Agenda
Public Policy Committee
April 17, 2024 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……Joseph P. McGill, Chairperson

A. Reports

1. Approval of January 19, 2024 minutes
2. Public Policy Report

B. Court Rules

1. ADM File No. 2023-34: Proposed Amendment of MCR 3.967

The proposed amendment of MCR 3.967 would align the rule with MCL 712B.15, as amended in 2016, to clarify the applicability of qualified expert witness testimony in a removal hearing involving an Indian child.

Status:	05/01/24 Comment Period Expires.
Referrals:	01/25/24 American Indian Law Committee; Access to Justice Policy Committee; Civil Procedure & Courts Committee; American Indian Law Section; Children's Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; American Indian Law Section.
Liaison:	Lori A. Buiteweg

2. ADM File No. 2023-36: Proposed Amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931

The proposed amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931 would implement 2023 PA 299 and incorporate additional changes from the SADO/MAACS Youth Defense Project regarding requests for and appointment of appellate counsel in cases involving juveniles.

Status:	05/01/24 Comment Period Expires.
Referrals:	01/25/24 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Children's Law Section; Criminal Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section. Comment provided to the Court is included in the materials.
Liaison:	Thomas P. Murray, Jr.

3. ADM File No. 2023-36: Proposed Amendments of MCR 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of MCR 3.907

The proposed amendments would implement the Justice for Kids and Communities legislation and align with recommendations of the Michigan Task Force on Juvenile Justice Reform.

Status:	05/01/24 Comment Period Expires.
Referrals:	01/25/24 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Children's Law Section; Criminal Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section. Comments provided to the Court are included in the materials.
Liaison:	John W. Reiser, III

C. Legislation

1. HB 5393 (Hope) Juveniles: other; default maximum time for a juvenile to complete the terms of a consent calendar case plan; increase to 6 months. Amends sec. 2f, ch. XIIA of 1939 PA 288 (MCL 712A.2f).

Status: 02/13/24 Placed on Order of Third Reading in the House After Being Reported Out of the House Committee on Criminal Justice Without Amendment.

Referrals: 01/25/24 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section.

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

Liaison: Takura N. Nyamfukudza

2. HB 5429 (Morse) Children: services; court-appointed special advocate program; create. Creates new act.

Status: 03/06/24 Referred to Second Reading in the House After Being Reported Out of the House Committee on the Judiciary Without Amendment.

Referrals: 02/09/24 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section; Probate & Estate Planning Section.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section.

Comments provided to the 02/21/24 House Committee on the Judiciary are included in the materials.

Liaison: Suzanne C. Larsen

3. HB 5431 (Andrews) Civil procedure: remedies; wrongful imprisonment compensation act; modify evidence requirements. Amends secs. 2, 4, 5 & 7 of 2016 PA 343 (MCL 691.1752 et seq.).

Status: 03/12/24 Referred to Second Reading in the House After Being Reported Out of the House Committee on Criminal Justice as Substitute H-1.

Referrals: 02/09/24 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

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

Comments provided to the 03/05/24 and 03/12/24 House Committee on Criminal Justice are included in the materials.

Liaison: Valerie R. Newman

4. Incumbency Designation for Judges

HJR O (Green) Elections: judicial; incumbency designation for judges; eliminate. Amends sec. 24, art. VI of the state constitution.

HB 5565 (Green) Elections: judicial; incumbency designation for judges; eliminate. Amends secs. 409b, 409l, 424, 424a, 433, 444, 467b, 467c, 467m, 561 & 696 of 1954 PA 116 (MCL 168.409b et seq.) & repeals sec. 435a of 1954 PA 116 (MCL 168.435a).

Status: 03/13/24 Referred to the House Committee on Government Operations.

Referrals: 03/18/24 Civil Procedure & Courts Committee.

Comments: Civil Procedure & Courts Committee; Family Law Section.

Liaison: Aaron V. Burrell

5. SB 665 (Hoitenga) Courts: district court; magistrate qualifications; modify. Amends secs. 8501 & 8507 of 1961 PA 236 (MCL 600.8501 & 600.8507).

Status:	11/09/23 Referred to Senate Committee on Civil Rights, Judiciary & Public Safety.
Referrals:	11/15/23 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section; Judicial Section.
Comments:	Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Joshua A. Lerner

6. SB 688 (Chang) Juveniles: juvenile justice services; certain information sharing for research purposes in juvenile justice cases; allow. Amends sec. 9 of 1988 PA 13 (MCL 722.829).

Status:	01/11/24 Referred to Senate Committee on Civil Rights, Judiciary & Public Safety.
Referrals:	01/25/24 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Civil Procedure & Courts Committee; Children's Law Section.
Liaison:	Takura N. Nyamfukudza

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 1.9(3) and 3.2(3)

The Committee proposes amending the Reasonable Doubt instructions found in M Crim JI 1.9(3) and 3.2(3) to add the sentence, "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." The amendment was prompted by research showing that the clear-and-convincing standard was considered by the general public to be higher than the beyond-a-reasonable-doubt standard. The Model Jury Instruction Committee proposes the additional sentence to impress upon the jurors the level of certainty required for a criminal conviction. A number of Committee members preferred not to make any change to the instruction, but agreed to publication of the proposal for public consideration. Comments suggesting other wording for the reasonable-doubt instructions are welcome, but the Committee is only considering whether to adopt the change proposed, or wording substantially similar to the proposal. The added language is underlined. There is an extended comment period for this proposal.

2. M Crim JI 20.2 and M Crim JI 20.13

The Committee proposes amending jury instructions M Crim JI 20.2 (Criminal Sexual Conduct in the Second Degree [MCL 750.520c]) and M Crim JI 20.13 (Criminal Sexual Conduct in the Fourth Degree [MCL 750.520e]) to add definitional "sexual contact" language from MCL 750.520a(q). Deletions are in strike-through, and new language is underlined.

3. M Crim JI 40.7 and M Crim JI 40.7a

The Committee proposes two jury instructions, M Crim JI 40.7 (loitering where prostitution is practiced) and M Crim JI 40.7a (loitering where an illegal occupation or business is practiced or conducted) for the "loitering" crimes found in the Disorderly Person statute at MCL 750.167(i) and (j). The instructions are entirely new.

4. M Crim JI 41.3, M Crim JI 41.3a, and M Crim JI 41.3b

The Committee proposes three jury instructions, M Crim JI 41.3 (placing eavesdropping devices), 41.3a (placing eavesdropping devices for a lewd or lascivious purpose), and 41.3b (disseminating images obtained by eavesdropping devices) for the crimes found in an eavesdropping and surveillance statute: MCL 750.539d. These instructions are entirely new.

MINUTES
Public Policy Committee
January 17, 2024 – 12 p.m. to 1:30 p.m.

Committee Members: Lori A. Buiteweg, Aaron V. Burrell, Suzanne C. Larsen, Joshua Lerner, Joseph P. McGill, Thomas P. Murray, Jr., Valerie R. Newman, Takura N. Nyamfukudza, John W. Reiser, III, Judge Cynthia D. Stephens (ret'd), Danielle Walton
SBM Staff: Peter Cunningham, Nathan A. Triplett, Carrie Sharlow
GCSI: Marcia Hune

A. Reports

1. Approval of November 15, 2023 minutes – The minutes were unanimously adopted with one abstention.
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2022-30: Proposed Amendments of MRE 702 and 804

The proposed amendment of MRE 702 would require the proponent of an expert witness's testimony to demonstrate that it is more likely than not that the factors for admission are satisfied and would clarify that it is the expert's opinion that must reflect a reliable application of principles and methods to the facts of the case. The proposed amendment of MRE 804 would require corroborating circumstances of trustworthiness for any statement against interest that exposes a declarant to criminal liability.
The following entities offered comments for consideration: Civil Procedure & Courts Committee.
The committee voted unanimously (10) to support the proposed amendments to MRE 702.
The committee voted unanimously (10) to support the proposed amendments to MRE 804.

2. ADM File No. 2022-45: Proposed Amendment of MCR 9.131

The proposed amendment of MCR 9.131 would require that the Supreme Court review requests for investigations involving allegations of attorney misconduct in instances where the Attorney Grievance Commission (AGC) administrator determines that an appearance of impropriety would arise if the AGC handled the investigation.
The following entities offered comments for consideration: Civil Procedure & Courts Committee.
The committee voted unanimously (10) to support ADM File No. 2022-45.[1]

C. Legislation

1. HB 5236 (Rheingans) Housing: landlord and tenants; form containing summary of tenant's rights; require state court administrative office to provide. Amends 1978 PA 454 (MCL 554.631 - 554.641) by adding sec. 4a.
The following entities offered comments for consideration: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Justice Initiatives Committee.
The committee agreed unanimously 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 (11) to support HB 5236 with the following amendments:
(1) amend Section (1)(c) to read: "Contact information for the statewide self-help website, the statewide legal aid hotline, and the 2-1-1 system telephone number." And,
(2) require landlords to serve the form on tenants with summons and complaint in eviction cases and provide enforcement remedies to tenants if landlords do not comply.

[1] Valerie R. Newman joined the meeting after this discussion and vote.

2. HB 5237 (Dievendorf) Civil procedure: defenses; tenants right to counsel; provide for. Creates new act.
The following entities offered comments for consideration: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Justice Initiatives Committee.
The committee agreed unanimously that the legislation is *Keller* permissible in affecting the functioning of the courts and the availability of legal services to society.
The committee voted 7 to 3 with one abstention to support HB 5237 with the following amendments:
(a) the program should be structured as a statewide program administered by MSHDA and the Michigan State Bar Foundation and coordinated with the current legal services delivery system;
(b) the program should provide informational and educational materials for both landlords and tenants, but the program should not otherwise provide representation for landlords; and
(c) the program should include outreach and education to tenants and tenant-led community groups.

3. HB 5238 (Wilson) Civil procedure: evictions; court records of evictions; require to be expunged.
Amends sec. 8371 of 1961 PA 236 (MCL 600.8371) & adda sec. 5755.
The following entities offered comments for consideration: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Justice Initiatives Committee.
The committee voted unanimously (11) that the legislation is not *Keller* permissible.

4. HB 5326 (Aragona) Courts: district court; magistrate jurisdiction and duties; modify. Amends secs. 5735 & 8511 of 1961 PA 236 (MCL 600.5735 & 600.8511).
The following entities offered comments for consideration: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Member Comment.
The committee agreed that the legislation is *Keller* permissible in affecting the functioning of the courts.
The committee voted unanimously (11) to support HB 5326.

