

Agenda
Public Policy Committee
January 24, 2020 – 9 am
State Bar of Michigan, Room 2

*For those joining by phone, the conference call number is
1.877.352.9775, passcode 651 620 4165#.*

Meeting starts promptly at 9 am

(Vince Lombardi Rule: “*Early is on time. On time is late.*”)

Public Policy Committee.....Robert J. Buchanan, Chairperson

A. Opening Statements

(Each member’s “good news,” whether personal, business, or State Bar of Michigan-related.)

B. Reports

1. Approval of November 22, 2019 minutes
2. Public Policy Report

C. Court Rules

1. ADM File 2018-34: Proposed Amendment of MCR 6.425

The proposed amendment of MCR 6.425 would clarify that criminal defendants whose request for counsel due to indigency are denied are entitled to appeal that denial.

Status: 02/01/20 Comment Period Expires.

Referrals: 10/25/19 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

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

Liaison: Kim Warren Eddie

2. ADM File 2018-35: Proposed Amendment of MCR 8.108

The proposed amendment of MCR 8.108 would clarify the rule regarding preparation and filing of transcripts including that a court reporter or court recorder shall file their transcripts with a court when produced for a party or for the court.

Status: 02/01/20 Comment Period Expires.

Referrals: 10/24/19 Civil Procedure & Courts Committee; 11/06/19 Access to Justice Policy Committee.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Family Law Section.

Comment provided to the Supreme Court included in materials.

Liaison: Judge Cynthia D. Stephens

**Minutes
Public Policy Committee
November 22, 2019**

Committee Members: Robert J. Buchanan, Joseph J. Baumann, Hon. Shauna L. Dunning, Kim Warren Eddie, Suzanne C. Larsen, E. Thomas McCarthy, Jr., Valerie R. Newman, Thomas G. Sinas, Hon. Cynthia D. Stephens
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Opening Statements

B. Reports

1. Approval of September 25, 2019 minutes

The minutes were unanimously approved.

2. Public Policy Report

The Governmental Relations staff offered a written report and Kathryn Hennessey offered a verbal report.

C. Court Rules

1. ADM File 2019-12: Amendments of MCR 1.109, 3.206, 3.931, and 3.961

The amendments of MCR 1.109, 3.206, 3.931, and 3.961 enable family division courts to use the required case inventory form to administer cases while keeping the information confidential. This change is intended to prevent providing information that could affect the safety of domestic violence victims and their children. The following entities offered recommendations: Access to Justice Policy Committee; Civil Procedure & Courts Committee.

The committee voted unanimously to support the proposed amendments with the following amendments:

1. **Tribal courts should be listed in the Case Inventory Addendum and included in the list of courts to be notified.**
2. **MCR 3.931 and 3.961 should be amended to reference the proper service rule for delinquency & child protection proceedings, MCR 3.920(I) (rather than the service provision for domestic relations proceedings, MCR 3.203).**

2. ADM File 2014-46: Proposed Alternative Amendments of MCR 6.508

The proposed alternative amendments of MCR 6.508 would allow a court to consider previously-decided claims in the context of a new claim for relief, consistent with footnote 17 in *People v Johnson*, 502 Mich 541 (2018), as expressed in Alternative A, or under a slightly different formulation in Alternative B.

The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee voted unanimously with one abstention to support the proposed amendment recommended by the Access to Justice Policy Committee and Appellate Practice Section, except change “strong likelihood” to “significant possibility,” as presented below:

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; **for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or**

if the previously-decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence.

3. ADM File 2018-29: Proposed Amendments of MCR 6.302 and 6.610

The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the requirement for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the “sentencing offense alone,” not the charged offense. Further, an “offense to which defendant is pleading” would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the “charged offense” clause may well be unnecessary.

The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

The committee voted unanimously to oppose the proposed amendments to Rule 6.302 and 6.610.

4. ADM File 2018-24: Proposed Amendment of MCR 8.301

The proposed amendment of MCR 8.301 would make the rule consistent with the statute (MCL 600.834) allowing only the probate registers and deputy probate registers to perform certain administrative tasks that would otherwise be performed by the probate judge.

