

Position Vote:

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

Contact Persons:

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

Public Policy Position
ADM File No. 2019-40: Proposed Adoption of AO 2025-X, Proposed Rescission of AO 2012-7, and Proposed Amendment of MCR 2.407

Oppose

Explanation

The Committee voted to oppose ADM File No. 2019-40 for the reasons stated below:

- The language in (1) regarding locations "authorized by statute or court rule" is vague;
- The language in (2) regarding a location being "free from personal distractions" is vague;
- The requirement of a black robe in (6) is unnecessary as to referees (who are included in the definition of "judicial officer" under the proposed administrative order); and
- Further specificity regarding the type of recording required is necessary.

The Committee also was unclear about whether the administrative order was intended to allow a judge to appear remotely, while parties were physically present in a courtroom, and how the order would be implemented when a party requests an in-person hearing.

Position Vote:

Voted For position: 15
Voted against position: 1
Abstained from vote: 3
Did not vote (absence): 9

Contact Person:

Marla Linderman Richelew mrichelew@gmail.com

Public Policy Position
ADM File No. 2019-40

Support

Explanation:
The Committee voted to support ADM File No 2019-40. The Committee believes that the proposed administrative order would make remote court proceedings more broadly accessible and clarify the procedures under which such proceedings must be conducted by judicial officers.

Position Vote:
Voted For position: 16
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 8

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

Public Policy Position
ADM File No. 2019-40: Proposed Adoption of AO 2025-X, Proposed Rescission of AO 2012-7, and Proposed Amendment of MCR 2.407

Support

Position Vote:
Voted for position: 9
Voted against position: 3
Abstained from vote: 0
Did not vote: 13

Contact Person: Takura N. Nyamfukudza
Email: takura@cndefenders.com

Public Policy Position
ADM File No. 2019-40: Proposed Adoption of AO 2025-X, Proposed Rescission of AO 2012-7, and Proposed Amendment of MCR 2.407

Explanation

The Negligence Law Section of the State Bar of Michigan values courtroom integrity, professional advocacy, and meaningful access to justice. We appreciate the role that remote proceedings can play in improving accessibility — particularly for litigants with limited means or mobility and in nonsubstantive matters such as scheduling conferences or routine pretrial check-ins. However, the Section has significant concerns about the broad and permanent expansion of remote judicial presiding authorized by the proposed amendment of MCR 2.407, the adoption of Administrative Order No. 2025-X, and the rescission of Administrative Order No. 2012-7.

Judges Should Generally Be Physically Present in the Courtroom

The Section believes that judicial officers should be physically present for court proceedings as a rule, absent clearly defined and compelling exceptions. These may include disability, emergency matters, or inclement weather, provided there is transparency and uniform application of such exceptions. The courtroom is a public institution—open, observable, and anchored by the presence of a judge who maintains order, assesses credibility, and embodies the authority of the judicial system.

Canon I of the Michigan Code of Judicial Conduct provides that "a judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary." The physical presence of the judge ensures that courtroom decorum is upheld, that the judge is fully engaged in the proceedings, and that the public maintains confidence in the transparency and seriousness of the process.

We are also concerned about the ambiguity in the proposed language allowing judges to preside remotely in any proceeding that "does not require the judicial officer's in-person presence." This phrase is undefined and subjective, leaving the determination to individual judicial officers without clear standards or guidance. Such ambiguity risks inconsistent application across courts and could result in judicial officers presiding remotely in matters where their in-person presence would materially impact the fairness, decorum, or perceived legitimacy of the proceeding. To maintain public trust and consistency in court operations, any rule permitting remote judicial participation must set forth explicit and narrowly tailored exceptions.

Remote Access for Litigants in Nonsubstantive Matters

We recognize that remote participation by litigants can reduce barriers and increase efficiency, particularly for routine or nonsubstantive matters. When used thoughtfully and under appropriate judicial supervision, remote access for litigants can promote access to justice. However, this flexibility should not be conflated with allowing judicial officers to routinely preside remotely, particularly in matters involving testimony, significant evidentiary rulings, or trial.

Maintaining Fairness and Consistency
A primary concern with broadening remote presiding is the potential erosion of uniformity and predictability in courtroom procedure across jurisdictions. We urge the Michigan Supreme Court to prioritize statewide consistency and safeguard litigants' ability to rely on standard practices, regardless of geography or judicial preference.

Moreover, while technology can improve efficiency for some, it can disadvantage others. Not all participants have access to reliable internet or technology, and reliance on videoconferencing platforms may unintentionally exclude those without resources or digital literacy. In-person courtrooms help ensure that everyone can meaningfully participate, regardless of their technological capacity.

Protecting the Development of Young Trial Lawyers
In-person courtroom proceedings are essential for the development of young trial lawyers. Open proceedings, with the Judge presiding in the courtroom, allow newer attorneys to observe and absorb the nuances of courtroom advocacy—how experienced litigators interact with judges, navigate difficult witnesses, discourteous opposing counsel, or even a bad outcome. These lessons are difficult, if not impossible, to replicate in a virtual format. The Section believes we have an obligation to preserve this environment for the next generation of attorneys.

Conclusion
For these reasons, the Negligence Law Section opposes the proposed amendments in ADM File No. 2019-40. To the extent the Court continues remote presiding, the Section urges the Court to provide narrowly defined exceptions under compelling circumstances such as disability or emergency. At the same time, the Section supports continued remote participation options for litigants in nonsubstantive matters, provided that access remains fair, consistent, and does not compromise due process or the quality of courtroom advocacy.

We thank the Court for the opportunity to provide comment on this important matter.

Position Vote:
Voted for position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Madelyne Lawry
Email: neglaw@sharedresources.us

Name: Alisha Riedl

Date: 03/18/2025

ADM File Number: 2019-40

Comment:
This proposed AO would require the court to provide referees/magistrates with black robes. This would have an effect on the court's budget as referees/magistrates are not currently provided with a black robe to wear. Our Judges are each provided with 2 robes and multiplying that out to our referees, would be a large expense.

From: Judge Bell
To: ADMcomment
Subject: ADM File No. 2019-40
Date: Tuesday, March 25, 2025 11:56:22 AM

Good afternoon. In review of the above referenced proposal, it provides:

The judicial officer who presides remotely must

1. be physically present in a location required or authorized by statute or court rule,

This language is confusing. It is unclear what this means and to what it may be referring. The rest of the language is otherwise clear.

Thank you.

Order

Michigan Supreme Court
Lansing, Michigan

April 17, 2025

Megan K. Cavanagh,
Chief Justice

ADM File No. 2025-03

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas,
Justices

Proposed Amendment of
Rule 1.111 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.111 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 1.111 Foreign Language Interpreters

(A) Definitions. When used in this rule, the following words and phrases have the following definitions:

(1)-(3) [Unchanged.]

(4) "Certified foreign language interpreter" means a person who meets all of the following criteria~~has~~:

(a) has passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) has met all the requirements established by the state court administrator for this interpreter classification, ~~and~~

(c) is registered with the State Court Administrative Office, and~~.~~

(d) provides foreign language interpreter services independently or on

behalf of a registered interpreter firm.

(5) "Interpret" and "interpretation" mean the oral rendering of spoken or written communication from one language to another without change in meaning.

(6) "Qualified foreign language interpreter" means a person who meets all of the following criteria:

(a) has passed the written English proficiency exam administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) within the last two calendar years, has passed the consecutive portion of a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(c) is actively engaged in becoming certified by continuing to test on each portion of the oral examination in each calendar year,

(d) has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services,

(e) meets the requirements established by the state court administrator for this interpreter classification,

(f) is registered with the State Court Administrative Office, and

(g) provides foreign language interpretation services independently or on behalf of a registered interpreter firm.

~~(a) A person who provides interpretation services, provided that the person has:~~

~~(i) registered with the State Court Administrative Office; and~~

~~(ii) passed the consecutive portion of a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator (if testing exists for the language), and is actively engaged in becoming certified; and~~

~~(iii) met the requirements established by the state court administrator for this interpreter classification; and~~

~~(iv) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or~~

~~(b) A person who works for an entity that provides in person interpretation services provided that:~~

~~(i) both the entity and the person have registered with the State Court Administrative Office; and~~

~~(ii) the person has met the requirements established by the state court administrator for this interpreter classification; and~~

~~(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or~~

~~(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:~~

~~(i) the entity has registered with the State Court Administrative Office; and~~

~~(ii) the entity has met the requirements established by the state court administrator for this interpreter classification; and~~

~~(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services~~

(7) "Registered interpreter firm" means an entity that employs certified or qualified foreign language interpreters to provide foreign language interpretation services and that is registered with the State Court Administrative Office.

(B) [Unchanged.]

(C) Waiver of Appointment of Foreign Language Interpreter. A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's

rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(D) Recordings. The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings.

(E) [Unchanged.]

(F) Appointment of Foreign Language Interpreters

(1)-(4) [Unchanged.]

(5) Except as otherwise provided in this subrule, ~~i~~If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for all or a portion of interpretation costs. Reimbursement is prohibited in criminal cases.

(6)-(7) [Unchanged.]

(G) Administration of Oath or Affirmation to Interpreters. The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: "Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?"

(H) [Unchanged.]

Staff Comment (ADM File No. 2025-03): The proposed amendment of MCR 1.111 would prohibit reimbursement for interpreter services in criminal cases, update the definitions for "interpret," "certified foreign language interpreter," and "qualified foreign language interpreter," and add a new definition for a "registered interpreter firm."

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, 2025 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. 2025-03. 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. 2025

Clerk

Public Policy Position
ADM File No. 2025-03: Proposed Amendment of MCR 1.111

Support with Amendment

Explanation
The Committee voted unanimously to support the proposed amendment of MCR 1.111 with a further amendment clarifying the language of (F)(5) to read: "The court shall not order reimbursement from defendants in criminal cases."

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

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

Public Policy Position
ADM File No. 2025-03: Proposed Amendment of MCR 1.111

Support with Amendment

Explanation
The Committee voted unanimously to support the proposed amendment of MCR 1.111 with a further amendment clarifying the language of (F)(5) to read: "The court is prohibited from ordering a party to reimburse the court for all or a portion of the costs for foreign language interpreters in a criminal case."

Position Vote:
Voted For position: 16
Voted against position: 1
Abstained from vote: 0
Did not vote (absence): 11

Contact Person:
Marla Linderman Richelew mrichelew@gmail.com

Public Policy Position
ADM File No. 2025-03: Proposed Amendment of MCR 1.111

Support with Amendment

Explanation:
The Committee voted to support the proposed amendment of MCR 1.111 with a further amendment of (A)(4) to state that " . . . a person who meets all of the following criteria ***or in the first year after the court rule is passed, is making substantial progress to meet all the following criteria.***"

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

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

Order

Michigan Supreme Court
Lansing, Michigan

April 17, 2025

Megan K. Cavanagh,
Chief Justice

ADM File No. 2025-04

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas,
Justices

Proposed Amendment of
Rule 3.613 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.613 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 3.613 Change of Name

(A) [Unchanged.]