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 12, 2024

Re: Public Policy Update

Electronic Votes on Budgets/Legislation
Circumstances at the State Capitol necessitated that the Board of Commissioners take a number of electronic votes on public policy positions concerning legislation between the January and April Board meetings:

Executive Budget Recommendations for the Michigan Indigent Defense Commission (MIDC) and the Judiciary for Fiscal Year 2024-2025
At its February 22 meeting, the Executive Committee reviewed the Executive Budget recommendations for the Michigan Indigent Defense Commission ("MIDC") and the Judiciary for Fiscal Year 2024-2025. The executive budget was presented by Governor Whitmer at a February 7 joint meeting of the House and Senate Appropriations Committees. The Executive Committee recommended support for both of these budgets and an e-vote was sent to the full Board on February 23. Both motions to support were approved unanimously with a few abstentions. Budget bills have since been introduced – SB 757 (Shink) & HB 5515 (Wilson) for the Judiciary; and SB 764 (Cavanagh) & HB 5514 (Skaggs) for the Department of Licensing & Regulatory Affairs, which administratively houses the MIDC. SBM staff are actively lobbying for legislative adoption of the Executive Budget recommendations. Subcommittee reports are expected to be approved as soon as this week.

Trial Court Funding
Additionally, there has been movement on the long-awaited Trial Court Funding issue. Commissioners may recall the 2014 case of *People v Cunningham* where the Michigan Supreme Court unanimously held that trial courts may only impose court costs on defendants when specifically authorized by statute.[1] The Legislature created the Trial Court Funding Commission to make recommendations regarding reform to Michigan's trial court funding system. The Commission's final report was published in 2019. Unable or unwilling to implement a long-term funding fix, the Legislature has extended the sunset on the current statutory authorization to impose costs four times—through May 1, 2024. The Board of Commissioners has regularly supported each sunset extension, as well as the work of the Trial Court Funding Commission; however, with the most recent extension (2022), the Board expressed significant frustration with the Legislature's lack of progress implementing the Commission's recommendations.

HB 5392 was introduced in early January and once again extends the sunset, this time to December 31, 2026. That bill is tie-barred with HB 5534, which directs the State Court Administrative Office ("SCAO") to undertake the budgetary analysis necessary to create the Court Operations Resource

[1] 496 Mich 145; 852 NW2d 118 (2014).

Report recommended by the Trial Court Funding Commission by May 1, 2026. As the current sunset expires May 1, 2024, these bills must move quickly through the Legislature, again necessitating an e-vote by the Board. The Public Policy Committee reviewed HB 5392 and HB 5534 on March 7 and voted to recommend that the Board support the legislation. An e-vote was sent on March 20. Both bills were unanimously supported with one abstention.

When the Board of Commissioners meets on Friday, April 19, there will be four session days before the current deadline of May 1, 2024. It is imperative that the Legislature extend the sunset to avoid a significant disruption in trial court funding and operations. Staff will keep the Board up-to-date on this important issue.

Staff anticipates that an additional electronic vote will be required before the June 14 Board meeting due to the anticipated introduction of the Judicial Protection Act. When Chief Justice Clement presented before the Judiciary Appropriations Subcommittees, judicial security was one of her areas of focus. She noted that in 2021 the U.S. Marshals Service reported 4,511 threats and inappropriate communications against federal judges. The Chief Justice reported that Michigan has similarly faced a rising tide of threats against judicial officers. The FY 2025 Judiciary Budget request included $475,000 "to protect judges' personal information, increasing their physical safety." These findings are intended in part to support the implementation of the Judicial Protection Act. Further information will be distributed when available.

Court Rule Amendments

ADM File No. 2022-42: Proposed Amendments of MCR 2.508 and 4.002 and **ADM File No. 2022-54: Proposed Amendment of MCJC Canon 7** were reviewed by the Executive Committee at its February 22, 2024 meeting. As permitted by SBM's Bylaw's and owing to the public comment deadlines for these rules, the Executive Committee voted to support both administrative files.

Summary of Legislative Activity

Since the beginning of the 2023-2024 legislative session, the Board has taken positions on 70 bills – 22 in the Senate, and 48 in the House. 16 of these positions were repeat legislation from earlier sessions. Of the 70 bills, 19 have not advanced from their initial introduction, and 20 have been signed by the Governor.

Order

Michigan Supreme Court
Lansing, Michigan

January 24, 2024

ADM File No. 2023-34

Proposed Amendment of
Rule 3.967 of the Michigan
Court Rules

Elizabeth T. Clement,
Chief Justice

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

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.967 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 3.967 Removal Hearing for Indian Child

(A)-(C) [Unchanged.]

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence~~, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe,~~ that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. The evidence

must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

(E)-(F) [Unchanged.]

Staff Comment (ADM File No. 2023-34): The proposed amendment of MCR 3.967 would align the rule with MCL 712B.15, as amended in 2016, to clarify the applicability of qualified expert witness testimony in a removal hearing involving an Indian child.

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 May 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-34. 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.

January 24, 2024

Clerk

Public Policy Position
ADM File No. 2023-34: Proposed Amendment of MCR 3.967

Support

Explanation

The Committee voted unanimously to support the proposed amendment to MCR 3.967 in order to clarify the treatment of qualified expert witness testimony in a removal hearing involving an Indian child and align the court rule more closely with applicable statutory provisions.

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. 2023-34: Proposed Amendment of MCR 3.967

Support

Explanation
The Committee voted unanimously to support the proposed amendment to MCR 3.967 in order to clarify the treatment of qualified expert witness testimony in a removal hearing involving an Indian child and align the court rule more closely with applicable statutory provisions.

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

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
ADM File No. 2023-34: Proposed Amendment of MCR 3.967

Support

Explanation
The proposed amendment of MCR 3.967 would align the rule with MCL 712B.15, as amended in 2016, to clarify the applicability of qualified expert witness testimony in a removal hearing involving an Indian child. This is an amendment many tribes have been advocating in favor of for a long time and this section supports this effort.

Position Vote:
Voted for position: 7
Voted against position: 1
Abstained from vote: 1
Did not vote: 1

Contact Person: Stacey L. Rock
Email: stacey.rock@pokagonband-nsn.gov

Order

Michigan Supreme Court
Lansing, Michigan

January 24, 2024

Elizabeth T. Clement,
Chief Justice

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

ADM File No. 2023-36

Proposed Amendments of
Rules 3.937, 3.950, 3.955,
3.993, and 6.931 of the
Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.937, 3.950, 3.955, 3.993, and 6.931 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 3.937 Advice of Appellate Rights

(A) At the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody, the court must advise the juvenile on the record that:

(1)-(2) [Unchanged.]

(3) A request for the appointment of an appellate attorney must be made

(a) within 21 days after notice of the order is given or an order is entered denying a timely-filed postjudgment motion, if the juvenile wants to preserve any appeal by right authorized by these rules; or

(b) within 6 months of the entry of the order to be appealed.

(B)-(C) [Unchanged.]

Rule 3.950 Waiver of Jurisdiction

(A)-(D) [Unchanged.]

(E) Grant of Waiver Motion.

(1) If the court determines that it is in the best interests of the juvenile and public to waive jurisdiction over the juvenile, the court must:

(a)-(b) [Unchanged.]

(c) Advise the juvenile, orally or in writing, that

(i)-(ii) [Unchanged.]

(iii) if the juvenile is financially unable to retain an attorney, the court will appoint one to represent the juvenile on appeal in accordance with MCR 3.993(D)(5).

(d) [Unchanged.]

(2) [Unchanged.]

(F)-(G) [Unchanged.]

Rule 3.955 Sentencing or Disposition in Designated Cases

(A)-(B) [Unchanged.]

(C) Sentencing. If the court determines that the juvenile should be sentenced as an adult, either initially or following a delayed imposition of sentence, the sentencing hearing shall be held in accordance with the procedures set forth in MCR 6.425, including the procedures of MCR 6.425(G) for appointing appellate counsel.

(D) [Unchanged.]

(E) Disposition Hearing. If the court does not determine that the juvenile should be sentenced as an adult, the court shall hold a dispositional hearing and comply with the procedures set forth in MCR 3.943. Requests for and appointment of appellate counsel are subject to the procedures in MCR 3.993(D).

Rule 3.993 Appeals

(A) The following orders are appealable to the Court of Appeals by right:

(1)-(3) [Unchanged.]

(4) an order granting a motion to waive jurisdiction as provided in MCR 3.950(E)(1)(c),

(4)-(7) [Renumbered (5)-(8) but otherwise unchanged.]

In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts.

(B)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) To preserve an appeal by right from an order listed in subrule (A), a~~A~~ request for appointment of appellate counsel must be made within 21 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2) Except as provided in subrule (C)(3), i~~I~~f a request for appointment of appellate counsel is ~~timely~~ filed within 6 months of entry of the order to be appealed and the court finds that the respondent is financially unable to retain~~provide~~ an attorney, the court must,~~shall~~

(a) in child protective proceedings, appoint an attorney within 14 days after the respondent's request is filed.

(b) in all other proceedings subject to this rule, appoint an attorney as provided in subrule (D)(5).

The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(3) All requests for the appointment of appellate counsel must be granted or denied on forms approved by the State Court Administrative Office. If the order being appealed is appealable by right and the request for appointment of appellate counsel was filed within the time provided in subrule (D)(1), t~~T~~he order described in subrule (D)(2) must be entered on a form ~~approved by the State Court Administrator's Office,~~ entitled "Claim of Appeal and Order Appointing Counsel.~~,~~" ~~and~~

(4) Tthe court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(5) Proceedings Subject to Appointment of Appellate Counsel via Michigan Appellate Assigned Counsel System. This subrule is not applicable to child protective proceedings.

(a) A request for the appointment of appellate counsel in a proceeding subject to this subrule (D)(5) must be deemed filed on the date it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier.

(b) Within 7 days after receiving a juvenile's request for a lawyer, or within 7 days after the disposition of a postjudgment motion if one is filed, the trial court must submit the request, the order to be appealed, the register of actions, and any additional requested information to MAACS under procedures approved by the Appellate Defender Commission for the preparation of an appropriate order granting or denying the request. The court must notify MAACS if it intends to deny the request.

(c) Within 7 days after receiving a request and related information from the trial court, MAACS must provide the court with a proposed order appointing appellate counsel or denying the appointment of appellate counsel. A proposed appointment order must name the State Appellate Defender Office (SADO) or an approved private attorney who is willing to accept an appointment for the appeal.

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the juvenile is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 6 months. An order denying a request for the appointment of appellate counsel must include a statement of reasons and must inform the juvenile that the order denying the request may

be appealed by filing an application for leave to appeal in the Court of Appeals under MCR 7.205.

(e) The trial court must serve MAACS with a copy of its order granting or denying a request for a lawyer. Unless MAACS has agreed to provide the order to any of the following, the trial court must also serve a copy of its order on the juvenile, the juvenile's parents, the juvenile's attorney, the petitioner, and, if the order includes transcripts, the court reporter(s)/recorder(s).

(E) [Unchanged.]

Rule 6.931 Juvenile Sentencing Hearing

(A)-(D) [Unchanged.]

(E) Juvenile Sentencing Hearing Procedure.

(1)-(5) [Unchanged.]