The following entities offered recommendations: Civil Procedure & Courts Committee.

The committee voted unanimously (9) to support the proposed amendment to Rule 8.301.

D. Legislation

1. Bail Bond Procedures

HB 4351 (LaGrand) Criminal procedure; bail; procedure for bail hearings and criteria a court must consider; amend. Amends sec. 6, ch. V of 1927 PA 175 (MCL 765.6).

HB 4352 (Peterson) Criminal procedure; bail; procedure a court must follow in imposing financial condition on pretrial release; amend. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 6f to ch. V.

HB 4353 (Howell) Crimes; penalties; remove cases in which a court must impose a cash bond and penalties for misrepresentation on a financial disclosure form; provide for. Amends sec. 6a, ch. V of 1927 PA 175 (MCL 765.6a).

HB 4354 (VanSingel) Criminal procedure; bail; criteria a court must consider before imposing a financial condition of release; amend. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 6e to ch. V.

HB 4355 (Neeley) Criminal procedure; bail; interim bail bonds for misdemeanors; modify. Amends sec. 1 of 1961 PA 44 (MCL 780.581).

HB 4356 (Johnson) Criminal procedure; bail; authority for officer to issue appearance ticket; modify. Amends sec. 9c, ch. IV of 1927 PA 175 (MCL 764.9c).

HB 4357 (Brann) Criminal procedure; bail; setting of bond related to spousal or child support arrearage; modify. Amends sec. 165 of 1931 PA 328 (MCL 750.165).

HB 4358 (Garrett) Criminal procedure; bail; data on specific number and type of bonds issued; require district court to submit to state court administrative office. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 6g to ch. V.

HB 4359 (Yancey) Criminal procedure; bail; data on specific number and type of bonds issued; require circuit court to submit to state court administrative office. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 6h to ch. V.

HB 4360 (LaFave) Traffic control; driver license; reference to surrendering license as condition of pretrial release; remove to reflect changes in code of criminal procedure. Amends sec. 311a of 1949 PA 300 (MCL 257.311a).

The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee agreed unanimously to table the legislation.

2. Jury Pool Selection

HB 5026 (Yancey) Courts; juries; jury pool selection process; revise. Amends secs. 1304, 1312 & 1321 of 1961 PA 236 (MCL 600.1304 et seq.) & adds secs. 1301c, 1310a & 1310b.

The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

HB 5027 (LaGrand) Courts; juries; jury selection for circuit court; modify. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1321a.

The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

The committee agreed unanimously that the legislation is *Keller*-permissible in affecting the functioning of the courts and increasing access to justice.

The committee voted unanimously (9) to take no position on these bills, but support the goal of the legislation and sit down with the sponsors of the bills to take steps to craft legislation to achieve the goal of more diverse jury pools.

3. HB 5106 (Schroeder) Criminal procedure; evidence; use of expert testimony for domestic violence in criminal cases; allow. Amends 1927 PA 175 (MCL 760.1 - 760.69) by adding sec. 27d to ch. VIII.

The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee agreed that the legislation is *Keller*-permissible in affecting the functioning of the courts.

The committee voted 8 to 1 to oppose the legislation. Kim Warren Eddie, Valerie R. Newman, and Judge Cynthia D. Stephens will conduct a conference call in the next week to discuss appropriate position language.

4. HB 5169 (Hernandez) Torts; nonmedical malpractice; affidavit of merit; require for malpractice action against architect or professional engineer. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 2912i.

The following entities offered recommendations: Civil Procedure & Courts Committee.

The committee agreed 8 to 1 that the legislation is *Keller*-permissible in affecting the functioning of the courts and the availability of legal services to society.

The committee voted unanimously with one abstention to oppose the legislation.

5. SB 0420 (Lucido) Civil procedure; execution; service of execution; modify procedures. Amends secs. 2559, 6002 & 6012 of 1961 PA 236 (MCL 600.2559 et seq.).

The following entities offered recommendations: Civil Procedure & Courts Committee.

The committee agreed 5 to 4 that the legislation is not *Keller*-permissible.