(B) Published Notice; Contents. Unless otherwise provided in this rule, the court must order publication of the notice of the proceeding to change a name in a newspaper in the county where the action is pending. If the court has waived fees under MCR 2.002, it must pay the cost of any ordered publication, including any affidavit fee charged by the publisher or the publisher's agent for preparing the affidavit pursuant to MCR 2.106(G). Any case record reflecting court payment must be nonpublic. A published notice of a proceeding to change a name must include the name of the petitioner; the current name of the subject of the petition; the proposed name; and the time, date, and place of the hearing, or alternatively, the date by which a person with the same or similar name to the petitioner's proposed name must file a motion to intervene. Proof of service must be made as provided by MCR 2.106(G)(1).

(C) No Publication of Notice; Confidential Record. Upon receiving a petition showing~~establishing~~ good cause, the court must order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause includes but is not limited to evidence that publication or availability of

thea record of the proceeding could place the petitioner or another individual in physical danger, at an or increased the likelihood of such danger, orsuch as evidence that the petitioner or another individual has been the victim of stalking, domestic violence, human trafficking, harassment, or an assaultive crime, or evidence that publication or the availability of a record of the proceeding could place the petitioner or another individual at risk of unlawful retaliation or discrimination. Good cause must be presumed as provided in MCL 711.3.

(1) A petition that showsEvidence supporting good cause must stateinclude the petitioner's or the endangered individual's sworn statement stating the reason(s) why the petitioner or the endangered individual fears publication or availability of the record of the proceedingsupporting good cause, including but not limited to fear of physical danger, if the record is published or otherwise available. The court must not require proof of an arrest or prosecution to find that a petition showsreach a finding of good cause.

(2) [Unchanged.]

(3) If a petition requesting nonpublication under this subrule is granted, the court must:

(a) [Unchanged.]

(b) notify the petitioner of its decision and the time, date, and place of the hearing, if any, on the requested name change under subrule (A); and

(c) [Unchanged.]

(4) If a petition requesting nonpublication under this subrule is denied, the court must issue a written order that states the reasons for denying relief and advises the petitioner of the right to

(a)-(b) [Unchanged.]

(c) proceed with a hearing on the name change petition by submitting a publication of notice of hearing for name change form with the court within 14 days of entry of the order denying the petition requesting nonpublication. If the petitioner submits such form, in accordance with subrule (B) the court maymust set a time, date, and place of a hearing and must order publication in accordance with subrule (B).

(5)-(9) [Unchanged.]

(10) If a petition requesting nonpublication under this subrule is denied, and the petitioner or the court proceed with the~~setting a time, date, and place of a hearing on the petition for a~~ name change as provided in subrules (4)(c) or (6), the court must order that the record is no longer confidential.

(D) Minor's Signature. A petition for a change of name by a minor need not be signed in the presence of a judge.~~ However, the separate written consent that must be signed by a minor 14 years of age or older shall be signed in the presence of the judge.~~

(E) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name must be made in the following manner:

(1) [Unchanged.]

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent must be served with a notice of hearing by one of the following methods:

(a) by publishing in a newspaper and filing a proof of service as provided by MCR 2.106(G)(1). Unless otherwise provided in this rule, the notice must be published one time at least 14 days before the date of any~~the~~ hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (B). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.

(b) [Unchanged.]

(F)-(G) [Unchanged.]

Staff Comment (ADM File No. 2025-04): The proposed amendment of MCR 3.613 would realign the rule with recent amendments of MCL 711.1 and MCL 711.3 regarding name change proceedings.

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, 2025 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. 2025-04. 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, 2025

Clerk

Public Policy Position
ADM File No. 2025-04: Proposed Amendment of MCR 3.613

Support

Explanation
The Committee voted unanimously to support the proposed amendment of MCR 3.613. The amendments will align the rule with the provisions of 2024 PA 229, which became effective April 2, 2025.

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

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

Public Policy Position
ADM File No. 2025-04: Proposed Amendment of MCR 3.613

Support with Amendment

Explanation
The Committee voted unanimously to support the proposed amendment of MCR 3.613 with a further amendment adding commas as follows to (C) so that the rules is consistent with the language of MCL 711.3(4)(e): "includes**,** but is not limited to**,**"

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 11

Contact Person:
Marla Linderman Richelew mrichelew@gmail.com

Order

Michigan Supreme Court
Lansing, Michigan

April 17, 2025

Megan K. Cavanagh,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas,
Justices

ADM File No. 2023-10

Proposed Amendment of
Rule 6.008 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.008 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 6.008 Criminal Jurisdiction

(A)-(B) [Unchanged.]

(C) Remands Following Dismissal of Charges. If the circuit court dismisses all felony charges and the only remaining charges are those cognizable in the district court, the circuit court may remand the case to the district court for further proceedings to be held in accordance with applicable laws and rules.

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

Staff Comment (ADM File No. 2023-10): The proposed amendment of MCR 6.008 would incorporate the *People v Cramer*, 511 Mich 896 (2023) holding by clarifying that circuit courts can remand misdemeanor charges to the district court following the dismissal of all felony charges that were bound over.

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, 2025 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. 2023-10. 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, 2025

Clerk

Public Policy Position
ADM File No. 2023-10: Proposed Amendment of MCR 6.008

Support

Explanation
The Committee voted unanimously to support the proposed amendment of MCR 6.008, which will align the rule with the Michigan Supreme Court's holding in *State v Cramer*, 511 Mich 896 (2023).

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

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

Public Policy Position
ADM File No. 2023-10: Proposed Amendment of MCR 6.008

Support

Explanation:
The Committee voted to support the proposed amendment of MCR 6.008, as it essentially incorporates the Court's holding in *People v Cramer* into the Court Rules.

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

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

Order

Michigan Supreme Court
Lansing, Michigan

April 23, 2025

Megan K. Cavanagh,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas,
Justices

ADM File No. 2023-38

Proposed Amendments of Rules 9.110, 9.111, 9.115, 9.117, 9.118, 9.125, 9.128, 9.129, 9.131, 9.201, 9.211, 9.221, 9.224, 9.231, 9.232, 9.233, 9.234, 9.235, 9.236, 9.240, 9.241, 9.242, 9.243, 9.244, 9.245, 9.251, 9.261, and 9.263 of the Michigan Court Rules and Rules 1.12 and 3.5 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 amendments of Rules 9.110, 9.111, 9.115, 9.117, 9.118, 9.125, 9.128, 9.129, 9.131, 9.201, 9.211, 9.221, 9.224, 9.231, 9.232, 9.233, 9.234, 9.235, 9.236, 9.240, 9.241, 9.242, 9.243, 9.244, 9.245, 9.251, 9.261, and 9.263 of the Michigan Court Rules and Rules 1.12 and 3.5 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 9.110 Attorney Discipline Board

(A)-(D) [Unchanged.]

(E) Powers and Duties. The board has the power and duty to:

(1) [Unchanged.]

(2) appoint hearing panels, neutral arbiters~~masters~~, monitors and mentors;

(3) assign a proceeding under this subchapter to a hearing panel or to a neutral arbiter~~master~~, except that a proceeding for reinstatement under MCR 9.124 may not be assigned to a neutral arbiter~~master~~;

(4)-(10) [Unchanged.]

Rule 9.111 Hearing Panels

(A) [Unchanged.]

(B) Hearing Panelists or Neutral Arbiters~~Masters~~; Discipline.

(1) An attorney shall not be appointed as a hearing panelist or neutral arbiter~~master~~ if he or she:

(a)-(b) [Unchanged.]

(2) A hearing panelist or neutral arbiter~~master~~ who becomes the subject of an order imposing discipline, an admonition, or placement on contractual probation shall be removed from the roster of hearing panelists. A hearing panelist or neutral arbiter~~master~~ who becomes the subject of a formal discipline proceeding shall be removed from consideration of any pending matter; shall be placed on the ADB's roster of inactive panelists; and shall not be assigned to a panel until the formal discipline proceeding has been resolved. A hearing panelist or neutral arbiter~~master~~ who becomes the subject of an otherwise confidential request for investigation must disclose that investigation to the parties in the matter before the panelist or neutral arbiter~~master~~, or must disqualify himself or herself from participation in the matter.

(C) [Unchanged.]

Rule 9.115 Hearing Panel Procedure

(A)-(F) [Unchanged.]

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing within a

reasonable time, the board may reassign the complaint to another panel or to a neutral arbitermaster. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. Notwithstanding MRE 615, there shall be a presumption that a complainant is entitled to be present during a hearing, which may only be overcome upon a finding by the panel, supported by facts that are particular to the proceeding, that testimony by the complainant is likely to be materially affected by exposure to other testimony at the hearing.

(H)-(M) [Unchanged.]

Rule 9.117 Hearing Procedure Before Neutral ArbiterMaster

If the board assigns a complaint to a neutral arbitermaster, the neutral arbitermaster shall hold a public hearing on the complaint and receive evidence. To the extent that MCR 9.115 may be applied, it governs procedure before a neutral arbitermaster. After the hearing, the neutral arbitermaster shall prepare a report containing

(1)-(3) [Unchanged.]

The neutral arbitermaster shall file the report with a hearing panel designated by the board and serve a copy on the administrator and the respondent. Within 14 days after the report is filed, the administrator or the respondent may file objections to the report and a supporting brief. The panel must determine if the record supports the findings of fact and conclusions of law and impose discipline, if warranted. Further proceedings are governed by MCR 9.118.

Rule 9.118 Review of Order of Hearing Panel

(A)-(B) [Unchanged.]

(C) Hearing.

(1) [Unchanged.]

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a neutral arbitermaster. The panel or the neutral arbitermaster shall then take the additional testimony and shall make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D)-(F) [Unchanged.]

Rule 9.125 Immunity

A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, neutral arbiters~~masters~~, voluntary investigators, fee arbitrators, mentors, practice monitors, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

A medical or psychological expert who administers testing or provides a report pursuant to MCR 9.114(C) or MCR 9.121 is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or formal disciplinary proceeding.

Rule 9.128 Costs

(A) [Unchanged.]

(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary expenses actually incurred by the board, the commission, a neutral arbiter~~master~~, or a panel for the expenses of that investigation, hearing, review and appeal, if any.

(1) [Unchanged.]

(2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a neutral arbiter~~master~~, shall be a part of the report in all matters of discipline and reinstatement.

(C)-(E) [Unchanged.]

Rule 9.129 Expenses; Reimbursement

The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, neutral arbitermaster, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.

Rule 9.131 Investigation of Member or Employee of Board or Commission, or Relative of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Other Investigations Creating the Possible Appearance of Impropriety; Representation by Member or Employee of Board or Commission

(A) [Unchanged.]

(B) Investigation of Board Member or Employee or Relative of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board or relative of a member or employee of the board, are the same as in other cases. Thereafter, the following provisions apply:

(1) [Unchanged.]

(2) The chief justice shall appoint a hearing panel and may appoint a neutral arbitermaster to conduct the hearing. The hearing procedure is as provided in MCR 9.115, 9.117, or 9.120, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the chief justice.

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

Rule 9.201 Definitions

As used in this chapter, unless the context or subject matter otherwise requires

(A)-(D) [Unchanged.]