(6) Appellate Rights and Appointment of Appellate Counsel. Following the court's decision at the juvenile sentencing hearing, it must advise the juvenile as provided in MCR 6.425(F). Requests for and appointment of appellate counsel are subject to the procedures in MCR 6.425(G).

(F) [Unchanged.]

Staff Comment (ADM File No. 2023-36): The proposed amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931 would implement 2023 PA 299 and incorporate additional changes from the SADO/MAACS Youth Defense Project regarding requests for and appointment of appellate counsel in cases involving juveniles.

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 May 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When

submitting a comment, please refer to ADM File No. 2023-36. 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.

January 24, 2024

Clerk

Public Policy Position
ADM File No. 2023-36: Proposed Amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931

Support

Explanation
The Committee voted unanimously to support ADM File No. 2023-36.

The primary purpose of the proposed amendments is to create a procedure for youth to be assigned appellate counsel in juvenile delinquency, traditional waiver, and designation proceedings which match the procedure used for felony criminal appeals. The amendments would further clarify when that procedure is followed in juvenile court proceedings. The amendments also separate the procedure for assigning appellate counsel in delinquency proceedings from the procedure for child protective proceedings. In large part, these amendments are necessary to update the Court Rules to align with the recent expansion of the statutory appellate indigent defense mandate to include juveniles.

One component of the proposal which is not directly related to the recently enacted legislation is the addition of MCR 3.937(A)(3)(b) and amendment to MCR 3.993(D)(2) extending the time for requesting appellate counsel up to 6 months. Currently, juvenile court judges have no obligation to appoint counsel if the request is made outside of the 21 days for a claim of appeal or if the request is made on a case for which there is no claim of appeal. This has allowed courts to deny appellate counsel to indigent youth and parents. Extending the request deadline to 6 months (except when parental rights have been terminated) brings the juvenile court procedures in line with the felony criminal procedures of MCR 6.425(H).

The Committee believes that both the extension of time for requesting counsel and the amendments establishing the new procedure for appointing appellate counsel for youth are positive changes which will benefit children and indigent parents by making it less likely that they are denied appellate counsel while providing a more uniform system of assigning counsel in juvenile delinquencies. Additionally, by utilizing the MAACS system for assigning appellate counsel, attorneys who receive these assignments will receive greater compensation for their work. This will improve both the quantity and quality of attorneys who accept delinquency appellate assignments, which will in turn result in more positive results for the youth they represent.

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. 2023-36: Proposed Amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931

Support

Explanation

The Committee voted unanimously to support ADM File No. 2023-36. The Committee believed that the proposed amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931 appropriately update the Court Rules to align with the recent expansion of the statutory appellate indigent defense mandate to include juveniles.

Position Vote:

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

Contact Persons:

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

Public Policy Position
ADM File No. 2023-36: Proposed Amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931

Support with Recommended Amendments

Explanation:
The Children's Law Section unanimously supports ADM File No 2023-36 implementing the amendments to the Appellate Defender Act and limiting the discretion of trial courts to deny a request for appellate counsel so long as the request is made while an appeal is still available.

Position Vote:
Voted for position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Person: Joshua Pease
Email: jpease@sado.org

SADO

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(Phone) 313.256.9833 (Client calls) 313.256.9822
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Jonathan Sacks
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March 11, 2024

Justices of the Michigan Supreme Court
Hall of Justice
P.O. Box 30052
Lansing, MI 48909

ADM File No. 2023-36

Honorable Justices,

We write in support of the proposed changes to MCRs 3.937, 3.950, 3.955, 3.993, and 6.931. The State Appellate Defender Office (SADO) supports these new rules implementing the amendments to the Appellate Defender Act and expanding opportunities for children to request the appointment of appellate counsel.

Public Act 299 of 2023 includes the first substantive amendments to the Appellate Defender Act since it was originally enacted in the 1970s. As amended, youth defense is integrated into the mandate of SADO and the Michigan Appellate Assigned Counsel System (MAACS). Starting October 1, 2024, all requests for the appointment of appellate counsel in delinquency, designation, and waiver proceedings in juvenile court will go MAACS for the assignment of counsel, and SADO attorneys will represent some youth on such appeals. The creation of a uniform system for assigning counsel is great progress for youth wanting to appeal decisions of the trial courts.

The main part of ADM File No 2023-36 is the addition of MCR 3.993(D)(5) and references to it. Subrule (D)(5) creates a procedure for assigning appellate counsel for youth which is nearly identical to the procedure for assigning counsel in felony appeals for adults under MCR 6.425(G). By adopting the same procedure for youth appeals, the assignment process will be efficient and reliable, rather than deferring to the hodgepodge of systems throughout the state which are currently utilized.

This ADM includes one other important proposal which was not part of the Appellate Defender Act amendments. Under MCR 3.993(D)(2), a court must appoint appellate counsel for an indigent respondent (in both delinquency and child protective proceedings) if the respondent requests appellate counsel within 6 months of entry of the order to be appealed. This follows the adoption of MCR 6.425(H), which requires

that courts appoint counsel if the request for counsel form is received within 6 months after sentencing.

In addition to the new procedure for appointing counsel in delinquency proceedings, we support extending the time for requesting appellate counsel to 6 months to match the criminal rules. Currently, youth are only guaranteed counsel if they file a request within 21 days of the order, and then only if the order is one which is appealable by right. Trial courts have discretion to deny a request for appellate counsel for any appeal which is an application or delayed application for leave to appeal. Making the change to require appointment of counsel so long as an appeal is available will help protect youth by limiting the discretion of courts to deny requests for counsel and by ensuring that young people have access to counsel even if the appeal is an application and not by right.

Accordingly, SADO supports ADM File No 2023-36 and urges this Court to adopt it in full. We thank you for your consideration.

Respectfully,

Joshua Pease
Youth Defense Project Director

SADO/MAACS Court Rules and Legislation Committee

Garrett Burton, Assistant Defender
Dominica Convertino, Assistant Defender
Oliver Edmond, MAACS Accountant
Stephanie Farkas, MAACS Litigation Support Counsel
Taylor Fellows, Assistant Defender
Tomiko Gumbleton, Mitigation Specialist
Brad Hall, MAACS Administrator
Tabitha Harris, Assistant Defender
Steven Helton, Assistant Defender
Emma Lawton, Assistant Defender
Katherine Marcuz, Managing Attorney
Jacqueline McCann, Assistant Defender
Maya Menlo, Assistant Defender
Matt Monahan, Assistant Defender
Emily New, Assistant Defender
Jonathan Sacks, Director
Claire Ward, Assistant Defender
Jessica Zimbelman, Managing Attorney

State of Michigan

Court of Appeals

April 12, 2024

Larry Royster
Clerk of the Michigan Supreme Court
925 W. Ottawa Street
Lansing, MI 48915

Dear Clerk Royster:

On behalf of the Court of Appeals, following consideration by the Court's Rules Committee, I offer the following comment regarding ADM 2023-36. The Court supports the proposed amendments of MCR 3.937, 3.950, 3.955, 3.993, and 6.931, which will provide for and expand appellate rights for youth in Michigan. We note that the proposed amendments would provide similar rights to representation as have historically been available in adult criminal proceedings. As such, this Court is in favor of the Supreme Court's proposal. Thank you for your consideration in this matter.

Sincerely,

Hon. Michael F. Gadola
Chief Judge
Michigan Court of Appeals

Order

Michigan Supreme Court
Lansing, Michigan

January 24, 2024

Elizabeth T. Clement,
Chief Justice

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

ADM File No. 2023-36

Proposed Amendments of Rules 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of Rule 3.907 of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering amendments of Rules 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and a proposed addition of Rule 3.907 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 3.901 Applicability of Rules

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901-3.906, 3.911-3.930, and 3.991-3.993 apply to delinquency proceedings and child protective proceedings;

(2) MCR 3.907 applies only to delinquency proceedings and designated proceedings;

(2)-(5) [Renumbered (3)-(6) but otherwise unchanged.]

[NEW] Rule 3.907 Screening Tools and Risk and Needs Assessments

(A) General. The court must conduct and use screening tools and risk and needs

assessments in accordance with applicable law and the guidelines established by the State Court Administrative Office.

(B) Risk Screening Tool. A court or court intake worker must use a validated risk screening tool adopted by their county. The court or court intake worker, as applicable, must consider the results, along with the results of the mental health screening tool and the best interests of the juvenile and public when deciding whether to:

(1) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*; or

(2) proceed on the consent calendar as provided in MCR 3.932(C) or place the matter on the formal calendar as provided in MCR 3.932(D).

(C) Mental Health Screening Tool. A court or court intake worker must utilize a validated mental health screening tool adopted by their county. The court or court intake worker, as applicable, must consider the results, along with the risk screening tool and the best interests of the juvenile and public when deciding whether to:

(1) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*; or

(2) proceed on the consent calendar as provided in MCR 3.932(C) or place the matter on the formal calendar as provided in MCR 3.932(D).

(D) Detention Screening Tool. An individual or agency designated by the court must use a detention screening tool on a juvenile, and the court must consider the results of the tool before a juvenile may be detained in a secure facility pending hearing. A new tool must be used and considered before each placement in a secure facility.

The court must share the results of the detention screening tool with all parties at least 7 days before a detention hearing as provided in MCR 3.922(B)(4).

(E) Risk and Needs Assessment. Before disposition and for each juvenile, the court must order a qualified individual or agency to conduct a validated risk and needs assessment.

(1) Individual's/Agency's Use of Results. The individual or agency conducting an assessment under this subrule must use the results of the assessment to inform a dispositional recommendation that must be filed with the court. The individual or agency must consider all of the following in making its dispositional recommendation:

(a) The least restrictive setting possible.

(b) Public safety.

(c) Victim interests.

(d) Rehabilitation of the juvenile.

(e) Improved juvenile outcomes, including, but not limited to, educational advancement.

(2) Reporting. The results of the risk and needs assessment along with a written dispositional recommendation must be filed with the court and provided to the juvenile, juvenile's attorney, and prosecuting attorney no less than 7 days before the dispositional hearing as provided in MCR 3.922(B)(4). The written recommendation must include all of the following:

(a) Overall risk score.

(b) Type of supervision.

(c) Level of supervision.

(d) Length of supervision.

(e) Specific terms and conditions, including, but not limited to, frequency of reviews and requirements for early termination of supervision.

(3) Court's Consideration of Results. The court must consider the results of the assessment when making a dispositional decision regarding a juvenile, including, but not limited to, whether to place a juvenile

(a) under supervision, including the length, level, and conditions of supervision;

(b) on probation; or

(c) in out-of-home placement.

(4) Reassessment. The court must order that a new risk and needs assessment for the juvenile be conducted and used as provided in this subrule (E) if any of the following conditions occur:

(a) Six months have passed since the juvenile's last risk and needs assessment.

(b) The juvenile has experienced a major life event.

(c) There is a major change in the juvenile's proceedings.

Rule 3.915 Assistance of Attorney

(A)-(D) [Unchanged.]