6. HB 4329 (Vaupel) Civil procedure; costs and fees; transcript fee; increase. Amends sec. 2543 of 1961 PA 236 (MCL 600.2543).

The following entities offered recommendations: Civil Procedure & Courts Committee; Family Law Section.

The committee agreed 8 to 1 that the legislation is *Keller*-permissible in affecting the functioning of the courts and availability of legal services to society.

The committee voted unanimously to oppose the legislation, as the legislation impacts access to transcripts and courts.

E. Model Criminal Jury Instructions

1. M Crim JI 2.26, 3.1, and 3.6

The Committee proposes amending procedural and composite instructions M Crim JI 2.26, 3.1, and 3.6 to include cautionary information concerning “implicit bias” similar to those adopted July 2019 by the Committee on Model Civil Jury Instructions in M Civ JI 1.01, 2.06 and 3.02.

The committee voted to adopt the position of the Criminal Jurisprudence & Practice Committee, which supports the model criminal jury instructions with an addition of “gender identity” to the list of categories as found in M Crim JI 3.6(2) regarding witness credibility.

....and not be influenced by a witness’s disability, gender, **gender identity**, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.



p 517-346-6300

December 12, 2019

p 800-968-1442

f 517-482-6248

www.michbar.org

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

306 Townsend Street

Michael Franck Building

Lansing, MI

48933-2012

RE: ADM File No. 2019-12: Proposed Amendment of Rules 1.109, 3.206, 3.931, and 3.961 of the Michigan Court Rules

Dear Clerk Royster:

At its November 22, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee and Civil Procedure & Courts Committee.

After this review, the Board voted unanimously to support the rule changes with the following amendments:

- The rules should be amended to clarify that tribal court cases should be listed in the Case Inventory Addendum and tribal courts should be included in the list of courts to be notified.
- MCR 3.931 and 3.961 should be amended to refer to MCR 3.920(I), which is the service rule for delinquency and child protective proceedings, rather than MCR 3.203, which is the service rule for domestic relations proceedings.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President, State Bar of Michigan



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Lansing, MI
48933-2012

December 12, 2019

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

RE: ADM File No. 2014-46: Proposed Amendment of Rule 6.508 of the Michigan Court Rules

Dear Clerk Royster:

At its November 22, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and Appellate Practice Section.

Based on this review, the Board unanimously voted in support of combining Alternative A and a modified version of Alternative B as each alternative is valuable and addresses potentially different circumstances. MCR 6.508, therefore, should be amended as followed (modified language to Alternative B is highlighted in gray):

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; **for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously-decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence.**

These amendments will allow courts to fully consider previously-decided claims alongside new motions for relief from judgment. We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President, State Bar of Michigan



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48933-2012

RE: ADM File No. 2018-29: Proposed Amendment of Rules 6.302 and 6.610 of the Michigan Court Rules

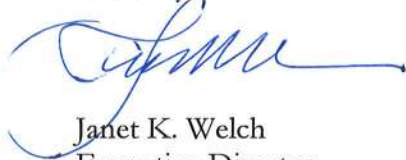
Dear Clerk Royster:

At its November 22, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and Criminal Law Section, all of which opposed the rule amendments.

Based on this review, the Board voted unanimously to oppose the rule amendments. These amendments will take away an important tool in the criminal justice process and reduce the options available when negotiating a plea, which has the potential to harm the government, defendants, and victims. For example, a victim may want the defendant to admit to the facts charged, and it is not clear why the court rules should deprive them of that option. These amendments are not only unnecessary but detrimental to the criminal justice process.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President, State Bar of Michigan



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

306 Townsend Street

Michael Franck Building

Lansing, MI

48933-2012

RE: ADM File No. 2018-24: Proposed Amendment of Rule 8.301 of the Michigan Court Rules

Dear Clerk Royster:

At its November 22, 2019 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendment published by the Court for comment. As part of its review, the Board considered recommendations from the Civil Procedure & Courts Committee.