(E) "neutral arbitermaster" means one or more judges or former judges appointed by the Supreme Court at the commission's request to hold hearings on a complaint against a respondent.

(F)-(I) [Unchanged.]

Rule 9.211 Judicial Tenure Commission; Powers; Review

(A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a neutral arbiter~~master~~ are governed by these rules. The commission may adopt and publish internal operating procedures for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court for approval.

(B) [Unchanged.]

(C) Control of Commission Action. Proceedings under these rules are subject to the direct and exclusive superintending control of the Supreme Court. No other court has jurisdiction to restrict, control, or review the orders of the neutral arbiter~~master~~ or the commission.

(D)-(E) [Unchanged.]

Rule 9.221 Evidence

(A)-(C) [Unchanged.]

(D) Sanctions for Contempt; Disobedience by Respondent.

(1) [Unchanged.]

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the neutral arbiter~~master~~, whether before or during the hearing, the commission or the neutral arbiter~~master~~ may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

(E) [Unchanged.]

Rule 9.224 Complaint

(A)-(B) [Unchanged.]

(C) Upon issuing a complaint, the commission shall petition the Court for the appointment of a neutral arbiter~~master~~.

Rule 9.231 Appointment of Neutral Arbiter~~Master~~

(A) The Supreme Court shall appoint a neutral arbiter~~master~~ to conduct the hearing within a reasonable period of the date of the petition and shall establish a date for completion of the hearing procedure.

(B) The neutral arbiter~~master~~ shall set a time and a place for the hearing and shall notify the respondent and the examiner at least 28 days in advance. The neutral arbiter~~master~~ shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing. Recommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the neutral arbiter~~master~~ may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion.

(C) The neutral arbiter~~master~~ may conduct one or more pretrial conferences, and may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.

(D) Unless the parties agree to waive them, closing arguments at the hearing before the neutral arbiter~~master~~ shall be oral and take place upon conclusion of the presentation of evidence. The neutral arbiter~~master~~ may not adjourn or postpone closing arguments for the preparation of a transcript or the submission of proposed findings of fact.

(E) MCR 2.003(B) shall govern all matters concerning the disqualification of a neutral arbiter~~master~~.

Rule 9.232 Discovery

(A)-(B) [Unchanged.]

(C) If a party fails to comply with subrules (A) or (B), the neutral arbiter~~master~~ may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(e).

Rule 9.233 Public Hearing

(A) [Unchanged.]

(B) Effect of Failure to Comply.

(1) If the respondent is in default for not having filed a timely answer or fails to attend the proceedings without being excused by the neutral arbiter~~master~~, the commission, or the court, the allegations set forth in the complaint shall

be deemed admitted, taken as true, and may form the basis for the neutral arbitermaster to make findings of fact.

(2) The respondent's failure to testify in his or her own behalf or to submit to a medical examination requested by the commission or the neutral arbitermaster may be considered as an evidentiary fact, unless the failure was due to circumstances unrelated to the facts in issue at the hearing.

(C) Record. The proceedings at the hearing must be recorded by stenographic or mechanical means. If the neutral arbitermaster declines to admit evidence, a separate record shall be made so that the commission and/or the court may consider that evidence and determine whether to include it in the record.

Rule 9.234 Subpoenas

(A) [Unchanged.]

(B) Sanctions for Contempt; Disobedience by Respondent.

(1) [Unchanged.]

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the neutral arbitermaster, whether before or during the hearing, the commission or the neutral arbitermaster may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

Rule 9.235 Amendments of Complaint or Answer

The neutral arbitermaster, before the conclusion of the hearing, or the commission, before its determination, may allow or require amendments of the complaint or the answer. The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged in the amendment. A "28-day letter" is not required to amend a complaint.

Rule 9.236 Report of Neutral ArbiterMaster

The court reporter shall prepare a transcript of the proceedings conducted before the neutral arbitermaster within 21 days of the conclusion of the hearing, filing the original with the commission, and serving copies on the respondent (or the respondent's attorney) and disciplinary counsel, by August 30, 2024 e-mail. Within 21 days after a transcript of the proceedings is provided, the neutral arbitermaster shall prepare and transmit to the

commission a report that contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. On receiving the report, the commission must promptly send a copy to the respondent, unless the neutral arbiter~~master~~ has already done so.

Rule 9.240 Objections to Report of Neutral Arbiter~~Master~~

Within 28 days after the neutral arbiter~~master~~'s report is mailed to the respondent, disciplinary counsel or the respondent may file with the commission an original and 9 copies of a brief in support of or in opposition to all or part of the neutral arbiter~~master~~'s report. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the commission, are limited to 50 pages in length. A copy of the brief must be served on the opposite party, who shall have 14 days to respond.

Rule 9.241 Appearance Before Commission

When the hearing before the neutral arbiter~~master~~ has concluded, the commission shall set a date for hearing objections to the report. Both the respondent and the disciplinary counsel may present oral argument at the hearing before the commission.

Rule 9.242 Extension of Time

For good cause shown, the commission or its chairperson may extend for periods not to exceed 28 days the time for the filing of an answer, for the commencement of a hearing before the commission, for the filing of the neutral arbiter~~master~~'s report, and for the filing of a statement of objections to the report of a neutral arbiter~~master~~.

Rule 9.243 Hearing Additional Evidence

The commission may order a hearing before itself or the neutral arbiter~~master~~ for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

Rule 9.244 Commission Decision

(A) Majority Decision.

(1) The affirmative vote of 5 commission members who have considered the report of the neutral arbiter~~master~~ and any objections, and who were present at an oral hearing provided for in MCR 9.241, or have read the transcript of

that hearing, is required for a recommendation of action with regard to a respondent. A commissioner may file a written dissent.

(2) [Unchanged.]

(B) Record of Decision.

(1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the neutral arbiter~~master~~, in whole or in part, by reference. The commission's report must include a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR 9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(2) [Unchanged.]

Rule 9.245 Consent Agreements

(A) [Unchanged.]

(B) Commission Action. If the commission agrees to the terms set forth in the consent agreement in subsection (1), the commission shall issue a decision and recommendation as if there had been a neutral arbiter~~master~~'s report filed. If the commission agrees to the terms set forth in the consent agreement in subsection (2), the stipulated facts serve in lieu of a neutral arbiter~~master~~'s report and the matter then proceeds to a hearing before the commission, with the briefing schedule and an appearance before the commission, as set forth in MCR 9.240 and MCR 9.241. The time for filing a brief before the commission in matters filed under subsection (2) shall start with the filing of the consent agreement. A copy of the consent agreement shall be attached to the commission's decision. The commission's recommendation must include its rationale for accepting the consent agreement as well as a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR 9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(C)-(E) [Unchanged.]

Rule 9.251 Review by Supreme Court

(A) [Unchanged.]

(B) Role of Commission Counsel and Disciplinary Counsel. If a respondent submits a petition under subsection (A), commission counsel shall appear on behalf of the commission, submit the brief of the commission under subrule (C), and shall advocate only for the position recommended by the commission. Filing of documents with the commission shall be deemed service on commission counsel. Disciplinary counsel's involvement in the case is ended, unless the matter is remanded for further proceedings before the commission or neutral arbiter~~master~~.

(C)-(G) [Unchanged.]

Rule 9.261 Confidentiality; Disclosure

(A)-(C) [Unchanged.]

(D) After Filing of Complaint

(1) When the commission issues a complaint, the following shall not be confidential or privileged:

(a) the complaint and all subsequent pleadings filed with the commission or neutral arbiter~~master~~, all stipulations entered, all findings of fact made by the neutral arbiter~~master~~ or commission, and all reports of the neutral arbiter~~master~~ or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and

(b) the formal hearing before the neutral arbiter~~master~~ or commission, and the public hearing provided for in MCR 9.241.

(2)-(3) [Unchanged.]

(E)-(K) [Unchanged.]

Rule 9.263 Immunity

A person is absolutely immune from civil suit for statements and communications transmitted solely to the commission, its employees, or its agents, or given in an investigation or proceeding on allegations regarding a respondent, and no civil action predicated upon the statements or communications may be instituted against a grievant, a witness, or his or her counsel. Members of the commission and their employees and agents, neutral arbiters~~masters~~, disciplinary counsel, and commission counsel are absolutely immune from civil suit for all conduct in the course of their official duties.

Michigan Rules of Professional Conduct

Rule 1.12. Former Judge or Arbitrator.

(a)-(c) [Unchanged.]

Comment:

This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, neutral arbiters, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

Rule 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

(a)-(d) [Unchanged.]

Comment:

[Paragraph 1 unchanged.]

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, neutral arbiters, masters, or jurors, unless authorized to do so by law or court order.

[Paragraphs 3-4 unchanged.]

Staff Comment (ADM File No. 2023-38): The proposed amendments would replace the term "master" or "special master" with "neutral arbiter" or add the term "neutral arbiter" to a definition.

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, 2025 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. 2023-38. 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.

April 23, 2025

Clerk

Public Policy Position
ADM File No. 2023-38: Proposed Amendments of Subchapters MCR 9.100 and MCR 9.200 and MRPC 1.12 and MRPC 3.5

No Position

Explanation
The Committee voted to take no position on ADM File No. 2023-38 except to suggest that, should the Court adopted the proposal, the definition of "neutral arbiter" should note that this term had previously been referred to as "master" and that this change in terminology was not done to alter the substantive meaning of the term as used in the Rules.

Position Vote:
Voted For position: 15
Voted against position: 1
Abstained from vote: 1
Did not vote (absence): 11

Contact Person:
Marla Linderman Richelew mrichelew@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: June 4, 2025

Re: HB 4434 – Elimination of Michigan's "One-Person Grand Jury"

Background

House Bill 4434 would repeal several sections of Chapter VII of the Code of Criminal Procedure, 1927 PA 175, and thereby eliminate Michigan's unique "one-man grand jury" system. A considerable amount of ink has been spilled over the course of the last century examining the origins, uses, and abuses of Michigan's "one-man grand jury." In short, the statute was enacted by the Legislature in 1917 at the behest of a special Committee on Criminal Law and Criminal Procedure established by the Michigan State Bar Association (the voluntary predecessor of the State Bar of Michigan). While the "one-man grand jury" was used with some frequency in the early decades of its existence, it was subsequently supplanted in most matters by criminal complaint or information.

The most notable contemporary use of the "one-man grand jury" occurred in the prosecution of state officials charged with various offenses related to the Flint water crisis. However, the Michigan Supreme Court ultimately decided unanimously in *State v Peeler*[1] that if a criminal process begins with a "one-man grand jury" the accused is entitled to a preliminary examination before being brought to trial. The Court held that MCL 767.3 and MCL 767.4 (both of which would be repealed under HB 4434) authorize the use of a "one-man grand jury" to investigate, subpoena witnesses, and issue arrest warrants, but do not authorize the "one-man grand jury" to issue an indictment. Because the Court resolved *Peeler* and the associated cases on statutory grounds, the Court did not reach the constitutional questions presented.