(E) Costs. In a child protective proceeding, w~~W~~hen an attorney is appointed for a party under this rule, the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party after a determination of ability to pay, which order may be enforced as provided by law.

Rule 3.916 Guardian Ad Litem

(A)-(C) [Unchanged.]

(D) Costs. In a child protective proceeding, t~~T~~he court may assess the cost of providing a guardian ad litem against the party or a person responsible for the support of the party after a determination of ability to pay, and may enforce the order of reimbursement as provided by law.

Rule 3.922 Pretrial Procedures in Delinquency and Child Protection Proceedings

(A) [Unchanged.]

(B) Discovery and Disclosure in Delinquency Matters.

(1)-(3) [Unchanged.]

(4) At delinquency dispositions, reviews, designation hearings, hearings on alleged violation of court orders or probation, and detention hearings, the following must~~shall~~ be provided to the respondent, respondent's counsel, and the prosecuting attorney no less than ~~seven (~~7~~)~~ days before the hearing:

(a) detention screening results, risk and needs assessments results, other assessments, and evaluations to be considered by the court during the hearing;

(b)-(c) [Unchanged.]

(5) [Unchanged.]

(C)-(F) [Unchanged.]

Rule 3.932 Summary Initial Proceedings

(A) Preliminary Inquiry. When a petition is not accompanied by a request for detention of the juvenile, the court may conduct a preliminary inquiry. Except in cases involving offenses enumerated in the Crime Victim's Rights Act, MCL 780.781(1)(g), the preliminary inquiry need not be conducted on the record. After completion and consideration of the results of the risk screening tool and mental health screening tool pursuant to MCR 3.907, t~~T~~he court may, in the interest of the juvenile and the public:

(1)-(5) [Unchanged.]

(B) [Unchanged.]

(C) Consent Calendar.

(1) [Unchanged.]

(2) A case must~~shall~~ not be placed on the consent calendar unless all of the following apply:

(a) ~~t~~The juvenile and the parent, guardian, or legal custodian and the prosecutor, agree to have the case placed on the consent calendar. A case involving the alleged commission of an offense as that term is defined in section 31 of the Crime Victim's Rights Act, MCL 780.781 *et seq*., must~~shall~~ only be placed on the consent calendar upon compliance with procedures set forth in MCL 780.786b. The court must not consider restitution when determining if the case should be placed on the consent calendar under MCL 712A.2f.

(b) The court considers the results of the risk screening tool and mental health screening tool conducted on the juvenile pursuant to MCR 3.907.

(3)-(4) [Unchanged.]

(5) Conference. After placing a matter on the consent calendar, the court mustshall conduct a consent calendar case conference with the juvenile, the juvenile's attorney, if any, and the juvenile's parent, guardian, or legal custodian. The prosecutor and victim may, but need not, be present. At the conference, the court mustshall discuss the allegations with the juvenile and issue a written consent calendar case plan in accordance with MCL 712A.2f(97). The period for a juvenile to complete the terms of a consent calendar must not exceed 6 months, unless the court determines that a longer period is needed for the juvenile to complete a specific treatment program and includes this determination as part of the consent calendar case record.

(6)-(7) [Unchanged.]

(8) Access to Consent Calendar Case Records. Records of consent calendar proceedings mustshall be nonpublic. Access to consent calendar case records is governed by MCL 712A.2f(75).

(9)-(11) [Unchanged.]

(D) [Unchanged.]

Rule 3.933 Acquiring Physical Control of Juvenile

(A) [Unchanged.]

(B) Custody With Court Order. When a petition is presented to the court, and probable cause exists to believe that a juvenile has committed an offense, the court may issue an order to apprehend the juvenile. The order may include authorization to

(1)-(2) [Unchanged.]

However, a juvenile may not be detained in a secure facility pending hearing unless the court has considered the results of a detention screening tool conducted on the juvenile under MCR 3.907.

(C)-(D) [Unchanged.]

Rule 3.935 Preliminary Hearing

(A) [Unchanged.]

(B) Procedure.

(1)-(2) [Unchanged.]

(3) After considering the results of a juvenile's risk screening tool and mental health screening tool, t~~T~~he court must~~shall~~ determine whether the petition should be dismissed, whether the matter should be referred to alternate services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq*., whether the matter should be heard on the consent calendar as provided by MCR 3.932(C), or whether to continue the preliminary hearing.

(4)-(8) [Unchanged.]

(C) Determination Whether to Release or Detain.

(1) Factors. In determining whether the juvenile is to be released, with or without conditions, or detained, the court must~~shall~~ consider the following factors:

(a)-(f) [Unchanged.]

(g) the court's ability to supervise the juvenile if placed with a parent or relative,~~ and~~

(h) the results of a detention screening tool, and

(h) [Relettered (i) but otherwise unchanged.]

(2) [Unchanged.]

(D) Detention.

(1) Conditions for Detention. A juvenile may be ordered detained or continued in detention if the court finds probable cause to believe the juvenile committed the offense, the results of the detention screening tool have been considered pursuant to MCR 3.907, and that one or more of the following circumstances are present:

(a)-(g) [Unchanged.]

(2)-(4) [Unchanged.]

(E) Release; Conditions.

(1) [Unchanged.]

(2) Violation of Conditions of Release. If a juvenile is alleged to have violated the conditions set by the court and the court has consulted the results of the detention screening tool as provided under MCR 3.907, the court may order the juvenile apprehended and detained immediately. The court may then modify the conditions or revoke the juvenile's release status after providing the juvenile an opportunity to be heard on the issue of the violation of conditions of release.

(F) Bail. In addition to any other conditions of release, the court may require a parent, guardian, or legal custodian to post bail.

(1)-(3) [Unchanged.]

(4) Return of Bail. If the conditions of bail are met, the court mustshall discharge any surety.

(a) If disposition imposes restitutionreimbursement or costs, the bail money posted by the parent must first be applied to the amount of restitutionreimbursement and costs, and the balance, if any, returned.

(b) [Unchanged.]

(5) Forfeiture. If the conditions of bail are not met, the court may issue a writ for the apprehension of the juvenile and enter an order declaring the bail money, if any, forfeited.

(a) [Unchanged.]

(b) If the juvenile does not appear and surrender to the court within 28 days from the forfeiture date, or does not within the period satisfy the court that the juvenile is not at fault, the court may enter judgment against the parent and surety, if any, for the entire amount of the bail and, when allowed, costs of the court proceedings.

Rule 3.943 Dispositional Hearing

(A)-(D) [Unchanged.]

(E) Dispositions.

(1) If the juvenile has been found to have committed an offense and the court has considered the results of a risk and needs assessment pursuant to MCR

3.907, the court may enter an order of disposition as provided by MCL 712A.18.

(2) In making second and subsequent dispositions in delinquency cases, the court must consider imposing increasingly severe sanctions, which may include imposing additional conditions of probation; extending the term of probation; ~~imposing additional costs;~~ ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court. Waiver of jurisdiction to adult criminal court, either by authorization of a warrant or by judicial waiver, is not considered a sanction for the purpose of this rule.

(3)-(7) [Unchanged.]

(F) [Unchanged.]

Rule 3.944 Probation Violation

(A) [Unchanged.]

(B) Detention Hearing; Procedure. At the detention hearing:

(1)-(5) [Unchanged.]

(6) The court must consider the results of a detention screening tool in accordance with MCR 3.907.

(C)-(D) [Unchanged.]

(E) Disposition of Probation Violation; Reporting.

(1) [Unchanged.]

(2) If, after hearing, the court finds that the juvenile has violated a court order under MCL 712A.2(a)(2) to (4), ~~and~~ the court may order that the juvenile ~~is ordered to~~ be placed in a secure facility if it has considered the results of a detention screening tool in accordance with MCR 3.907.~~,~~ An~~the~~ order requiring the juvenile to be placed in a secure facility must~~shall~~ include all of the following individualized findings by the court:

(a)-(e) [Unchanged.]

(3) [Unchanged.]

(F) Failure to Pay Restitution~~Determination of Ability to Pay~~. A juvenile ~~and/or parent~~ must~~shall~~ not be detained or incarcerated solely because of nonpayment of restitution. If the juvenile~~for the nonpayment of court ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent~~ has the resources to pay and has not made a good-faith effort to pay restitution, the court may revoke or alter the terms and conditions of probation as provided in MCL 712A.30~~do so~~.

Rule 3.950 Waiver of Jurisdiction

(A)-(C) [Unchanged.]

(D) Hearing Procedure. The waiver hearing consists of two phases. Notice of the date, time, and place of the hearings may be given either on the record directly to the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual.

(1) [Unchanged.]

(2) Second Phase. If the court finds the requisite probable cause at the first-phase hearing, or if there is no hearing pursuant to subrule (D)(1)(c), the second-phase hearing must~~shall~~ be held to determine whether the interests of the juvenile and the public would best be served by granting the motion. However, if the juvenile has been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or 600.606, the court must~~shall~~ waive jurisdiction of the juvenile to the court of general criminal jurisdiction without holding the second-phase hearing.

(a)-(c) [Unchanged.]

(d) The court, in determining whether to waive the juvenile to the court having general criminal jurisdiction, must~~shall~~ consider and make findings on the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria:

(i) the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines~~,~~ and the use of a firearm or other dangerous weapon~~, and the effect on any victim~~;

(ii) [Unchanged.]

(iii) the juvenile's prior record of delinquency that would be a crime if committed by an adult~~including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior~~;

(iv) the juvenile's programming history, including, but not limited to, any out-of-home placement or treatment and the juvenile's past willingness to participate meaningfully in available programming;

(v) the adequacy of the ~~punishment or~~ programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and the juvenile's amenability to treatment;

(vi) the dispositional options available for the juvenile;~~.~~

(vii) the juvenile's developmental maturity, emotional health, and mental health;

(viii) if the juvenile is a member of a federally-recognized Indian tribe, culturally honoring traditional values of the juvenile's tribe; and

(ix) the impact on any victim.

(e) [Unchanged.]

(E)-(G) [Unchanged.]

Rule 3.952 Designation Hearing

(A)-(B) [Unchanged.]

(C) Hearing Procedure.

(1)-(2) [Unchanged.]

(3) Factors to be Considered. In determining whether to designate the case for trial in the same manner as an adult, the court must consider all the following

factors, giving greater weight to the seriousness of the alleged offense and the juvenile's prior delinquency record than to the other factors:

(a) the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines~~,~~ and the use of a firearm or other dangerous weapon~~, and the effect on any victim~~;

(b) [Unchanged.]

(c) the juvenile's prior record of delinquency that would be a crime if committed by an adult~~, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior~~;

(d) the juvenile's programming history, including, but not limited to, any out-of-home placement or treatment, and the juvenile's past willingness to participate meaningfully in available programming;

(e) the adequacy of the ~~punishment or~~ programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and the juvenile's amenability to treatment~~; and~~

(f) the dispositional options available for the juvenile~~.~~;

(g) the juvenile's developmental maturity, emotional health, and mental health;

(h) if the juvenile is a member of a federally-recognized Indian tribe, culturally honoring traditional values of the juvenile's tribe; and

(i) the impact on any victim.