Based on this review, the Board voted unanimously to support the rule amendment. The changes are appropriate and consistent with MCL 600.834.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President, State Bar of Michigan



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p 800-968-1442

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306 Townsend Street

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48933-2012

January 14, 2020

Samuel R. Smith, III
Committee Reporter
Michigan Supreme Court
Committee on Model Criminal Jury Instructions
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: M Crim JI 2.26, 3.1, and 3.6

Dear Mr. Smith:

At its last meeting, the Board of Commissioners of the State Bar of Michigan considered the above-referenced model criminal jury instructions published for comment. In its review, the Board considered a recommendation from the Criminal Jurisprudence & Practice Committee. The Board voted to support the proposed criminal jury instructions with an addition of "gender identity" to the list of categories found in M Crim JI 3.6(2) regarding witness credibility.

Thank you for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Dennis M. Barnes, President



To: Board of Commissioners
From: Governmental Relations Staff
Date: January 15, 2020
Re: Governmental Relations Update

This memo includes updates on legislation and court rules on which the State Bar has taken positions.

LEGISLATION

HJR O (Eliminating the Age Limitation From Eligibility Criteria for Judicial Office) –

HJR O would amend the state constitution to eliminate the age limitation from eligibility criteria for judicial office. The House Judiciary Committee held a hearing on HJR O in December, but has not scheduled a vote.

The SBM supports HJR O based on a vote by the Representative Assembly on October 8, 2015. The Michigan Freedom Fund also registered support at the December committee hearing. Several groups voiced opposition, including the Michigan Association of Justice, AFSCME, Michigan LiUNA, and AFT Michigan.

To take effect, HJR O requires a two-thirds vote in support in both legislative chambers, and then must be passed by a majority of voters at the next general election.

Michigan Joint Task Force on Jail and Pretrial Incarceration

On January 14, 2020, the Michigan Joint Task Force on Jail and Pretrial Incarceration released 18 recommendations. The Governor charged the bi-partisan task force with finding solutions to diverse challenges facing the criminal justice system and particularly to those facing the state's jails and incarcerated populations. The nearly 50-page report, the result of six separate task force meetings, offers proposed solutions ranging from the reclassification of misdemeanors as civil infractions, to addressing the length and type of pre-trial detention given arrestees. For a more detailed accounting of the task force's report, please see either the executive summary or the full report:

Executive Summary:

<https://bit.ly/2u0UyWs>

(full url: https://courts.michigan.gov/NewsEvents/Documents/final/Executive%20Summary%20of%20Report_Final.pdf)

Full Report

<https://bit.ly/2Nu1ySG>

(full url: <https://courts.michigan.gov/News-Events/Documents/final/Jails%20Task%20Force%20Final%20Report%20and%20Recommendations.pdf>)

The House and Senate are expected to take up legislation implementing the task force's recommendations this calendar year (2020). The SBM will monitor developing legislation to determine the extent to which, if any, the bills are potentially *Keller* permissible.

COURT RULES

ADM 2018-28 – Amendment to Local Court Rule 2.119 of the Court of Claims

The amendment would require a moving party, prior to filing a motion, to seek the concurrence of the opposing party. On July 26, 2019, the Board unanimously supported the rule amendment as it would improve cooperation between parties in Court of Claims proceedings.

On November 20, 2019, the Court adopted the amended rule as originally drafted. The amendment took effect on January 1, 2020.

ADM 2018-36 –Amendment to Rule 3.802 of the Michigan Court Rules

The proposed amendments to MCR 3.802 were intended to make the court rule consistent with MCL 710.51(6), by modifying references to “noncustodial parent” to “parent under MCL 710.51(6)” to allow “stepparent adoption when the petitioning stepparent’s spouse has joint legal custody, rather than requiring sole legal custody.” On September 25, 2019, the Board voted unanimously to support the rule change.

On November 20, 2019, the Court adopted the amendments as published for comment. The amendments took effect on January 1, 2020.

ADM 2019-04 – Amendment of Rule 5.117 of the Michigan Court Rules

As part of its continued support for providing affordable legal service options for low- and moderate-income individuals through, among other things, limited scope representation (LSR), SBM proposed amendments to MCR 5.117 to clarify that LSR is available in civil cases and proceedings in probate court.

On June 19, 2019, the Court published the rule for comment. On November 20, 2019, the Court adopted the rule as proposed by SBM. The rule amendments took effect on January 1, 2020.