The House Judiciary Committee held a hearing on HB 4434 on May 21, 2025. There was no opposition testimony nor were any opposing cards submitted for the record. The Criminal Defense Attorneys of Michigan (CDAM), ACLU of Michigan, and Christian Coalition support the bill. Neither the Office of the Attorney General nor the Prosecuting Attorneys Association of Michigan (PAAM) intend to adopt a position on HB 4434.

***Keller* Considerations**

How criminal prosecutions are initiated in Michigan courts, and how judges participate (or not) in investigations into criminal conduct, are questions necessarily and significantly related to the functioning of the courts. In April 2021, the Board of Commissioners considered 2021 SB 159. Like HB 4434, SB 159 would have eliminated the "one-man grand jury" in Michigan. While action on a substantive position on that legislation was ultimately deferred, the Board—concurring with both the Criminal Jurisprudence & Practice Committee and the Criminal Law Section—determined that SB 159 was *Keller*-permissible as being related to the functioning of the courts.

[1] 509 Mich 381; 984 NW2d 80 (2022).

***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

House Bill 4434 is necessarily related to the functioning of the courts and therefore *Keller*-permissible. The bill may be considered on its merits.

HOUSE BILL NO. 4434

May 06, 2025, Introduced by Reps. Meerman, Outman, Pohutsky, Rigas, Johnsen, Wozniak, Kunse and Wortz and referred to Committee on Judiciary.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

by repealing sections 3, 4, 5, 6, 6a, and 6b of chapter VII (MCL 767.3, 767.4, 767.5, 767.6, 767.6a, and 767.6b).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Enacting section 1. Sections 3, 4, 5, 6, 6a, and 6b of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.3, 767.4, 767.5, 767.6, 767.6a, and 767.6b, are repealed.

Michigan Supreme Court
Lansing, Michigan

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

PEOPLE v PEELER
PEOPLE v BAIRD
PEOPLE v LYON

Docket Nos. 163667, 163672, and 164191. Argued on application for leave to appeal May 4, 2022. Decided June 28, 2022.

Nancy Peeler (Docket No. 163667), Richard L. Baird (Docket No. 163672), and Nicolas Lyon (Docket No. 164191) were charged with various offenses in the Genesee Circuit Court for actions they took as state employees during the Flint water crisis. The cases did not proceed by the prosecutor issuing criminal complaints and then holding preliminary examinations in open court at which defendants could have heard and challenged the evidence against them. Instead, at the request of the Attorney General's office, the prosecutor proceeded under MCL 767.3 and MCL 767.4, which authorize the use of a "one-man grand jury." Judge David Newblatt served as the one-man grand jury, considered the evidence behind closed doors, and then issued indictments against defendants; defendants' cases were assigned to a Genesee Circuit Court judge. Peeler and Baird moved to remand their cases for a preliminary examination, but the court, Elizabeth A. Kelly, J., denied the motion, holding that indicted persons have no right to a preliminary examination. Peeler and Baird filed interlocutory applications for leave to appeal in the Court of Appeals, challenging the Genesee Circuit Court's denial of their motions for a preliminary examination; the Court of Appeals denied leave. Lyon moved to dismiss the charges against him, arguing that he had a statutory right to a preliminary examination, that MCL 767.3 and MCL 767.4 did not confer the one-man grand jury with charging authority, and that those statutes violated the separation-of-powers doctrine and the right to due process; the Genesee Circuit Court denied the motion. Lyon filed in the Court of Appeals an interlocutory application for leave to appeal that decision. Peeler and Baird sought leave to appeal the Court of Appeals' denial of their applications in the Michigan Supreme Court, and Lyon sought leave to appeal the Genesee Circuit Court's decision in the Michigan Supreme Court prior to a decision by the Court of Appeals. The Supreme Court ordered and heard oral argument on whether to grant the applications for leave to appeal or take other action. *People v Peeler*, 509 Mich ___ (2022); *People v Baird*, 509 Mich ___ (2022); *People v Lyon*, 509 Mich ___ (2022).

In a unanimous opinion by Chief Justice MCCORMACK, the Supreme Court, in lieu of granting leave to appeal, *held*:

If a criminal process begins with a one-man grand jury under MCL 767.3 and MCL 767.4, the accused is entitled to a preliminary examination before being brought to trial. *People v Green*, 322 Mich App 676 (2018), was overruled to the extent it held that the one-person grand-jury procedure serves the same function as a preliminary examination. The Genesee Circuit Court erred by denying Peeler's and Baird's motions to remand for a preliminary examination. Further, while MCL 767.3 and MCL 767.4 authorize the use of a one-man grand jury to investigate, subpoena witnesses, and issue arrest warrants, those statutes do not authorize that one-man grand jury to issue an indictment initiating a criminal prosecution. The Genesee Circuit Court therefore also erred by denying Lyon's motion to dismiss.

1. The one-man grand-jury statutes were enacted because (1) law enforcement agencies are sometimes unable effectively and lawfully to enforce the laws, particularly with regard to corruption by government officials and (2) the common-law 23-man grand jury is cumbersome and ineffective in the investigation of those crimes. MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena witnesses, and issue arrest warrants. Specifically, MCL 767.3 provides that whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record has probable cause to suspect that any crime, offense, or misdemeanor has been committed within their jurisdiction and that any persons may be able to give any material evidence respecting such suspected crime, offense, or misdemeanor, the judge may order that an inquiry be made into the matter and conduct the inquiry. In turn, MCL 767.4 provides that if upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, the judge may cause the apprehension of that person by proper process and, upon the return of the process served or executed, the judge having jurisdiction shall proceed with the case, matter, or proceeding in like manner as upon formal complaint. MCL 767.4 further provides, in relevant part, that the judge conducting the inquiry under MCL 767.3 is disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment and from presiding at any trial arising therefrom.

2. MCL 767.4 provides a right to a preliminary examination. MCL 767.4 refers to a "hearing on the complaint or indictment" and disqualifies the judge who conducted the inquiry from being the "examining magistrate" at that hearing. It is unclear what "hearing" that language could be referring to other than a preliminary examination. Moreover, "examining magistrate" is a term of art used in other statutes; it refers to a judge who conducts a preliminary examination. The statute further provides that the judge should treat a one-man-grand-jury-charged case the same as a case in which a formal complaint has been filed. Thus, a judge should treat a case brought using a one-man grand jury the same as a case in which a formal complaint is filed: an arrest warrant is issued after the formal complaint is filed, the accused is apprehended, and the court holds a preliminary examination before the information may issue. This conclusion is also supported by historical practice; preliminary examinations have been routinely conducted after a one-person grand jury returned an indictment. The preliminary examination is not redundant in this situation, even though the statute requires the judge to find probable cause to believe the defendant committed the crime, because the probable cause necessary for a bindover is greater than that required for an arrest. In these cases, Peeler and Baird were entitled to a preliminary examination under MCL 767.4. Accordingly, the Genesee Circuit Court erred by denying Peeler's and Baird's motions to remand for a preliminary examination.

3. While the citizens grand-jury statutes, MCL 767.24(1) and MCL 767.23, specifically authorize grand juries to issue indictments, MCL 767.4, in its current form, does not. In 1949, the Legislature authorized one-man grand juries to issue indictments, but it later repealed that provision; the current version of MCL 767.4 cannot be interpreted to authorize what the Legislature has explicitly rejected. Further, MCL 767.4 clearly authorizes a judge to issue an arrest warrant, and it did not *explicitly* grant that authorization while at the same time *implicitly* authorizing a judge to issue an indictment. As further evidence that a one-man grand jury cannot initiate charges by issuing indictments, the citizens grand-jury statutes require a jury oath—a hallmark of the jury process—while the one-man grand-jury statutes do not have that requirement. For those reasons, MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena witnesses, and issue arrest warrants, but they do not authorize a judge to issue an indictment initiating a criminal prosecution. Judge Newblatt lacked authority under MCL 767.3 and MCL 767.4 to issue indictments. Accordingly, the Genesee Circuit Court erred by denying Lyon's motion to dismiss, and there was no need to address Lyon's constitutional arguments. Although Peeler and Baird joined in Lyon's motion to dismiss in the Genesee Circuit Court, the only relief they requested in the Michigan Supreme Court was the reversal of the circuit court's order denying their motions to remand for a preliminary examination.

Genesee Circuit Court orders denying Peeler's and Baird's motions to remand for a preliminary examination and denying Lyon's motion to dismiss reversed; cases remanded to the Genesee Circuit Court for further proceedings.

Justice BERNSTEIN, concurring, agreed fully with the Court's opinion but wrote separately to address the significant procedural interests implicated in these cases. The Attorney General's office invoked obscure statutes, specifically—MCL 767.3 and MCL 767.4—to deprive defendants of their statutory right to a preliminary examination. A preliminary examination is crucial for criminal defendants in our adversarial system in that it functions, in part, as a screening device to ensure there is a basis for a defendant to face a criminal charge. Allowing the prosecution to opt out of a preliminary examination would run afoul of the basic notions of fairness underlying our adversarial system. The Court remained cognizant of the effect these decisions could have on Flint residents given the unconscionable injustice they suffered as a result of their government's betrayal. Given the magnitude of the harm suffered by Flint's residents, it was paramount to adhere to proper procedure to guarantee to the general public that Michigan's courts could be trusted to produce fair and impartial rulings for all defendants regardless of the severity of the charged crime. The prosecution cannot cut corners—here, by not allowing defendants a preliminary examination as statutorily guaranteed—in order to prosecute defendants more efficiently. The criminal prosecutions provide historical context for this consequential moment in history, and future generations will look to the record as a critical and impartial answer in determining what happened in Flint.

Justice CLEMENT did not participate due to her prior involvement as chief legal counsel for Governor Rick Snyder.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED June 28, 2022

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 163667

NANCY PEELER,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 163672

RICHARD LOUIS BAIRD,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 164191

NICOLAS LYON,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH (except CLEMENT, J.)

MCCORMACK, C.J.

Nancy Peeler, Richard L. Baird, and Nicolas Lyon were state employees investigated and charged for their roles in the Flint water crisis. But for some reason, they were not charged the way that almost everyone in Michigan is charged—with a criminal complaint issued by a prosecutor and followed by a preliminary examination in open court at which the accused can hear and challenge the prosecution's evidence. Instead, the prosecution chose to proceed with these cases using what have become known as the "one-man grand jury" statutes, MCL 767.3 and MCL 767.4. A Genesee County judge served as the one-man "grand" jury and considered the evidence not in a public courtroom but in secret, a Star Chamber comeback. The one-man grand jury then issued charges. To this day, the defendants do not know what evidence the prosecution presented to convince the grand jury (i.e., juror) to charge them.

We consider two questions about the one-man grand-jury statutes. First, if charged by a one-man grand jury, is a defendant entitled to a preliminary examination? Second, can a judge issue an indictment authorizing criminal charges against a defendant?