(D)-(E) [Unchanged.]

Rule 3.955 Sentencing or Disposition in Designated Cases

(A) [Unchanged.]

(B) Burden of Proof. After the court has considered the results of the risk and needs assessment pursuant to MCR 3.907, t~~T~~he court shall enter an order of disposition unless the court determines that the best interests of the public would be served by

sentencing the juvenile as an adult. The prosecuting attorney has the burden of proving by a preponderance of the evidence that, on the basis of the criteria in subrule (A), it would be in the best interests of the public to sentence the juvenile as an adult.

(C)-(E) [Unchanged.]

Rule 3.977 Termination of Parental Rights

(A) General.

(1) [Unchanged.]

(2) Parental rights of the respondent over the child may not be terminated unless termination was requested in an original, amended, or supplemental petition by:

(a)-(d) [Unchanged.]

(e) the state child~~ren's~~ advocate~~ombudsman~~, or

(f) [Unchanged.]

(3) [Unchanged.]

(B)-(K) [Unchanged.]

Rule 6.931 Juvenile Sentencing Hearing

(A)-(E) [Unchanged.]

(F) Postjudgment Procedure; Juvenile Probation and Commitment to State Wardship. If the court retains jurisdiction over the juvenile, places the juvenile on juvenile probation, and commits the juvenile to state wardship, the court must~~shall~~ comply with subrules (1)-(10~~1~~):

~~(1) The court shall enter a judgment that includes a provision for reimbursement by the juvenile or those responsible for the juvenile's support, or both, for the cost of care and services pursuant to MCL 769.1(7). An order assessing such cost against a person responsible for the support of the juvenile shall not be binding on the person, unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first class mail to the person's last known address.~~

(2)-(11) [Renumbered (1)-(10) but otherwise unchanged.]

Staff Comment (ADM File No. 2023-36): The proposed amendments would implement the Justice for Kids and Communities legislation and align with recommendations of the Michigan Task Force on Juvenile Justice Reform.

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 May 1, 2024 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-36. 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.

January 24, 2024

Clerk

Public Policy Position
ADM File No. 2023-36: Proposed Amendments of MCR 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of MCR 3.907

Support with Recommended Amendments

Explanation

The Committee voted unanimously (20) to support ADM File No. 2023-36 with the additional amendment proposed by the Children's Law Section adding MCR 3.907(F) as follows: "Any statements a juvenile makes as part of a screening tool or risk and needs assessment under this Rule must not be admitted into evidence against the juvenile at any adjudication hearing." Variations of this proposed language were used (with SBM's support) in the bills in the Justice for Kids and Communities bill package addressing various assessment/screening tool, and the Committee agrees with the Children's Law Section that it should be integrated into the court rules as well.

In addition, the Committee voted 18 to 1 with one abstention to recommend that the State Bar work with the Legislature to amend MCL 769.1(3) by matching the criteria for automatic waivers with those for traditional waiver and designation. Until the recent statutory amendments, the criteria the court must consider was identical at all three proceedings, and the Committee believes it should remain so by amending MCL 769.1(3) so that the automatic waiver criteria again match the traditional waiver and designation criteria.

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. 2023-36: Proposed Amendments of MCR 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of MCR 3.907

Support with Amendment

Explanation

The Committee voted unanimously to support ADM File No. 2023-36. The Committee believed that the proposed amendments of MCR 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and proposed addition of MCR 3.907 appropriately update the Court Rules to align with legislation recently passed by the Legislature as part of the Justice for Kids and Communities bill package, based on the recommendations of the Michigan Task Force on Juvenile Justice Reform. The Community did recommend that MCR 3.922 be further amended to address their concern that requiring detention screening results seven days prior to a detention hearing would unnecessarily delay such hearings.

Position Vote:

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

Contact Persons:

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

Public Policy Position
ADM File No. 2023-36: Proposed Amendments of MCR 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of MCR 3.907

Support with Recommended Amendments

Explanation:
The Children's Law Section unanimously supports ADM File No 2023-36 implementing the provisions of the Justice for Kids and Communities bill package. The Council does recommend one amendment, though. Several of the bills included a provision that statements which youth making during the course of a screening tool or risk/needs assessment cannot be introduced as evidence against the youth at an adjudication trial in a delinquency proceeding. Because that provision is integrated into the various statutes, it is not strictly necessary to include it in the court rules as well, but the Council felt that it would be best if it was included so that there can be no confusion. As such, Council recommends that the Court add MCR 3.907(F) reading "Any statements a juvenile makes as part of a screening tool or risk and needs assessment under this Rule must not be admitted into evidence against the juvenile at any adjudication hearing."

Position Vote:
Voted for position: 11
Voted against position: 0
Abstained from vote: 0
Did not vote: 8

Contact Person: Joshua Pease
Email: jpease@sado.org

Name: Scott Hamilton

Date: 01/25/2024

ADM File Number: 2023-36

Comment:
The court rule should account for and document the new MCL 712A.823(4), the first sentence of which now states: 'Except as otherwise provided in this subsection, before a diversion decision is made for a minor, a risk screening tool and a mental health screening tool may be conducted on the minor.' The original version of this bill used the word "shall" instead of "may". It was changed, I assume, to allow courts to NOT use a diversion screening tool on cases they intend to divert regardless of the outcome of a screening tool. In other words, mandatory use of a screening tool could unintentionally result in less diversions rather than more diversions if the tool advises against diversion in a case that would otherwise have been diverted. Before we get to "shall" language in the new version of MCL 722.823(5) (whatever this means in light of (4)), section (4) makes it clear that the court need NOT use a diversion screening tool in every case that ultimately gets diverted.

Act No. 287
Public Acts of 2023
Approved by the Governor
December 12, 2023
Filed with the Secretary of State
December 13, 2023
EFFECTIVE DATE: October 1, 2024

STATE OF MICHIGAN
102ND LEGISLATURE
REGULAR SESSION OF 2023

Introduced by Reps. Brenda Carter, Hope, Wilson, Morse, Tsernoglou, Paiz, Pohutsky, Byrnes, Miller, Young, Rheingans, Wegela, Dievendorf, Hood, Grant, O'Neal, Breen, Price, Brixie, Morgan, Hoskins, MacDonell, Edwards, Arbit, Brabec, Glanville, Scott, Conlin, Skaggs and Aiyash

ENROLLED HOUSE BILL No. 4625

AN ACT to amend 1988 PA 13, entitled "An act to permit certain minors to be diverted from the court system having jurisdiction over minors; to establish diversion criteria and procedures; to require certain records to be made and kept; to prescribe certain powers and duties of courts having jurisdiction over minors and of law enforcement agencies; and to prescribe certain penalties," by amending sections 2, 3, 6, and 9 (MCL 722.822, 722.823, 722.826, and 722.829), section 2 as amended by 2019 PA 101 and section 6 as amended by 1996 PA 137.

The People of the State of Michigan enact:

Sec. 2. As used in this act:

(a) "Court" means the family division of circuit court.

(b) "Divert" or "diversion" means the placement that occurs when a law enforcement agency makes a formally recorded investigation or apprehension for an act by a minor that if a petition were filed with the court would bring that minor within section 2(a) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2, and instead of petitioning the court or authorizing a petition, either of the following occurs:

(*i*) The minor is released into the custody of the minor's parent, guardian, or custodian and the investigation is discontinued.

(*ii*) The minor and the minor's parent, guardian, or custodian agree to work with a person or public or private organization or agency that will assist the minor and the minor's family in resolving the problem that initiated the investigation.

(c) "Law enforcement agency" means a police department of a city, village, or township, a sheriff's department, the department of state police, or any other governmental law enforcement agency in this state.

(d) "Minor" means an individual who is less than 18 years of age.

(e) "Specified juvenile violation" means any of the following:

(*i*) A specified juvenile violation as that term is defined in section 2 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2.

(*ii*) A violation of section 82(2), 321, 397, or 520c of the Michigan penal code, 1931 PA 328, MCL 750.82, 750.321, 750.397, and 750.520c.

Sec. 3. (1) If in the course of investigating an alleged offense by a minor a petition has not been filed with the court, or if a petition has not been authorized, a law enforcement official or court intake worker may do 1 of the following:

(a) Release the minor into the custody of the minor's parent, guardian, or custodian and discontinue the investigation.

(b) Subject to subsections (4) and (5), divert the matter by making an agreement under section 5 with the minor and the minor's parent, guardian, or custodian to refer the minor to a person or public or private organization or agency that will assist the minor and the minor's family in resolving the problem that initiated the investigation. Restitution must not be considered when deciding if the minor may be diverted under this subdivision.

(c) File a petition with the court or authorize a petition that has been filed.

(2) A minor may be diverted only as provided in subsection (1)(a) or (b) and subsection (3).

(3) A minor accused or charged with a specified juvenile violation must not be diverted.

(4) Except as otherwise provided in this subsection, before a diversion decision is made for a minor, a risk screening tool and a mental health screening tool may be conducted on the minor. A risk screening tool and a mental health screening tool may not be conducted on a minor who meets any of the following criteria:

(a) Is accused or charged with a specified juvenile violation.

(b) Is currently under supervision in the juvenile justice system by the court or the department of health and human services.

(5) A minor must not be diverted under subsection (1)(b) unless both of the following requirements are met:

(a) The law enforcement official or court intake worker receives the results of a risk screening tool and a mental health screening tool for the minor conducted by a designated individual or agency that is trained in those screening tools.

(b) The law enforcement official or court intake worker uses the results of the risk screening tool and the mental health screening tool, and the best interests of public safety and the minor, to inform the decision to divert the minor.

(6) A risk screening tool and a mental health screening tool described in subsections (4) and (5) must meet both of the following requirements:

(a) Be research based and nationally validated for use with minors.

(b) Comply with the guidelines created under subsection (7).

(7) The state court administrative office, under the supervision and direction of the supreme court, shall create guidelines on the use of risk screening tools and mental health screening tools described in subsections (4) and (5).

Sec. 6. (1) When a decision is made to divert a minor, the law enforcement official or court intake worker shall file with the court in the county in which the minor resides or is found all of the following information:

(a) The minor's name, address, and date of birth.

(b) The act or offense for which the minor was apprehended.

(c) The date and place of the act or offense for which the minor was apprehended.

(d) The diversion decision made, whether referred or released.

(e) The nature of the minor's compliance with the diversion agreement.

(f) If the diversion is under section 3(1)(b), the results of the minor's risk screening tool and mental health screening tool.

(2) If a diversion agreement is revoked under section 5(5), the law enforcement official or court intake worker shall file the fact of and reasons for the revocation with the court in which the information described in subsection (1) is filed.