ADM 2018-30 – Amendments of Rule 8.115 of the Michigan Court Rules

The amendments would allow individuals’ access to and use of cellular phones and portable electronics in courthouses, subject to certain restrictions and prohibitions on such access and usage. The purposes of the proposed amendments were to: 1) to create consistency across courts with respect to cellular phone and personal electronic usage, and 2) to broaden litigants’ ability to utilize their cell phones and portable electronics to support their cases in court.

On July 26, 2019, the Board voted to support the rule amendments. In its letter to the Court, SBM acknowledged that enforcement may be challenging,” but that “the benefits to the public far outweigh these concerns.” Given the public’s reliance on cellular devices, the proposed rules would, “increase access to justice for all litigants, including self-represented litigants, and will make it easier for other people to use the courts, and participate and witnesses and jurors.”

Fifty individuals submitted written comments to the Court on the rules and numerous individuals commented at the public administrative hearing both for and against the rule proposal. On January 8, 2020,

the Court adopted the proposed rule with minor amendments. The rule will become effective on May 1, 2020.

ADM 2019-02 – Amendments of Rule 9.123 of the Michigan Court Rules

These rule amendments would govern the procedure for attorney reinstatement following a short-term suspension of their license. On September 25, 2019, the Board discussed and voted unanimously to support the rule proposal in concept, subject to modifications. Specifically, the Board supported modifying the rule to, “take further consideration of the timeline, forum, and procedure to reinstatement of licenses after a short-term suspension, including modifying the process to help ensure that suspended attorneys are not punished with an extended suspension simply because the Attorney Discipline Board has raised an objection to the [suspended attorney’s] affidavit.”

On November 20, 2019, the Court adopted amendments to MCR 9.123, adopting amendments proposed by the Attorney Discipline Board, as follows:

Proposed Language	Final Language (additions in bold)
9.123(A) If the administrator files an objection, an order of reinstatement will be issued only after the board makes a determination that the attorney has complied with the suspension order. If the administrator does not file an objection and the board is not otherwise apprised of a basis to conclude that the attorney has failed to comply with the suspension order, the board must promptly issue an order of reinstatement. The order must be filed and served under MCR 9.118(F).	9.123(A) If the administrator files an objection, an order of reinstatement will be issued only after the board if the objection is withdrawn or a hearing panel makes a determination that the attorney has complied with the suspension order. An objection which cannot be resolved without the adjudication of a disputed issue of fact shall be promptly referred to a hearing panel for decision on an expedited basis. If the administrator does not file an objection and the board is not otherwise apprised of a basis to conclude that the attorney has failed to comply with the suspension order, the board must promptly issue an order of reinstatement. The order must be filed and served under MCR 9.118(F).

The final language expands and details the requirements for attorney reinstatement. If an administrator files an objection to an attorney’s compliance with a suspension order, an attorney can be reinstated under one of two initial scenarios: 1) the Discipline Board withdraws an objection to an attorney’s affidavit or 2) the hearing panel determines that a suspended attorney has complied with a suspension order. However, if objections to an attorney’s compliance with a suspension order persist and/or involve disputed issues of fact, the matter will be referred to a hearing panel for a decision on an expedited basis.

Because the amended rule fully adopts the Discipline Board’s suggested language, it may not wholly address the Board’s documented concern that “suspended attorneys [may be] punished with an extended suspension because the Attorney Discipline Board has raised an objection to [an] affidavit.” In addition, SBM’s initial concerns with timeline, forum, and procedural issues may remain.

The rule amendments took effect on January 1, 2020.

ADM 2018-31 – Amendments of Rule 2 of the Rules Concerning the State Bar of Michigan

The proposed rule amendments would require SBM members to provide one or multiple email addresses to the State Bar to fulfill membership requirements.

On September 25, 2019, the Board voted to unanimously support the rule proposal, “with the recommendation that attorneys be required to provide only one e-mail address” to prevent confusion as to where to send electronic service and annual SBM licensing dues.”