In *Peeler* and *Baird*, we hold that the answer to the first question is yes. In *Lyon*, we hold that the answer to the second question is no. We therefore reverse the June 16, 2021 order of the Genesee Circuit Court denying Peeler's and Baird's motions to remand for a preliminary examination and reverse the Genesee Circuit Court's February 16, 2022 order denying Lyon's motion to dismiss. We remand all three cases to the Genesee Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

These prosecutions have an extremely long procedural history, most of which is not germane to the questions we answer here. Peeler, a former manager of the Early Childhood Health Section of the Michigan Department of Health and Human Services (DHHS), is charged with two counts of misconduct in office (a five-year felony), MCL 750.505, and one count of willful neglect of duty (a misdemeanor), MCL 750.478. Baird, the former "Transformation Manager" and a senior advisor to former Governor Rick Snyder, is charged with misconduct in office; perjury during an investigative-subpoena examination (a 15-year felony), MCL 767A.9; obstruction of justice (a five-year felony), MCL 750.505; and extortion (a 20-year felony), MCL 750.213. Lyon, a former director of the Michigan Department of Community Health and DHHS, is charged with nine counts of involuntary manslaughter (a 15-year felony), MCL 750.321; and one count of willful neglect of duty.

In December 2019, the Attorney General's office requested the appointment of a one-person grand jury. Genesee Circuit Chief Judge Pro Tem Duncan Beagle granted the motion and appointed Genesee Circuit Judge David Newblatt to act as the one-person grand

jury for a six-month term under MCL 767.3 and MCL 767.4. Judge Newblatt later extended his term for six more months.

In January 2021, Newblatt issued indictments against Peeler and Baird, and the cases were then assigned to Genesee Circuit Judge Elizabeth Kelly. Peeler and Baird moved to remand their cases for a preliminary examination, but the trial court denied the motion, holding that "indictees have no right to [a] preliminary examination." The Court of Appeals denied leave in both applications for lack of merit.

Judge Newblatt also issued an indictment against Lyon in January 2021. Lyon moved to dismiss, raising statutory arguments about the right to a preliminary examination, that the statutes do not confer charging authority upon a one-man grand jury, and that MCL 767.3 and MCL 767.4 violate the separation-of-powers doctrine and the right to due process. The trial court denied this motion too. Lyon filed an interlocutory application for leave to appeal in the Court of Appeals, which remains pending.

Peeler and Baird filed applications for leave to appeal in this Court, and Lyon filed a bypass application here, seeking leave to appeal prior to a decision by the Court of Appeals. We ordered oral argument on the application in each case. *People v Peeler*, 509 Mich ___ (2022); *People v Baird*, 509 Mich ___ (2022); *People v Lyon*, 509 Mich ___ (2022). In *Peeler* and *Baird*, we allowed further briefing on "whether a defendant charged with a felony after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination." In *Lyon*, we allowed further briefing on these issues:

> (1) whether MCL 767.3 and MCL 767.4 violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2; (2) whether those statutes confer charging authority on a member of the judiciary; (3) whether a defendant charged after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination; and (4) whether the proceedings conducted pursuant to MCL 767.3 and MCL 767.4 violated due process, Mich Const 1963, art 1, § 17. [*Lyon*, 509 Mich ___ 16(2022).]

II. LEGAL BACKGROUND

Whether MCL 767.3 and MCL 767.4 confer charging authority on a member of the judiciary and whether a defendant charged under those statutes is entitled to a preliminary examination are matters of statutory interpretation that we review de novo. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018). That means we review the issue independently, without required deference to the trial court. *Id*.

Enacted in 1917, MCL 767.3 and MCL 767.4 are part of a statutory scheme that quickly became known as the "one man grand jury" law. See, e.g., *People v Doe*, 226 Mich 5, 6; 196 NW 757 (1924) (referring to the judge "sitting as a one man grand jury"). The Legislature enacted these statutes because "regularly constituted law enforcement agencies sometimes are unable effectively and lawfully to enforce the laws, particularly with respect to corrupt conduct by officers of government and conspiratorial criminal activity on an organized and continuing basis" and "the common law 23-man grand jury is unwieldy and ineffective for the investigation of such crimes . . . ." *In re Colacasides*, 379 Mich 69, 89; 150 NW2d 1 (1967). Unlike citizens grand juries, which have a centuries-long history, Michigan's one-man grand jury has no such historical pedigree and has been

the subject of two successful constitutional challenges so far.[1] Cf. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U Chi L Rev 613, 613 (1983) (tracing the use of a citizens grand jury to the year 1166); Davidow, *Dealing with Prosecutorial Discretion: Some Possibilities*, 62 Wayne L Rev 123, 126 (2017) (describing the "checkered past" of the one-man grand jury, citing *In re Oliver*, 333 US 257; 68 S Ct 499; 92 L Ed 682 (1948), and *In re Murchison*, 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955)).

Despite its nickname, the word "juror" makes no appearance in the statutes, and the term "grand jury" appears only twice. See MCL 767.3 ("Any person called before the *grand jury* shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt.") (emphasis added); MCL 767.4a ("It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any *grand jury* inquiry conducted prior to the effective date of this act . . . .") (emphasis added).

MCL 767.3 and MCL 767.4 are wordy, but the important language in each is included here.

MCL 767.3:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, *any judge of a court of law and of record shall*

[1] The Legislature has since corrected the deficiencies that led to the earlier constitutional challenges. See Davidow, *Dealing with Prosecutorial Discretion: Some Possibilities*, 62 Wayne L Rev 123, 126 (2017).

> *have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction*, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, *such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint . . . and thereupon conduct such inquiry*. [Emphasis added.]

MCL 767.4:

> *If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint*. *The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment*, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. [Emphasis added.]

III. ANALYSIS

A. RIGHT TO A PRELIMINARY EXAMINATION

We agree with Peeler and Baird that the statutory language provides a right to a preliminary examination. We have said so before, although in dictum: In *People v Duncan*, 388 Mich 489, 498-499; 201 NW2d 629 (1972), overruled in part on other grounds by *People v Glass*, 464 Mich 266 (2001), we identified MCL 767.4 as a statute with "specific statutory language" providing for a preliminary examination. MCL 767.4 refers to a "hearing on the complaint or indictment" and disqualifies the judge who conducted the inquiry from being the "examining magistrate" at that hearing. It is unclear what "hearing" that language could be referring to other than a preliminary examination. Moreover, "examining magistrate" is a term of art used in other statutes, so we need not guess what it

means—an examining magistrate is a judge who conducts a preliminary examination. See, e.g., MCL 766.1 ("The state and the defendant are entitled to a prompt examination and determination *by the examining magistrate* in all criminal causes . . . .") (emphasis added).

MCL 767.4 also requires that once an accused has been apprehended, "the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint." In other words, the judge should treat the one-man-grand-jury-charged case the same as a case in which a formal complaint has been filed. We know how that process works too: When a formal complaint is filed, an arrest warrant is issued, the accused is apprehended, and the court holds a preliminary examination before an information may issue. See MCL 764.1a(1) ("A magistrate shall issue a warrant or summons upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. The complaint must be sworn to before a magistrate or clerk."); MCL 767.42(1) ("An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination."). Thus, for a case to proceed "in like manner as upon formal complaint," MCL 767.4, a preliminary examination must be held unless waived by the defendant, MCL 767.42(1). See MCR 6.110(A) ("The defendant may waive the preliminary examination with the consent of the prosecuting attorney.").

There is more evidence in historical practice. We see in our cases evidence that preliminary examinations were routinely conducted after a one-person grand jury returned an indictment. See, e.g., *People v Bellanca*, 386 Mich 708, 711-712; 194 NW2d 863 (1972)

(defendant charged by a one-man grand jury was entitled to transcripts of witness testimony given before the grand jury before his preliminary examination on the charges); *In re Slattery*, 310 Mich 458, 464; 17 NW2d 251 (1945) ("[U]nder the laws of this State, hereinbefore referred to, the testimony is kept secret, but if the judge finds that a crime has been committed, he orders a warrant to be issued, *and an examination held in open court before a magistrate* and, if probable cause is shown, the accused is bound over for trial in the proper court.") (emphasis added); *People v McCrea*, 303 Mich 213, 224-225; 6 NW2d 489 (1942) ("As a result of the grand-jury investigation indictments were returned and warrants were issued against McCrea and other defendants. The preliminary examinations were conducted before Judge Ferguson, and McCrea and other defendants were held for trial."). And in other authorities. See, e.g., *Committee Reports (Special Committee to Study and Report Upon the One-Man Grand Jury Law)* (hereinafter *Committee Reports*), 26 Mich St B J 11, 59 (1947) ("Before there can be a trial there must be an accusation, and in Michigan this may come in either of the following three ways: a. An Indictment voted by a 23-Man Grand Jury; or b. A complaint and warrant issued in the customary way by a justice of the peace or other magistrate; or c. A complaint and warrant issued by a 'One-Man Grand Juror'. *In either of the last two instances the defendant is entitled to an examination before being bound over for trial*.") (emphasis added).

The Attorney General's office believes that because the statutory scheme requires the judge to make a finding of probable cause that the defendant committed the crime, a preliminary examination would be redundant. After all, a preliminary examination's main function is for a court to determine whether there is probable cause. But the argument confuses some basics. Probable cause to *arrest* (which MCL 767.4 requires and authorizes

the judge to order) is different from probable cause to *bindover* (which must be found at a preliminary examination to bind the defendant over on felony charges). "[T]he probable cause required for a bindover is 'greater' than that required for an arrest and . . . imposes a different standard of proof. . . . [T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing *and* to the probability that the government will be able to establish guilt at trial." LaFave & Israel, *Criminal Procedure* (2d ed, 1992), § 14.3, pp 668-669; see also *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011) ("We disagree with the circuit court's conclusion that probable cause to support an arrest is equivalent to probable cause to bind a defendant over for trial."). So the Court of Appeals was wrong in *People v Green*, 322 Mich App 676, 687; 913 NW2d 385 (2018), when it held that the one-person grand-jury procedure "serve[s] the same function" as a preliminary examination. We overrule *Green*.

The circuit court erred by denying Peeler's and Baird's motions to remand for a preliminary examination. We therefore reverse the circuit court's order denying those motions.[2]

[2] Although Peeler and Baird joined in Lyon's motion to dismiss in the circuit court, the only relief they request in this Court is the reversal of the circuit court's order denying their motions to remand for an evidentiary hearing.

B. CHARGING AUTHORITY

Lyon brings another challenge to the application of MCL 767.4: he argues that the statute does not grant the judge conducting the inquiry the authority to issue indictments. We agree.[3]

The word "indictment" appears four times in the statute, and its use is important:

> The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate *in connection with the hearing on the complaint or indictment*, or from presiding at any trial arising therefrom, or *from hearing any motion to dismiss or quash any complaint or indictment*, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. . . . Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, *or who shall disclose the fact that any indictment for a felony has been found* against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry *otherwise than by issuing or executing processes prior to the indictment*, or shall disclose, publish or cause to be published any comment,

[3] Our order to schedule oral argument on the application asked a more general question: "[W]hether [MCL 767.3 and MCL 767.4] confer charging authority on a member of the judiciary[.]" Because Lyon was charged by an indictment, it is not necessary for the disposition of this case to resolve whether MCL 767.3 or MCL 767.4 confer authority to issue charges by some other method such as a complaint.

> opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court, and the offense when committed by a public official shall also constitute malfeasance in office. [MCL 767.4 (emphasis added).]