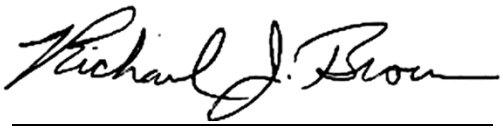
Sec. 9. (1) A record kept under this act must not be used by any person, including a court official or law enforcement official, for any purpose except in making a decision on whether to divert a minor.

(2) A person that violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 180 days, a fine of not more than $1,000.00, or both.

(3) A risk screening tool and a mental health screening tool conducted as part of a proceeding under this act and any information obtained from a minor in the course of those screenings or provided by the minor in order to participate in a diversion program, including, but not limited to, any admission, confession, or incriminating evidence, are not admissible into evidence in any adjudicatory hearing in which the minor is accused and are not subject to subpoena or any other court process for use in any other proceeding or for any other purpose.

Enacting section 1. This amendatory act takes effect October 1, 2024.

Enacting section 2. This amendatory act does not take effect unless Senate Bill No. 418 of the 102nd Legislature is enacted into law.



Clerk of the House of Representatives

Secretary of the Senate

Approved_____

_____
Governor

Name: Manda Breuker

Date: 04/02/2024

ADM File Number: 2023-36

Comment:
At what phase the court caseworker or intake worker would complete the risk and mental health screening tool for a consent calendar case? The proposed changes indicate that the court must consider these results before placing a case on the consent calendar. In our courts, often the juvenile caseworker has not met with the family prior to the inquiry hearing and the court relies on recommendations from the prosecutor on whether to place a case on consent calendar, and the majority of DL cases are placed on the consent calendar at the first hearing. Would the intake worker simply be reviewing the petition to complete these screening tools, or would the court have to order that the family meet with the intake worker or complete a questionnaire prior to the inquiry hearing? My hope is that any changes to these court rules will not cause us to have to delay resolving our less complex juvenile consent calendar cases.

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 10, 2024

Re: **HB 5393 – Juvenile Justice Reform (Consent Calendar) Technical Fix**

Background

In December 2023, Governor Whitmer signed nineteen bills into law based on the recommendations of the Task Force on Juvenile Justice Reform ("Task Force"). Identical bills (a "double set") were introduced in both the House and the Senate to allow legislators from each chamber to share primary sponsorship of the public acts that would result from enactment of the package. This is a common practice in the Legislature, but if the bills are not thoroughly cross-referenced for conflicts or if more than one bill amends a particular statutory provision and the overlapping bills are signed into law in the incorrect order, unintended technical errors result. House Bill 5393 was introduced to correct such an error.

House Bill 4633 (now 2023 PA 291) amends MCL 712A.2f to, among other things, require that consent calendar case plans not exceed six months. This bill aimed to implement a component of Task Force recommendation #9a:

> Limit the length of time that a youth can be placed on pre-court diversion to no longer than three months, and to no longer than six months for youth on the consent calendar, unless the court determines, and articulates on the record, a longer period is needed for youth to complete a specific treatment program.

At the same time, Senate Bill 428 (now 2023 PA 301) also amended MCL 712A.2f, but provided that consent calendar case plans may not exceed three months. HB 4633 was signed by the Governor at 10:30 a.m. on December 12. Senate Bill 428 was signed into law twenty minutes later at 10:50 a.m. Because the bill signed later in time takes precedence, the consent calendar case plan time limitation in MCL 712A.2f that is set to go into effect on October 1 is incorrect. House Bill 5393 was introduced by House Criminal Justice Committee Chair Kara Hope at the request of SCAO/MSC to correct the technical error before the bills' effective date. SCAO, the Michigan Association of Family Court Administrators, MDHHS, and the Michigan Center for Youth Justice all support the bill.

The House Criminal Justice Committee has already reported the bill with a recommendation that it be passed, and the full House advanced it to the order of third reading in February 2024. It is expected that the House will vote on the bill after special elections scheduled to take place on April 16, which will restore that chamber back to its full complement of 110 members.

***Keller* Considerations**

House Bill 5393 will improve court functioning by providing the bench and bar with a clearly defined period of time for court supervision over cases on court's consent calendar. When the Board of

Commissioners reviewed the report and recommendations of the Task Force on Juvenile Justice Reform, it determined that recommendation 9—the recommendation being implemented by HB 5393—was *Keller*-permissible because it was reasonably related to improvement in the functioning of the courts. Subsequently, when the Board reviewed both HB 4633 and SB 428—the two bills signed into law that contained conflicting provisions related to consent calendar plan time limitation, it also determined that both of those bills were *Keller*-permissible on the same basis. Likewise, House Bill 5393 is *Keller*-permissible because it is reasonably related to improvement in the functioning of the courts.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

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

Staff Recommendation

House Bill 5393 is *Keller*-permissible because it is reasonably related to improvement in the functioning of the courts. The bill may be considered on its merits.

HOUSE BILL NO. 5393

January 16, 2024, Introduced by Rep. Hope and referred to the Committee on Criminal Justice.

A bill to amend 1939 PA 288, entitled

"Probate code of 1939,"

by amending section 2f of chapter XIIA (MCL 712A.2f), as amended by 2023 PA 301.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER XIIA

Sec. 2f. (1) Subject to subsection (2), if the court determines that formal jurisdiction should not be acquired over a juvenile, the court may proceed in an informal manner referred to

as a consent calendar. The court shall not consider restitution when determining if the case should be placed on the consent calendar under this section.

(2) A case must not be placed on the consent calendar unless all of the following apply:

(a) The juvenile and the parent, guardian, or legal custodian and the prosecutor agree to have the case placed on the consent calendar.

(b) The court considers the results of the risk screening tool and mental health screening tool conducted on the juvenile by a designated individual or agency that is trained in those screening tools.

(c) The court determines that the case should proceed on the consent calendar in compliance with section 11(1) of this chapter.

(3) A risk screening tool and a mental health screening tool under subsection (2) must meet both of the following requirements:

(a) Be research based and nationally validated for use with juveniles.

(b) Comply with the guidelines created under subsection (4).

(4) The state court administrative office, under the supervision and direction of the supreme court, shall create guidelines on the use of risk screening tools and mental health screening tools described in subsection (2).

(5) Subject to subsection (2), the court may transfer a case from the formal calendar to the consent calendar at any time before disposition. A case involving the alleged commission of an offense as that term is defined in section 31 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.781, must only be placed on the consent calendar upon compliance with

the procedures set forth in section 36b of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.786b.

(6) After a case is placed on the consent calendar, the prosecutor shall provide the victim with notice as required by article 2 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.781 to 780.802.

(7) Consent calendar cases must be maintained in the following nonpublic manner:

(a) Access to consent calendar case records must be provided to the juvenile, the juvenile's parents, guardian, or legal custodian, the guardian ad litem, counsel for the juvenile, the department ~~of health and human services~~ if related to an investigation of neglect and abuse, law enforcement personnel, prosecutor, and other courts. However, consent calendar case records must not be disclosed to federal agencies or military recruiters. As used in this subdivision, "case records" includes the pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, register of actions, consent calendar case plan, risk screening tool and mental health screening tool results, and court orders related to the case placed on the consent calendar.

(b) The contents of the confidential file must continue to be maintained confidentially. As used in this subdivision, "confidential file" means that term as defined in MCR 3.903.

(c) A risk screening tool and a mental health screening tool conducted as part of a proceeding under this section and any information obtained from a juvenile in the course of those screenings or provided by the juvenile in order to participate in a consent calendar case plan, including, but not limited to, any

admission, confession, or incriminating evidence, are not admissible into evidence in any adjudicatory hearing in which the juvenile is accused and are not subject to subpoena or any other court process for use in any other proceeding or for any other purpose.

(8) The court shall conduct a consent calendar conference with the juvenile, the juvenile's attorney, if any, and the juvenile's parent, guardian, or legal custodian to discuss the allegations. The prosecuting attorney and victim may be, but are not required to be, present.

(9) If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court shall issue a written consent calendar case plan. All of the following apply to a consent calendar case plan:

(a) The plan must include a requirement that the juvenile pay restitution under the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834. The court shall not order the juvenile or the juvenile's parent, guardian, or legal custodian to pay for fees or costs associated with consent calendar services.

(b) A consent calendar case plan must not contain a provision removing the juvenile from the custody of the juvenile's parent, guardian, or legal custodian.

(c) The period for a juvenile to complete the terms of a consent calendar case plan must not exceed ~~3~~ **6** months, unless the court determines that a longer period is needed for the juvenile to complete a specific treatment program and includes this determination as part of the consent calendar case record.

(d) The consent calendar case plan is not an order of the court, but must be included as a part of the case record.

(e) Violation of the terms of the consent calendar case plan may result in the court's returning the case to the formal calendar for further proceedings consistent with subsection (12).

(10) The court shall not enter an order of disposition in a case while it is on the consent calendar.

(11) Upon the juvenile's successful completion of the consent calendar case plan, the court shall close the case and shall destroy all records of the proceeding in accordance with the records management policies and procedures of the state court administrative office, established in accordance with supreme court rules.

(12) If it appears to the court at any time that proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court shall proceed as follows:

(a) If the court did not authorize the original petition, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition to determine whether the petition should be authorized.

(b) If the court authorized the original petition, the court may transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition only after a hearing. After transfer to the formal calendar, the court shall proceed with the case from where it left off before being placed on the consent calendar.

(13) Statements made by the juvenile during the proceeding on the consent calendar must not be used against the juvenile at a trial on the formal calendar on the same charge.

(14) Upon a judicial determination that the juvenile has

completed the terms of the consent calendar case plan, the court shall report the successful completion of the consent calendar to the juvenile and the department of state police. The department of state police shall maintain a nonpublic record of the case. This record is open to the courts of this state, another state, or the United States, the department of corrections, law enforcement personnel, and prosecutors for use only in the performance of their duties or to determine whether an employee of the court, department, law enforcement agency, or prosecutor's office has violated conditions of employment or whether an applicant meets criteria for employment with the court, department, law enforcement agency, or prosecutor's office.

Enacting section 1. This amendatory act takes effect October 1, 2024.

Legislative Analysis

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

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

DURATION OF CONSENT CALENDAR CASE PLANS

House Bill 5393 as reported from committee
Sponsor: Rep. Kara Hope
Committee: Criminal Justice
Complete to 2-13-24

SUMMARY:

House Bill 5393 would amend Chapter XIIA of the Probate Code, commonly known as the juvenile code, to provide that the period for a juvenile to complete the terms of a consent calendar plan must not exceed *six months*, unless the court determines that a longer period is needed for the juvenile to complete a specific treatment program and includes that determination as part of the consent calendar case record.[1]

The provision the bill would amend, which says that the period for a juvenile to complete the terms of a consent calendar case plan must not exceed *three months* unless the court makes the determination described above, was added to the code by a recent public act and does not take effect until October 1, 2024.[2] House Bill 5393 also would take effect on that date.