On November 1, 2019, the Court adopted amendments to Rule 2 and clarified that attorneys are required to provide a single email addressed “that can be used, among other things, for the annual dues notice and to effectuate electronic service.” The rule amendments took effect on January 1, 2020.

Order

Michigan Supreme Court
Lansing, Michigan

October 23, 2019

Bridget M. McCormack,
Chief Justice

ADM File No. 2018-34

David F. Viviano,
Chief Justice Pro Tem

Proposed Amendment of
Rule 6.425 of the Michigan
Court Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer's Responsibilities.

(1) Appointment of Lawyer and Preparation of Transcript.

(a)-(c) [Unchanged.]

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as

the defendant may file an application for leave to appeal. A denial of counsel must include a statement of reasons and must inform the defendant of the right to seek appellate review.

(e)-(g) [Unchanged.]

(2) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.425 would clarify that criminal defendants whose request for counsel due to indigency are denied are entitled to appeal that denial.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-34. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



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.

October 23, 2019

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk

**Public Policy Position
ADM File 2018-34**

Support

Explanation

The committee voted unanimously (20) to support the proposed amendment to Rule 6.425 as drafted in ADM File 2018-34. The proposed rule clarifies that when criminal defendants request counsel due to indigency, and those requests are denied, such defendants have the right to seek appellate review.

This position is in keeping with the Bar's long history of supporting defendants' rights to counsel and to appellate review.

Position Vote:

Voted For position: 20

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 8

Contact Persons:

Lorray S.C. Brown lorryb@mplp.org

Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2018-34

Explanation

The committee voted unanimously to support the proposed amendment to Rule 6.425 as drafted in ADM File 2018-34. The proposed rule clarifies that when criminal defendants request counsel due to indigency, and those requests are denied, such defendants have the right to seek appellate review.

This position is in keeping with the Bar's long history of supporting defendants' rights to counsel and to appellate review.

Position Vote:

Voted For position: 14

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 7

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2018-34

Support

Explanation

The State Bar of Michigan Appellate Practice Section Council considered this proposed court rule amendment at its November 15, 2019 Meeting. The Council members present voted unanimously in favor of the proposal to amend MCR 6.425(G)(1)(d).

Position Vote:

Voted For position: 16

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 8

Contact Person: Bradley R. Hall

Email: bhall@sado.org

**Public Policy Position
ADM File No. 2018-34**

Support

Position Vote:

Voted For position: 16

Voted against position: 1

Abstained from vote: 2

Did not vote (absent): 6

Contact Person: Christina B. Hines

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Order

Michigan Supreme Court
Lansing, Michigan

October 23, 2019

Bridget M. McCormack,
Chief Justice

ADM File No. 2018-35

David F. Viviano,
Chief Justice Pro Tem

Proposed Amendment of Rule
8.108 of the Michigan Court
Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.108 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Rule 8.108 Court Reporters and Recorders

(A)-(D) [Unchanged.]

(E) ~~Preparing~~Furnishing Transcript. The court reporter or recorder shall ~~prepare~~furnish without delay, in legible English, a transcript of the records taken by him or her (or any part thereof):

(1) to any party on request. The reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request.

(2) on order of the trial court. The court may order the transcript prepared without expense to either party. Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.

(F) Filing Transcript.

- (1) ~~After preparing a transcript upon request of a party or interested person to a case or~~ On order of the trial court, the court reporter or recorder shall promptly file the~~make and file in the clerk's office a transcript of the proceedings~~his or her records, in legible English, of any civil or criminal case (or any part thereof) without expense to either party; the transcript is a part of the records in the case.
- (2) ~~After an official transcript is filed, copies shall be made only from the official transcript filed with the court~~Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.

(G) [Unchanged.]

Staff comment: The proposed amendment of MCR 8.108 would clarify the rule regarding preparation and filing of transcripts including that a court reporter or court recorder shall file their transcripts with a court when produced for a party or for the court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-35. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



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.

October 23, 2019

Clerk

**Public Policy Position
ADM File No. 2018-35**

Support with Amendments

Explanation

Without access to affordable transcripts, parties are unable to pursue appellate litigation. Currently pending before the legislature is HB 4329, which proposes to increase the court reporter fees for transcripts; if passed, the increased costs of transcripts would make appellate review, including circuit court review of Friend of the Court referee decisions, even more inaccessible for low-income individuals.