Perhaps not surprisingly, the statute never says a judge may issue an indictment, in specific contrast to the statutes governing citizens grand juries. Cf. MCL 767.24(1) ("An indictment for any of the following crimes may be found and filed at any time[.]"); MCL 767.23 ("No indictment can be found without the concurrence of at least 9 grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill.").

Indeed, the Legislature amended the statutory scheme to authorize judges to issue indictments, but later removed that authority. In 1949, the Legislature amended the statute to provide for three-judge grand juries and gave them express authority to issue indictments ("Provided, That orders returning Indictments shall be signed by 3 judges."). See MCL 767.3, as amended by 1949 PA 311. But it repealed that provision several years later. See MCL 767.3, as amended by 1951 PA 276. "Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999).

And the statute is clear about what it *does* authorize a judge to do. If, after conducting the inquiry, "the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, *he may cause the apprehension of such person by proper process* . . . ." MCL 767.4 (emphasis added).

In other words, the judge may authorize an *arrest warrant*. The statute didn't authorize the judge to issue an arrest warrant explicitly and issue an indictment at the same time implicitly.

And while the word "indictment" can be understood narrowly to mean only "[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person," *Black's Law Dictionary* (11th ed), as in MCL 767.24(1) and MCL 767.23, that is not the case in MCL 767.4. MCL 761.1, which provides definitions for MCL 767.4, defines "indictment" broadly. See MCL 761.1(g):

> "Indictment" means 1 or more of the following:
>
> (*i*) An indictment.
>
> (*ii*) An information.
>
> (*iii*) A presentment.
>
> (*iv*) A complaint.
>
> (*v*) A warrant.
>
> (*vi*) A formal written accusation.
>
> (*vii*) Unless a contrary intention appears, a count contained in any document described in subparagraphs (*i*) through (*vi*).

This definition encompasses much more than a formal indictment—a charging document initiating a criminal prosecution.

The circuit court and the Attorney General's office have emphasized the purported parallels between the one-man grand-jury and the citizens grand-jury procedures. Thus, the argument goes, because the citizens grand-jury statutes authorize the issuance of indictments, so too must MCL 767.4. But we find the differences between the statutes

more important. As the defendants and amici note, the citizens grand-jury statutes—unlike MCL 767.4—expressly authorize the grand jurors to issue indictments and require the grand jurors to swear an oath. See MCL 767.9 (setting forth the oath to be administered to citizen grand jurors). A juror's oath is a significant part of service. See, e.g., *People v Cain*, 498 Mich 108, 123; 869 NW2d 829 (2015) ("The juror's oath involves a conscious promise to adopt a particular mindset—to approach matters fairly and impartially—and its great virtue is the powerful symbolism and sense of duty it imbues the oath-taker with and casts on the proceedings."); *id*. at 134 (VIVIANO, J., dissenting) ("The essence of the jury is, and always has been, the swearing of the oath."). The absence of this hallmark of the grand-jury process is more evidence that the one-man grand-jury statutes do not authorize a judge to initiate charges by issuing indictments.

To be sure, judges serving as one-person grand jurors have issued indictments following investigations. See, e.g., *Colacasides*, 379 Mich at 77-78 ("These documents were the evidentiary basis *upon which appellant had been indicted by Grand Juror Piggins* for conspiracy to bribe a police officer.") (emphasis added); *Green*, 322 Mich App at 681 ("Defendant was indicted by a one-person grand jury . . . ."). But the historical practice has been mixed because the procedure has also been used to authorize warrants. See, e.g., *Bellanca*, 386 Mich at 711 ("[T]he 'grand juror' ordered the issuance of a warrant for the arrest of the defendant so that he might be prosecuted for perjury and such warrant issued on that day."); *People v Dungey*, 356 Mich 686, 687, 688; 97 NW2d 778 (1959) ("[D]efendants in this case were tried in the circuit court of Genesee county *on an information* charging them with conspiracy to violate the laws of the State relating to the suppression of gambling" after "an investigation conducted in said county by a visiting

circuit judge, under the provisions of [MCL 767.3]," after which "*the judge issued his warrant for the arrest of 11 individuals*, including the four defendants in this case[.]") (emphasis added); *People v Birch*, 329 Mich 38, 41; 44 NW2d 859 (1950) ("Thereafter Judge Leibrand proceeded to conduct the investigation. Witnesses were called and examined by him, findings made, *and warrants issued including the warrants involved in the above entitled cases*.") (emphasis added). It seems that the power of a judge conducting an inquiry to issue an indictment was simply an unchallenged assumption, until now. See generally *Committee Reports*, 26 Mich St B J at 59 (providing that a "One-Man Grand Juror" may issue a complaint or warrant, while only a citizens grand jury may vote to issue an indictment).

For these reasons, we conclude that MCL 767.4 does not authorize a judge to issue an indictment initiating a criminal prosecution.[4] The trial court therefore erred by denying Lyon's motion to dismiss. Given our statutory holding, we need not address Lyon's constitutional arguments that MCL 767.4 violates separation of powers and due process. See *People v McKinley*, 496 Mich 410, 415-416; 852 NW2d 770 (2014) (applying "the widely accepted and venerable rule of constitutional avoidance").

IV. CONCLUSION

MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena witnesses, and issue arrest warrants. But they do not authorize the judge to issue indictments. And if a criminal process begins with a one-man grand jury, the accused is entitled to a preliminary

[4] We use "indictment" to refer to a formal indictment issued by a one-person grand jury and not in the broader sense it is used in MCL 761.1(g).

examination before being brought to trial. Accordingly, we reverse the Genesee Circuit Court's orders denying Peeler's and Baird's motions to remand for a preliminary examination and denying Lyon's motion to dismiss. We remand to the Genesee Circuit Court for further proceedings consistent with this opinion.

Bridget M. McCormack
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch

S T A T E O F M I C H I G A N

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BERNSTEIN, J. (*concurring*).

I concur fully with the Court's opinion but write separately to address the significant interests implicated in this case. Today, this Court recognizes what we have always known

to be true: procedure matters. It is, in fact, the foundation of our adversarial process. Indeed, our adversarial system of justice "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson v Ohio*, 488 US 75, 84; 109 S Ct 346; 102 L Ed 2d 300 (1988) (quotation marks and citations omitted).

However, the Attorney General has invoked obscure statutes, MCL 767.3; MCL 767.4, to deprive these defendants of their statutory right to a preliminary examination. "A preliminary examination functions, in part, as a screening device to insure that there is a basis for holding a defendant to face a criminal charge." *People v Weston*, 413 Mich 371, 376; 319 NW2d 537 (1982). Our court rules state that a defendant is entitled to "subpoena and call witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination." MCR 6.110(C).

Clearly, and as this Court's decision aptly recognizes, a preliminary examination serves a crucial function for criminal defendants in our adversarial system. It allows defendants to learn about the specific criminal charges they face, confront allegedly incriminating evidence, and prepare a defense. The prosecution argues that the Legislature, through the statutes in question, has given it the discretion to opt out of a preliminary examination, as the prosecution did here. This assertion is quite alarming, and were it true, the prosecution would have the power to decide whether to grant a defendant permission to probe and challenge the charges against them before being formally indicted. Such a result runs afoul of the basic notions of fairness that underlie our adversarial system. I do not believe we can tolerate such a procedural offense.

At the same time, this Court remains cognizant of the impact that this decision might have on the residents of Flint, who have suffered an unconscionable injustice. Residents of Flint have been supplied with water that was contaminated with toxic levels of lead, E. coli, and Legionella bacteria. *Mays v Governor of Michigan*, 506 Mich 157, 201; 954 NW2d 139 (2020) (BERNSTEIN, J., concurring). Despite evidence of contamination, state officials denied that the water was contaminated. *Mays*, 506 Mich at 169-170 (opinion by BERNSTEIN, J.). Later, officials allegedly manipulated data evidencing water contamination and continued to lie to Flint residents. *Id*. at 175. Research suggests that the death toll has been undercounted. See Childress, *We Found Dozens of Uncounted Deaths During the Flint Water Crisis. Here's How.*, PBS Frontline (September 10, 2019), available at <https://www.pbs.org/wgbh/pages/frontline/interactive/how-we-found-dozens-of-uncounted-deaths-during-flint-water-crisis/> (accessed June 3, 2022) [https://perma.cc/H2U3-J3J8]. Lead exposure can also impact fertility rates, birth outcomes, and childhood development. See Matheny, *Study: Flint Water Killed Unborn Babies; Many Moms Who Drank It Couldn't Get Pregnant*, Detroit Free Press (September 20, 2017), available at <https://www.freep.com/story/news/local/michigan/flint-water-crisis/2017/09/20/flint-water-crisis-pregnancies/686138001/> (accessed June 3, 2022) [https://perma.cc/U8N4-HQCR]. We may not know the extent to which the contaminated water has detrimentally affected the health and well-being of Flint residents because the effects of lead poisoning can be long-term and slow to fully develop. See Harvard TH Chan School of Public Health, *High Levels of Lead in Bone Associated With Increased Risk of Death From Cardiovascular Disease in Men*, 2009 Press Release, available at <https://www.hsph.harvard.edu/news/press-releases/high-levels-lead-bone-risk-of-death-cardiovascular-disease-men/> (accessed June 3,

2022) [https://perma.cc/ZMW9-KTJ2]; Carroll, *What the Science Says About Long-Term Damage From Lead*, New York Times (February 8, 2016), available at <https://www.nytimes.com/2016/02/09/upshot/what-the-science-says-about-long-term-damage-from-lead.html> (accessed June 3, 2022) [https://perma.cc/JD8R-GZH9]. Even after Flint's water was declared safe for consumption, Flint residents have remained hesitant to use the water. Robertson, *Flint Has Clean Water Now. Why Won't People Drink It?*, Politico (December 23, 2020), available at <https://www.politico.com/news/magazine/2020/12/23/flint-water-crisis-2020-post-coronavirus-america-445459> (accessed June 3, 2022) [https://perma.cc/Y48U-LLQ7]. If the allegations can be proved, it is impossible to fully state the magnitude of the damage state actors have caused to an innocent group of people—a group of people that they were entrusted to serve. The Flint water crisis stands as one of this country's greatest betrayals of citizens by their government.

Yet the prosecution of these defendants must adhere to proper procedural requirements *because* of the magnitude of the harm that was done to Flint residents. Proper procedure is arguably most necessary in cases of great public significance, particularly where the charged crimes have been characterized as especially heinous and where the court proceedings are likely to be heavily scrutinized by the general public. In such cases, adherence to proper procedure serves as a guarantee to the general public that Michigan's courts can be trusted to produce fair and impartial rulings for all defendants, regardless of the severity of the charged crime.

The tenets of our system of criminal procedure are only as strong as our commitment to abide by them. Indeed, there would be little credibility to a criminal process that purports to strike a fair balance between adversaries if the guarantees underpinning that criminal

process—such as the statutory right to a preliminary examination—could be done away with at the whims of the prosecution. Put simply, the prosecution's power to charge individuals and haul them into court is constrained by certain preconditions. We recognize today that, under these circumstances, one of those preconditions is required by statute—a preliminary examination. The prosecution cannot simply cut corners in order to prosecute defendants more efficiently. To allow otherwise would be repugnant to the foundational principles of our judicial system. This Court's decision reaffirms these principles and makes clear that the government's obligations remain steadfast for all criminal defendants.