MCL 712A.2f

BACKGROUND:

The Michigan Task Force on Juvenile Justice Reform was created by Executive Order 2021-6 as a bipartisan advisory body in the Department of Health and Human Services[3] to "lead a data-driven analysis of [Michigan's] juvenile justice system and recommend proven practices and strategies for reform grounded in data, research, and fundamental constitutional principles." In particular, in the words of its final report,[4] the task force was "charged with developing recommendations to improve state law, policy, and appropriations guided by the following objectives:

- Safely reduce placement in detention and residential placement and associated costs.
- Increase the safety and well-being of youth impacted by the juvenile justice system.
- Reduce racial and ethnic disparities among youth impacted by the juvenile justice system.
- Improve the efficiency and effectiveness of the state's and counties' juvenile justice systems.
- Increase accountability and transparency within the juvenile justice system.
- Better align practices with research and constitutional mandates."

[1] The consent calendar is an informal docket of cases the court has determined should not proceed on the formal calendar but that the protective and supportive action by the court will serve the best interests of a juvenile and the public. Under both current law and the bill, a case cannot be placed on the consent calendar unless the prosecutor, the juvenile, and the juvenile's parent, guardian, or legal custodian agree to have the case placed on the consent calendar.
[2] http://legislature.mi.gov/doc.aspx?2023-SB-0428
[3] https://www.legislature.mi.gov/documents/2021-2022/executiveorder/pdf/2021-EO-06.pdf
[4] https://micounties.org/wp-content/uploads/Michigan-Taskforce-on-Juvenile-Justice-Reform-Final-Report.pdf

The task force issued its final report on July 18, 2022.[5]

Among its unanimous recommendations was to "Align pre-court diversion and consent calendar conditions with research and developmental science." A specific recommendation for achieving this was to "Limit the length of time that a youth can be placed on pre-court diversion to no longer than three months, *and to no longer than six months for youth on the consent calendar*, unless the court determines, and articulates on the record, a longer period is needed for youth to complete a specific treatment program" (emphasis added). Among other things, the goal of these and related recommendations was to provide a statewide standard for diversion and consent calendar decisions in order to create more equitable access to diversion across the state. The task force had found that different jurisdictions varied widely in their policies and practices concerning diversion and consent calendar eligibility, decision-making authority, and oversight.

Bills to implement most of the task force's legislative recommendations were passed in 2023 as Public Acts 287 to 305. Some of these bills made amendments to the same section of law to do different things, and in coordinating those changes, the general maximum length of time for a consent calendar plan was changed from the recommended six months to three months.

Of note, three months is the default maximum time period the bills provide (and the task force recommended) for a minor to complete the terms of a precourt diversion agreement. However, according to committee testimony on House Bill 5393, the longer six-month period was recommended as appropriate for consent calendar plans because they may involve assaultive crimes, which precourt diversions typically do not, and so may require more time to complete and more monitoring by the court.

FISCAL IMPACT:

The bill would have no fiscal impact on the state or local units of government.

POSITIONS:

Representatives of the following entities testified in support of the bill (2-6-24):

- State Court Administrative Office
- Michigan Association of Family Court Administrators

The following entities indicated support for the bill (2-6-24):

- Department of Health and Human Services
- Michigan Center for Youth Justice

Legislative Analyst: Rick Yuille
Fiscal Analyst: Robin Risko

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

[5] https://www.michigan.gov/whitmer/news/press-releases/2022/07/18/task-force-on-juvenile-justice-reform-approves-blueprint-for-transforming-juvenile-justice

Public Policy Position
HB 5393

Support

Explanation
The Committee voted to support HB 5393. The legislation will correct a technical error that arose due to a conflict between two of the bills included in the Justice for Kids and Communities legislative package and ensure that the law aligns with the recommendations of the Michigan Task Force on Juvenile Justice Reform prior to its effective date.

Position Vote:
Voted For position: 19
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 4

***Keller*-Permissibility Explanation:**
HB 5393 is reasonably related to the functioning of the courts and therefore *Keller*-permissible.

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

Public Policy Position
HB 5393

Support

Explanation
The Committee voted to support HB 5393. As noted by both the Access to Justice Policy Committee and Criminal Jurisdiction & Practice Committee, this is clean up legislation. It will correct a technical error that arose due to a conflict between two of the bills included in the Justice for Kids and Communities legislative package and ensure that the law aligns with the recommendations of the Michigan Task Force on Juvenile Justice Reform prior to its effective date.

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

Keller Permissibility Explanation:
HB 5393 is reasonably related to the functioning of the courts and therefore *Keller*-permissible.

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
HB 5393

Support

Explanation
The Committee voted unanimously (17) to support HB 5393.

The Committee recognized that purpose of this bill is to address an unintended conflict between two of the public acts that were recently passed as part of the Justice for Kids and Communities bill package of bills based on the recommendations of the Michigan Task Force on Juvenile Justice Reform. HB 4633 (Public Act 291 of 2023) had a consent calendar time cap of six months, which was recommended by the Task Force. SB 428 had a cap of three months. Both bills were passed by the Legislature and signed into law by the Governor, but because there was a conflict, the bill signed later in time (SB 428 with a cap of three months) controls. HB 5393 was introduced to correct the technical error before the bills' effective dates.

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

***Keller* Permissible Explanation**
HB 5393 is reasonably related to the functioning of the courts and therefore *Keller*-permissible. It will improve court functioning by providing a defined period of time for court supervision over a case on the consent calendar. The Committee also noted that previously the Board of Commissioners and this Committee found that the original legislation necessitating this technical fix was also *Keller*-permissible.

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

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 10, 2024

Re: **HB 5429 – Court Appointed Special Advocate (CASA) Act**

Background

House Bill 5429 would create the Court-Appointed Special Advocate Act to authorize courts to establish court-appointed special advocate ("CASA") programs that would provide for volunteers charged with advocating for a child's best interests in a proceeding brought under either Section 2 or Section 19b of Chapter XIIA of the Probate Code, 1939 PA 288 (also known as the Juvenile Code). The new act specifies minimum requirements for a CASA program, qualifications and duties for CASA volunteers, and CASA appointment procedures and standards of conduct.

Over 30 local CASA programs are already operating in Michigan today under the auspices of Michigan CASA, a 501(c)(3) nonprofit corporation. The intent of House Bill 5429 is to expand the number of CASA programs and their reach across Michigan and, ultimately, to provide a means by which the state can provide greater direct funding to support CASA.

House Bill 5429 has been reported with recommendation by the House Judiciary Committee and is presently awaiting further action by the full House on second reading.

***Keller* Considerations**

The presence of a CASA volunteer has a significant impact on Juvenile Code proceedings. The proposed public act would specify how courts adopt and implement CASA programs, as well as how such programs function in courtrooms across Michigan. It would provide some measure of statewide uniformity to a process that is largely ad hoc today. CASA volunteers would be appointed by court order and act as a friend of the court under the court's authority. As a result, House Bill 5429 is reasonably related to the improvement in the functioning of the courts and therefore *Keller*-permissible.

***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 5429 is reasonably related to the improvement in the functioning of the courts and therefore *Keller*-permissible. The bill may be considered on its merits.

HOUSE BILL NO. 5429

February 07, 2024, Introduced by Reps. Morse, Rheingans, Skaggs, Brabec, Martus, Tyrone Carter, Brenda Carter, Brixie, Hill, Hood, Rogers, MacDonell, Glanville, Weiss, Haadsma, Coffia, Wilson and Churches and referred to the Committee on Judiciary.

A bill to create the court-appointed special advocate program; and to prescribe the duties and responsibilities of the court-appointed special advocate program and volunteers.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act may be cited as the "court-appointed special advocate act".

Sec. 2. As used in this act:

(a) "Child" means an individual under 18 years of age.

(b) "Court-appointed special advocate child" or "CASA child"

means a child under the jurisdiction of the court.

(c) "Court-appointed special advocate program" or "CASA program" means a program established under section 3.

(d) "Court-appointed special advocate volunteer", "CASA volunteer", or "volunteer" means an individual appointed by a court under section 7.

(e) "Permanency plan" means a plan ordered by the court at a permanency hearing conducted under section 19a of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19a.

(f) "Program director" means the director of a CASA program.

(g) "Treatment plan" means a case service plan as that term is defined in section 13a of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.13a.

Sec. 3. (1) Each court in this state may establish a court-appointed special advocate program. The court-appointed special advocate program shall be administered under this act.

(2) A court-appointed special advocate program must do all of the following:

(a) Screen, train, and supervise court-appointed special advocate volunteers to advocate for the best interests of a child when appointed by a court as provided in section 7. Each court may be served by a CASA program. One CASA program may serve more than 1 court.

(b) Hold regular case conferences with volunteers to review case progress and conduct annual performance reviews for all volunteers.

(c) Provide CASA program staff and volunteers with written program policies, practices, and procedures.

(d) Provide the training required under section 5.

Sec. 4. The program director is responsible for administration of the CASA program, including, but not limited to, program operations, recruitment, selection, training, supervision, and evaluation of CASA program staff and volunteers.

Sec. 5. (1) All CASA volunteers must be screened, trained, and supervised in accordance with National CASA/GAL Association standards. CASA volunteers must participate in observing court proceedings before appointment as allowed by the court.

(2) Each court-appointed special advocate program must provide a minimum of 12 hours of in-service training per year to its volunteers.

Sec. 6. (1) A prospective CASA volunteer must meet all of the following minimum requirements:

(a) Be at least 21 years of age.

(b) Complete an application, including providing background information required under subsection (2).

(c) Participate in required screening interviews.

(d) Be willing to commit to the court for the duration of the CASA case until permanency has been established for the child.

(e) Participate in the training required under section 5.

(2) The program director must obtain written authorization and secure a background check on each prospective volunteer before any contact with a CASA child according to National CASA/GAL standards, Michigan CASA Association standards.

Sec. 7. (1) A court may appoint a CASA volunteer in a proceeding brought under section 2 or 19b of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2 and 712A.19b, when, in the court's opinion, a child who may be affected by the proceeding requires services that a CASA volunteer can provide and

the court finds that appointing a CASA volunteer is in the best interests of the child.

(2) A CASA volunteer must be appointed according to a court order. The court order must specify the CASA volunteer as a friend of the court acting on the court's authority. The CASA volunteer acting as a friend of the court shall offer as evidence a written report with recommendations consistent with the best interests of the child, subject to all pertinent objections.

(3) A memorandum of understanding between a court and a CASA program is required in a county in which a CASA program is established. The memorandum of understanding must set forth the roles and responsibilities of the CASA volunteer.

(4) The CASA volunteer's appointment ends when 1 of the following occurs:

(a) When the court's jurisdiction over the child ends.

(b) Upon discharge by the court on its own motion.

(c) With the approval of the court, at the request of the program director.

Sec. 8. It is against the National CASA/GAL standards and the Michigan CASA Association standards for a CASA volunteer to do any of the following:

(a) Accept compensation for the duties and responsibilities of the volunteer's appointment.