As proposed by the Court, a court has discretion to order transcripts prepared without expenses, but the rule provides no guidance on how to appropriately exercise that discretion. Because transcript costs are not included in the consistent fee waiver rule recently adopted by the court, the proposed revisions to MCR 8.108 should clarify that a court shall waive transcript and copying costs for indigent litigants who have obtained a fee waiver under MCR 2.002, as follows (recommended changes shown in bold and underline):

(1) to any party on request. The reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request **unless the person is granted a fee waiver pursuant to MCR 2.002.**

(2) on order of the trial court. The court ~~may shall~~ order the transcript prepared **or copies provided** without expense to **either a party if the court has granted a fee waiver for that party pursuant to MCR 2.002.** Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.

Position Vote:

Voted For position: 14

Voted against position: 0

Abstained from vote: 1

Did not vote (due to absence): 13

Contact Person:

Lorray S.C. Brown lorrayb@mplp.org

**Public Policy Position
ADM File 2018-35**

Support with Recommendations

Explanation

The committee appreciates the effort to clarify the rule to explicitly allow courts to order transcripts at the government's expense; however, the committee recommends that the rule be reviewed to address the following concerns:

- MCR 8.108(F)(1) requires the court reporter to file the transcript of the proceeding whenever a party or interested person requests a copy. While many times, transcripts are used for appellate purposes, they are also used for other purposes, including impeaching witnesses and for bankruptcy proceedings; therefore, parties may not want the transcript filed with the court.
- MCR 8.108(F)(2) provides that copies of the transcript must be made from the official transcript. The committee recommends that this rule be revised to make clear that once a party has paid for the transcript that he or she is able to make copies of it. The committee is also unsure whether this rule required parties to go the court reporter for copies or whether they could just make a copy from the transcript on file with the court. The committee recommends that the rule be revised to increase access to transcripts by allowing parties to make affordable copies of transcripts, particularly taking into account the needs of indigent and pro se litigants.

Position Vote:

Voted For position: 19

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 8

Contact Person: Randy J. Wallace

Email: rwallace@olsmanlaw.com

**Public Policy Position
ADM File No. 2018-35**

Support with Recommended Amendments

Explanation

The Committee voted to support the amendment with a recommendation to remove the phrase "filed with the court" at the end of paragraph 8.108(F)(2).

Position Vote:

Voted For position: 20

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 0

Contact Person: Jennifer Johnsen

Email: jenjohnsen@westmichigandivorce.com

From: [Dexter, Melinda](#)
To: [ADMcomment](#)
Subject: Comment Re: ADM File No. 2018-35
Date: Monday, November 25, 2019 9:18:07 AM

ADM File No. 2018-35.

MCR 8.108(E) & (F)(2) are proposed in part to say:

(E) ~~Preparing~~ ~~Furnishing~~ Transcript. The court reporter or recorder shall prepare ~~furnish~~ without delay, in legible English, a transcript of the records taken by him or her (or any part thereof):

(F) (2) ~~After an official transcript is filed, copies shall be made only from the official transcript filed with the court. Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.~~

This amendment is in contrast to the statute that entitles the court reporter/court recorder to demand and receive compensation for their work. This amendment denies the ability of any lawyer or person to obtain a copy of the certified record from the court reporter or recorder. I have attorneys that request the transcript be printed on a 4-to-1 page format. The new court rule requires 1-to-1 page format. In other words, what would previously have been a 1,000-page document is now 4,000 pages. They would like a word index attached to the transcript, which can only be produced by the court reporter. They would like a pdf transcript e-mailed to them. These services aren't provided by the clerk's office. This paragraph is too restricting. I would ask that it be amended to say:

(2) ~~After an official transcript is filed, copies shall be made only from the official transcript filed with the court~~ **or obtained from the certified court reporter/court recorder**. ~~Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.~~

Thank you for your consideration.

Melinda I. Dexter, CSR, RMR, CRR
National Realtime Systems Administrator
Official Court Reporter for Hon. James S. Jamo
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