In the end, such a prominent criminal prosecution will have a significant impact on the public at large. This criminal prosecution will serve as a historical record. Whether we realize it or not, courts provide historical context to consequential moments in history. See Rhodes, *Legal Records as a Source of History*, 59 ABA J 635, 635 (June 1973) ("The lawyer unwittingly is an agent of history."). What is happening before us cannot be understated. Former state officials, some of whom were elected, are being criminally prosecuted for their alleged roles in perpetrating an egregious injustice that resulted in the various ailments and even deaths of the people they served or represented. Future generations will look to this record as a critical and impartial answer to the question: what happened in Flint? For both their sake and ours, we should leave no question unanswered and no stone unturned.

For these reasons, I concur.

Richard H. Bernstein

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for Governor Rick Snyder.

Legislative Analysis

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

REPEAL "ONE-MAN GRAND JURY" PROVISIONS

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

House Bill 4434 as introduced
Sponsor: Rep. Luke Meerman
House Committee: Judiciary
Complete to 5-20-25

SUMMARY:

House Bill 4434 would amend Chapter VII (Grand Juries, Indictments, Informations and Proceedings Before Trial) of the Code of Criminal Procedure to repeal several sections that establish Michigan's "one-man grand jury" process, in which a judge serves as the sole juror. The sections that would be repealed (3, 4, 5, 6, 6a, and 6b) are described below.

Section 3 authorizes a judge to direct an inquiry to be made if they have probable cause to believe that a crime has been committed in their jurisdiction due to a filed complaint or upon the application of a prosecutor or the attorney general. The judge can call or subpoena witnesses, and all inquiry testimony must be in their presence. A witness has the right to have legal counsel present. If an inquiry lasts longer than 30 days, any judge, prosecutor, or attorney general who participated in it must be disqualified, for up to one year after the date the inquiry ends, from being appointed or elected to any office other than they one they held at the time of the inquiry.

Section 4 authorizes a judge conducting an inquiry to issue an arrest warrant if they are satisfied that a crime has been committed and that there is probable cause to suspect a person is guilty. The judge cannot conduct the preliminary examination in connection with the hearing on the complaint or indictment, preside at any trial arising from the inquiry, hear a motion to dismiss or quash a complaint or indictment, or generally hear a charge of contempt.

If the judge finds probable cause to believe that a public officer has engaged in misconduct that they can be removed from office for, the judge must serve a written finding on the officer and the board or body that has jurisdiction over the proceedings for removal.

If the judge, or a prosecutor or other person in the service of the judge, discloses certain information relating to the inquiry, they are guilty of a misdemeanor punishable by imprisonment for up to a year or a fine of $100 to $1,000, or both. However, the judge can file with the county clerk a report of "no finding of criminal guilt" for a person whose involvement with the inquiry became public but for whom no presentment of crime or wrongdoing is made. Such a report is at the judge's discretion and must be made with the person's consent.

An inquiry or proceeding under Chapter VII is limited to no more than six months unless extended by specific order of the judge for up to an additional six months.

Section 5 provides that a witness who neglects or refuses to appear in response to a summons in an inquiry, or who neglects or refuses to answer questions the judge considers material, is guilty of contempt punishable by imprisonment for up to one year or a fine of up to $1,000, or both.

Section 6 allows the judge to issue an order granting immunity to witnesses in an inquiry in exchange for truthful testimony on questions whose answers might tend to incriminate the witness. Under the grant of immunity, the witness's truthful testimony on those and related questions cannot be used as evidence against them in a criminal case (except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order).

Section 6a requires the records of an inquiry that lasts 30 days or less to be sealed and filed with the clerk of the Michigan Supreme Court, where it is to be held secretly in a securely locked container. A person who violates the secrecy is guilty of a misdemeanor punishable by imprisonment for up to a year or a fine of $100 to $1,000, or both. The section also provides that the records that relate to a witness must be made available to them upon request for certain court proceedings, such as an appeal. The records must be kept for at least six years, but after that can be destroyed if it is determined by a circuit judge of the relevant county that there is no further need to keep them.

Section 6b requires the judge to file with the court clerk a public accounting of all money disbursed by the judge or at the judge's direction within 90 days after an inquiry ends.

MCL 767.3 et seq. (repealed)

FISCAL IMPACT:

House Bill 4434 would have an indeterminate fiscal impact on the state and on local units of government. It is not possible to determine with certainty either the prevalence of the one-man grand jury system across the state or the associated costs. In the court caseload reporting system, data is not compiled in a way that distinguishes between different case types filed in courts, which means there is no differentiation between a one-man grand jury case and a citizen grand jury case. Based on surveys conducted to try to determine use of one-man grand juries in counties across the state, it appears the one-man grand jury is rarely used and has been used only more recently (in the last five years or so) in a small number of counties for very specific case types. Because it is not possible to get data on the actual number of one-man grand juries that are convened on an annual basis, it is not possible to determine the fiscal impact of the bill.

Legislative Analyst: Aaron A. Meek
Fiscal Analyst: Robin Risko

Public Policy Position
HB 4434

Support

Explanation
The Committee voted to support House Bill 4434. Michigan's one-man grand jury is an anachronism that is infrequently used, subject to abuse, and of little to no arguable value following the Michigan Supreme Court's holding in *State v Peeler*, 509 Mich 381 (2022).

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 7

***Keller* Permissibility Explanation**
The Committee voted that HB 4434 is necessarily related to the functioning of the courts and therefore *Keller*-permissible.

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

Public Policy Position
HB 4434

Support

Explanation:
The Committee voted to support House Bill 4434. Those supporting the bill voiced concerns about the necessity, constitutionality, and fundamental fairness of Michigan's unique "one-man grand jury." They believed other existing mechanisms for initiating a criminal prosecution were sufficient and more in keeping with due process. Those opposing the bill believed that the "one-man grand jury" is a useful tool for prosecutors, especially in cases such as public corruption and organized crime.

Position Vote:
Voted For position: 8
Voted against position: 7
Abstained from vote: 1
Did not vote (absent): 10

***Keller* Permissibility Explanation**
The Committee voted that HB 4434 is necessarily related to the functioning of the courts and therefore *Keller*-permissible.

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: June 4, 2025

Re: Model Criminal Jury Instructions – Authorization to Advocate

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In recent history, the State Bar of Michigan Board of Commissioners has not opted to adopt and advocate public policy positions on model criminal jury instructions. Instead, the Bar's Criminal Law Section and Criminal Jurisprudence & Practice Committee are regularly called upon to offer feedback to the Michigan Supreme Court's Committee on Model Criminal Jury Instructions on proposals to amend or repeal existing instructions, or to adopt new instructions.

Article VIII, Section 7 of the SBM Bylaws permits a section that has adopted a position on a *Keller*-permissible policy to publicly advocate that position on behalf of the section "unless expressly directed otherwise by the Board of Commissioners, the Representative Assembly, or, if the matter requires urgent attention, the Executive Committee of the State Bar.

State Bar entities other than sections—including standing committees—are not permitted, under Article VIII, Section 8 of the SBM Bylaws, to "publicly advocate a public policy position that has not been adopted by the Board of Commissioners or Representative Assembly unless authorized to do so by a majority vote of the Board of Commissioners or Representative Assembly."

To comply with these Bylaws requirements, the Board's consent agenda includes a proposed motion for consideration:

> **To authorize the Criminal Law Section and the Criminal Jurisprudence & Practice Committee to advocate their respective positions on the following model criminal jury instruction proposals:**
>
> - **M Crim JI 15.14, M Crim JI 15.14a, and M Crim JI 15.15**
> - **M Crim JI 20.24**
> - **M Crim JI 37.11**

Copies of the proposed instructions are attached to this memorandum.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 1, 2025. Comments may be sent in writing to Christopher M. 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.

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PROPOSED

The Committee proposes amending M Crim JI 15.14 (Reckless Driving), M Crim JI 15.14a (Reckless Driving Causing Death or Serious Impairment of a Body Function), and M Crim JI 15.15 (Moving Violation Causing Death or Serious Impairment of a Body Function) for improved readability and greater consistency with the statutes defining these offenses. The proposed changes were inspired by Footnote 7 in *People v Fredell*, ___ Mich ___ (December 26, 2024) (Docket No. 164098). Deletions are in ~~strikethrough~~, and new language is underlined.

[AMENDED] M Crim JI 15.14 Reckless Driving

(1) [The defendant is charged with the crime of / You may also consider the lesser charge of[1]] reckless driving. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant drove a motor vehicle[2] on a highway [or a frozen public lake, stream, or pond] or other place open to the general public ~~or generally accessible to motor vehicles~~ [including but not limited to any designated parking area].[3]

(3) Second, that the defendant drove the motor vehicle in willful or wanton disregard for the safety of persons or property. Willful or wanton disregard means more than simple carelessness but does not require proof of an intent to cause harm. It means knowingly disregarding the possible risks to the safety of people or property.

Use Notes

1. Use when instructing on this crime as a lesser included offense.

2. The term *motor vehicle* is defined in MCL 257.33.

3. A *highway* is the entire area between the boundary lines of a publicly maintained roadway, any part of which is open for automobile travel. *People v Bartel*, 213 Mich App 726, 728-729; 540 NW2d 491 (1995). ~~A private driveway is "generally accessible to motor vehicles." *People v Rea*, 500 Mich 422; 902 NW2d 362 (2017).~~ The phrase "open to the general public" is discussed in *People v Nickerson*, 227 Mich App 434; 575 NW2d 804 (1998), and *People v Hawkins*, 181 Mich App 393; 448 NW2d 858 (1989).

[AMENDED] M Crim JI 15.14a Reckless Driving Causing Death or Serious Impairment of a Body Function

(1) [The defendant is charged with the crime of / You may also consider the lesser charge of[1]] reckless driving causing [death / serious impairment of body function to another person]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant drove a motor vehicle[2] on a highway [or a frozen public lake, stream, or pond] or other place open to the general public ~~or generally accessible to motor vehicles~~ [including but not limited to any designated parking area].[3]

(3) Second, that the defendant drove the motor vehicle in willful or wanton disregard for the safety of persons or property. Willful or wanton disregard means more than simple carelessness but does not require proof of an intent to cause harm. It means knowingly disregarding the possible risks to the safety of people or property.

~~(4) Third, that the defendant's operation of the vehicle caused [the death of / a serious impairment of a body function[4] to] [*identify deceased or injured person*]. To [cause the death / such injury], the defendant's operation of the vehicle must have been a factual cause of the [death / injury], that is, but for the defendant's operation of the vehicle the [death / injury] would not have occurred. In addition, [death or serious injury / the injury] must have been a direct and natural result of operating the vehicle.[5]~~

(4) Third, that the defendant's operation of the vehicle caused [the death of (*name deceased*) / (*name injured person*) to suffer a serious impairment of a body function[4]]. To cause the [death / injury], the defendant's operation of the vehicle must have been a factual cause of the [death / injury], that is, but for the defendant's operation of the vehicle, the [death / injury] would not have occurred. In addition, the [death / injury] must have been a direct and natural result of operating the vehicle.[5]

Use Notes

1. Use when instructing on this crime as a lesser included offense.

2. The term *motor vehicle* is defined in MCL 257.33.

3. A *highway* is the entire area between the boundary lines of a publicly maintained roadway, any part of which is open for automobile travel. *People v Bartel*, 213 Mich App 726, 728-729; 540 NW2d 491 (1995). ~~A private driveway is "generally accessible to motor vehicles." *People v Rea*, 500 Mich 422; 902 NW2d 362 (2017).~~ The phrase "open to the general public" is discussed in *People v Nickerson*, 227 Mich App 434; 575 NW2d 804 (1998), and *People v Hawkins*, 181 Mich App 393; 448 NW2d 858 (1989).

4. The statute, MCL 257.58c, provides that serious impairment of a body function includes but is not limited to one or more of the following:

(a) Loss of a limb or loss of use of a limb.
(b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c) Loss of an eye or ear or loss of use of an eye or ear.
(d) Loss or substantial impairment of a bodily function.
(e) Serious visible disfigurement.
(f) A comatose state that lasts for more than 3 days.
(g) Measurable brain or mental impairment.
(h) A skull fracture or other serious bone fracture.
(i) Subdural hemorrhage or subdural hematoma.
(j) Loss of an organ.

5. If it is claimed that the defendant's operation of the vehicle was not a proximate cause of serious impairment of a body function because of an intervening, superseding cause, the court may wish to review *People v Schaefer*, 473 Mich 418, 438-439; 703 NW2d 774 (2005) (a "causes death" case under MCL 257.625(4)). *Schaefer* was modified in part on other grounds by *People v Derror*, 475 Mich 316;

715 NW2d 822 (2006), which was overruled in part on other grounds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).

[AMENDED] M Crim JI 15.15 Moving Violation Causing Death or Serious Impairment of a Body Function

(1) [The defendant is charged with the crime / You may consider the lesser charge[1]] of committing a moving traffic violation that caused [death / serious impairment of a body function]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant operated a motor vehicle.[2] To *operate* means to drive or have actual physical control of the vehicle.

(3) Second, that the defendant operated the vehicle on a highway or other place open to the general public ~~or generally accessible to motor vehicles~~ [including but not limited to any designated parking area].[3]

(4) Third, that, while operating the motor vehicle, the defendant committed a moving violation by [*describe the moving violation*].

(5) Fourth, that by committing the moving violation, the defendant caused [the death of (*name deceased*) / (*name injured person*) to suffer a serious impairment of a body function[4]]. To cause the [~~the~~ death ~~of (*name deceased*)~~ / ~~such~~ injury ~~to (*name injured person*)~~], the defendant's moving violation must have been a factual cause of the [death / injury], that is, but for committing the moving violation, the [death / injury] would not have occurred. In addition, the [death / injury] must have been a direct and natural result of committing the moving violation.[5]

Use Notes

1. Use when instructing on this crime as a lesser offense.

2. The term *motor vehicle* is defined in MCL 257.33.

3. A *highway* is the entire area between the boundary lines of a publicly maintained roadway, any part of which is open for automobile travel. *People v Bartel*, 213 Mich App 726, 728-729; 540 NW2d 491 (1995). ~~A private driveway is "generally accessible to motor vehicles." *People v Rea*, 500 Mich 422; 902 NW2d 362 (2017).~~ The phrase "open to the general public" is discussed in *People v*

Nickerson, 227 Mich App 434; 575 NW2d 804 (1998), and *People v Hawkins*, 181 Mich App 393; 448 NW2d 858 (1989).

4. MCL 257.58c provides that serious impairment of a body function includes but is not limited to one or more of the following:

(a) Loss of a limb or loss of use of a limb.
(b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c) Loss of an eye or ear or loss of use of an eye or ear.
(d) Loss or substantial impairment of a bodily function.
(e) Serious visible disfigurement.
(f) A comatose state that lasts for more than 3 days.
(g) Measurable brain or mental impairment.
(h) A skull fracture or other serious bone fracture.
(i) Subdural hemorrhage or subdural hematoma.
(j) Loss of an organ.

5. If it is claimed that the defendant's operation of the vehicle was not a proximate cause of serious impairment of a body function because of an intervening, superseding cause, the court may wish to review *People v Schaefer*, 473 Mich 418, 438-439; 703 NW2d 774 (2005) (a "causes death" case under MCL 257.625(4)). *Schaefer* was modified in part on other grounds by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), which was overruled in part on other grounds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).

Public Policy Position
M Crim JI 15.14, 15.14a, and 15.15

Support

Explanation:
The committee voted unanimously to support the Model Criminal Jury Instructions as drafted.

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

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

Public Policy Position
M Crim JI 15.14, 15.14a, and 15.15

Support

Position Vote:
Voted for position: 25
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Takura N. Nyamfukudza
Email: takura@cndefenders.com

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 1, 2025. Comments may be sent in writing to Christopher M. 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.

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PROPOSED

The Committee proposes amending M Crim JI 20.24 (Definition of Sufficient Force) in response to *People v Levran*, ___ Mich App ___ (December 3, 2024) (Docket No. 370931). The Court of Appeals held in *Levran* that the fifth paragraph of the current instruction did not accurately reflect how MCL 750.520b(1)(f)(*iv*) defines "force or coercion" for purposes of criminal sexual conduct committed during a medical exam or treatment. The proposed amendment would remedy this defect. Deletions are in ~~strikethrough~~, and new language is underlined.

[AMENDED] M Crim JI 20.24 Definition of Sufficient Force

[*Choose any of the following that are applicable:*]

(1) It is enough force if the defendant overcame [*name complainant*] by physical force.

(2) It is enough force if the defendant threatened to use physical force on [*name complainant*], and [*name complainant*] believed that the defendant had the ability to carry out those threats.

(3) It is enough force if the defendant threatened to get even with [*name complainant*] in the future, and [*name complainant*] believed that the defendant had the ability to carry out those threats.

(4) It is enough force if the defendant threatened to kidnap [*name complainant*], or threatened to force [*name complainant*] to do something against [his / her] will, or threatened to physically punish someone, and [*name complainant*] believed that the defendant had the ability to carry out those threats.

(5) It is enough force if the defendant was giving [*name complainant*] a medical exam or treatment and did so in a way or for a reason that is not recognized as medically acceptable. A medical exam or treatment ~~physical exam by a doctor~~ that includes inserting fingers into the vagina or rectum is not in itself criminal sexual conduct. You must decide whether the defendant did the exam or treatment in a manner or for purposes that are ~~as an excuse for sexual purposes and in a way that is~~ not recognized as medically ethical or acceptable.[1]

(6) It is enough force if the defendant, through concealment or by the element of surprise, [was able to overcome ~~[~~/ achieve sexual contact with]*[2] [*name complainant*].

(7) It is enough force if the defendant used force to induce the victim to submit to the sexual act or to seize control of the victim in a manner facilitating commission of the sexual act without regard to the victim's wishes.

Use Notes

1. *See People v Levran*, ___ Mich App ___; ___ NW3d ___ (December 3, 2024) (Docket No. 370931).

*2. Use the bracketed expression "achieve sexual contact" when criminal sexual contact in the fourth degree is charged. *See* MCL 750.520e(1)(b)(*v*).

Public Policy Position
M Crim JI 20.24

Support

Explanation:
The committee voted to support the Model Criminal Jury Instructions as drafted.

Position Vote:
Voted For position: 11
Voted against position: 6
Abstained from vote: 0
Did not vote (absent): 9

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

Public Policy Position
M Crim JI 20.24

Support

Position Vote:
Voted for position: 25
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Takura N. Nyamfukudza
Email: takura@cndefenders.com

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 1, 2025. Comments may be sent in writing to Christopher M. 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.

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PROPOSED

The Committee proposes amending M Crim JI 37.11 (Removing, Destroying or Tampering with Evidence) to add a missing *mens rea* element. MCL 750.483a(5)(a) makes it a crime to "[k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding." While the current instruction addresses the requirement that the defendant act "intentionally," it does not address the requirement that the defendant act "knowingly." The Court of Appeals has indicated that "the word 'knowingly' in the statute likely includes knowledge of an official proceeding." *People v Walker*, 330 Mich App 378, 388 (2019). The proposed amendment would add that element and make other stylistic changes. Deletions are in ~~strikethrough~~, and new language is underlined.

[AMENDED] M Crim JI 37.11 Removing, Destroying, or Tampering with Evidence

(1) [The defendant is charged with / You may also consider the less serious offense of[1]] intentionally removing, altering, concealing, destroying, or tampering with evidence to be offered at an official proceeding [not involving a criminal case where (*identify crime where the punishment was more than 10 years*) was charged[1]]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was some evidence to be offered in a present or future official proceeding.

> An official proceeding is a hearing held before a legislative, judicial, administrative, or other governmental agency, or a hearing before an

official authorized to hear evidence under oath, including a referee, a prosecuting attorney, a hearing examiner, a commissioner, a notary, or another person taking testimony in a proceeding.

(3) Second, that the defendant removed, altered, concealed, destroyed, or otherwise tampered with that evidence.

(4) Third, that when the defendant removed, altered, concealed, destroyed, or otherwise tampered with that evidence, [he / she] did so on purpose and not by accident.

(5) Fourth, that the defendant knew that the evidence would be offered in a present or future official proceeding at the time [he / she] removed, altered, concealed, destroyed, or otherwise tampered with it.[2]

[(~~5~~6) ~~Fourth~~ Fifth, that the evidence ~~that the defendant removed, altered, concealed, destroyed, or otherwise tampered with~~ would be offered ~~was used or intended to be used~~ in a criminal case where (*identify crime where the punishment was more than 10 years*) was charged.][~~2~~3]

Use Notes

1. Use this language when there is a dispute whether the charge involved the aggravating factor found in MCL 750.483a(6)(b) and the court is instructing the jury on the necessarily lesser included offense that does not require proof of the aggravating factor.

2. The Michigan Court of Appeals has assumed without deciding "that the word 'knowingly' in the statute likely includes knowledge of an official proceeding." *People v Walker*, 330 Mich App 378, 388; 948 NW2d 122 (2019). The Michigan Court of Appeals has also indicated that this element "may be proved with '[m]inimal circumstantial evidence.'" *Id.* (quoting *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001)).

~~2~~3. Use this paragraph where the aggravating element has been charged.

Public Policy Position
M Crim JI 37.11

Oppose

Explanation:
The Committee voted to oppose M Crim JI 37.11. The Committee believes that it is inappropriate to modify the jury instructions based on dicta in *People v Walker* and that the proposed instruction goes beyond the statutory language of MCL 750.483a.

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 10

Contact Persons:
Nimish R. Ganatra nimishg@umich.edu
John A. Shea jashea@earthlink.net

Public Policy Position
M Crim JI 37.11

Support

Position Vote:
Voted for position: 25
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Takura N. Nyamfukudza
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