(b) Have an association that creates a conflict of interest with the volunteer's duties.

(c) Be related to a party or attorney involved in the case.

(d) Be employed in a position that may result in a conflict of interest or give rise to the appearance of a conflict.

(e) Use the CASA volunteer position to seek or accept gifts or

special privileges.

Sec. 9. (1) Upon appointment in a proceeding, a CASA volunteer must do both of the following:

(a) Conduct an independent investigation regarding the best interests of the child that will provide factual information to the court regarding the child and the child's family. The examination may include interviews with and observations of the child and the child's family, interviews with other appropriate individuals, and review of relevant records and reports.

(b) Determine whether appropriate services are being provided to the child and the child's family, and whether the treatment plan and permanency plan are progressing in a timely manner.

(2) The CASA volunteer, with the support and supervision of CASA program staff, shall make recommendations consistent with the best interests of the child regarding placement, visitation, and appropriate services for the child and the child's family. The CASA volunteer with CASA program staff must prepare a written report to be distributed to the court and the parties to the proceeding.

(3) The CASA volunteer must monitor the case to which the CASA volunteer has been appointed to ensure that the child's essential needs are being met.

(4) The CASA volunteer must make every effort to attend all hearings, meetings, and other proceedings concerning the child to which the CASA volunteer has been appointed.

(5) The CASA volunteer may be called as a witness in a proceeding by a party or the court.

Sec. 10. (1) All government agencies, service providers, professionals, school districts, school personnel, and parents must cooperate with all reasonable requests of a CASA volunteer. A CASA

volunteer must cooperate with all government agencies, service providers, professionals, school districts, school personnel, parents, families, and other involved individuals and entities. The CASA volunteer must engage in regular visits with the child.

(2) The CASA volunteer must be notified in a timely manner of all hearings, meetings, and other proceedings concerning the case to which the CASA volunteer has been appointed.

Sec. 11. The contents of a document, record, or other information relating to a case to which the CASA volunteer has access are confidential. The CASA volunteer must not disclose that information to a person other than the court, a party to the action, or another person authorized by the court.

Sec. 12. A CASA volunteer is immune from civil liability as provided in the volunteer protection act of 1997, 42 USC 14501 to 14505.

Legislative Analysis

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

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

COURT-APPOINTED SPECIAL ADVOCATE (CASA) ACT

House Bill 5429 as introduced
Sponsor: Rep. Christine Morse
Committee: Judiciary
Complete to 2-20-24

SUMMARY:

House Bill 5429 would create a new act, the Court-Appointed Special Advocate Act, to authorize courts to establish a court-appointed special advocate (CASA) program to provide for court-appointed special advocate volunteers to advocate for a child's best interests. As described below, volunteers would conduct independent investigations to provide the court with information about the child, evaluate services and treatment or permanency plans, and make recommendations on placement, visitation, and appropriate services.

CASA program

Each Michigan court could establish or be served by a CASA program under the new act. A program could serve more than one court. A program would have to do all of the following:

- Screen, train, and supervise court-appointed special advocate volunteers.
- Hold regular case conferences with volunteers to review progress.
- Conduct annual performance reviews for all volunteers.
- Provide program staff and volunteers with written policies, practices, and procedures.

A program director would be responsible for administering the program, including operations, recruitment, selection, training, supervision, and evaluation of staff and volunteers.

CASA volunteers

Volunteers would have to be screened, trained, and supervised in accordance with National CASA/GAL Association standards.[1] Volunteers would have to participate in observing court proceedings, as allowed by the court, before appointment. A program would have to provide its volunteers with at least 12 hours of in-service training a year. A prospective volunteer would have to meet all of the following:

- Be at least 21 years of age.
- Complete an application, including providing information for a background check.
- Participate in required screening interviews.
- Participate in training.
- Be willing to commit for the duration of a CASA case until permanency has been established for the child.

The program director would have to obtain written authorization and secure a background check on each prospective volunteer before any contact with a CASA child according to National CASA/GAL standards, Michigan CASA Association standards.[2]

[1] https://nationalcasagal.org/ and https://member.nationalcasagal.org/wp-content/uploads/2021/03/Overview-of-2020-Local-Standards-1.pdf
[2] https://www.michigancasa.org/ and https://www.michigancasa.org/policy-templates-and-other-documents

Appointment

A court could appoint a CASA volunteer in a proceeding brought under section 2 or 19b of the juvenile code[3] when the court determines that a child who may be affected by the proceeding requires services that a CASA volunteer can provide and also finds that appointing a volunteer is in the best interests of the child.

A CASA volunteer would have to be appointed under a court order that specifies that the volunteer is a friend of the court acting on the court's authority. The CASA volunteer would have to offer as evidence, subject to relevant objections, a written report with recommendations consistent with the best interests of the child.

A memorandum of understanding between a court and a CASA program, setting forth the roles and responsibilities of the CASA volunteer, would be required in a county where a program is established.

The CASA volunteer's appointment would end upon discharge by the court on its own motion, when the court's jurisdiction over the child ends, or (with the approval of the court) at the request of the program director.

Duties of a volunteer

A CASA volunteer would have to do all of the following:

- Conduct an independent investigation regarding the child's best interests that will provide factual information to the court regarding the child and the child's family. This could include observations of the child and the child's family, interviews with them and with other appropriate individuals, and review of relevant records and reports.
- Determine whether appropriate services are being provided to the child and the child's family.
- Determine whether the ***treatment plan*** and ***permanency plan*** are progressing in a timely manner.
- With the support and supervision of CASA program staff, make recommendations consistent with the best interests of the child regarding placement, visitation, and appropriate services for the child and the child's family.
- With program staff, prepare a written report to be distributed to the court and the parties to the proceeding.
- Monitor the case to ensure that the child's essential needs are being met.
- Engage in regular visits with the child.
- Make every effort to attend all hearings, meetings, and other proceedings concerning the child.
- Cooperate with all government agencies, service providers, professionals, school districts and personnel, parents, families, and other involved individuals and entities.

Treatment plan would mean the plan developed by an *agency* and prepared under section 18f of the juvenile code[4] that includes services to be provided by and responsibilities and obligations of the *agency* and activities, responsibilities, and obligations of the parent. (As used here, *agency* means a public or private organization, institution, or facility that is performing the functions under part D of title IV of the

[3] http://legislature.mi.gov/doc.aspx?mcl-712A-2 or http://legislature.mi.gov/doc.aspx?mcl-712A-19b
The juvenile code is the informal name of Chapter XIIA of the Probate Code.
[4] http://legislature.mi.gov/doc.aspx?mcl-712A-18f

federal Social Security Act, 42 USC 651 to 669b,[5] or that is responsible under court order or contractual arrangement for a juvenile's care and supervision.)

Permanency plan would mean a plan ordered by the court at a permanency hearing conducted under section 19a of the juvenile code.

The CASA volunteer could be called as a witness in a proceeding by a party or the court.

Violation of standards

The bill states that it is against the National CASA/GAL standards and the Michigan CASA Association standards for a CASA volunteer to do any of the following:

- Accept compensation for the duties and responsibilities of their appointment.
- Have an association that creates a conflict of interest with their duties.
- Be employed in a position that may result in a conflict of interest or the appearance of one.
- Be related to a party or attorney involved in the case.
- Use the CASA volunteer position to seek or accept gifts or special privileges.

Duties of others

All government agencies, service providers, professionals, school districts and personnel, and parents would have to cooperate with all reasonable requests of a CASA volunteer. The CASA volunteer would have to be notified in a timely manner of all hearings, meetings, and other proceedings concerning the case the volunteer has been appointed to.

Confidentiality and immunity

The contents of a document or record or other case-related information the CASA volunteer has access to would be confidential, and the volunteer could not disclose it to anyone other than the court, a party to the action, or someone authorized by the court.

A CASA volunteer would be immune from civil liability as provided in the federal Volunteer Protection Act of 1997, 42 USC 14501 to 14505.[6]

FISCAL IMPACT:

House Bill 5429 would not have a significant fiscal impact on state expenditures for the Department of Health and Human Services (DHHS) but would increase expenditures for local units of government that choose to establish a CASA program by an indeterminate amount. The fiscal impact of the bill would be dependent of the cost of establishing and maintaining a CASA program within a county's court. For FY 2023-24, $1.0 million GF/GP is allocated on an ongoing basis to support a CASA program in Kent County. An additional $1.5 million is allocated on a one-time basis in the FY 2023-24 DHHS budget.

Legislative Analyst: Rick Yuille
Fiscal Analyst: Sydney Brown

[5] https://www.law.cornell.edu/uscode/text/42/chapter-7/subchapter-IV/part-D
[6] https://www.law.cornell.edu/uscode/text/42/chapter-139

Public Policy Position
HB 5429

Support

Explanation
A majority of the Committee voted to support HB 5429 and believed that legislation facilitating expansion of the Court Appointed Special Advocate (CASA) program to more courts would be beneficial to both children and court functioning.

Some members of the Committee did express concern that CASA duplicates the role of lawyers guardian ad litem and may have the unintended consequence of harming Michiganders of color and limited financial means.

Position Vote:
Voted For position: 12
Voted against position: 3
Abstained from vote: 5
Did not vote (absence):

***Keller*-Permissibility Explanation:**
The Committee determined that the legislation is *Keller*-permissible, as the implementation of a CASA program is reasonably related to improvements of the functioning of the courts.

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

Public Policy Position
HB 5429

Oppose

Explanation
A majority of the Committee voted to oppose House Bill 5429, while several Committee members abstained from voting on the measure due to a concern that they lacked subject matter expertise in this area of law. Those opposing the bill raised concerns about the necessity of the legislation, the propriety of having non-lawyer volunteers serving this function within the court system, and the expense. Committee members also took note of concerns about racial and socioeconomic disparities documented in research into the impact of CASA volunteers on families, children, and the functioning of the courts.

Position Vote:
Voted For position: 7
Voted against position: 2
Abstained from vote: 12
Did not vote (absence): 9

Keller Permissibility Explanation:
HB 5429 is reasonably related to the functioning of the courts and therefore *Keller*-permissible. It might also be argued that the bill is reasonably related to access to legal services, though CASA volunteers are often non-attorneys and their work itself is not legal services.

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

SBM State Bar of Michigan | CHILDREN'S LAW SECTION

Public Policy Position
HB 5429

Support

Explanation
The Children's Law Section supports HB 5429 without further comment.

Position Vote:
Voted for position: 6
Voted against position: 2
Abstained from vote: 2
Did not vote: 9

Contact Person: Joshua Pease
Email: jpease@sado.org

CASA
Court Appointed Special Advocates
FOR CHILDREN

MICHIGAN CASA

MICHIGAN CASA
BY THE NUMBERS

Michigan CASA, Inc. is dedicated to changing the lives of abused and neglected children by advocating for their best interests through establishing, supporting, and expanding quality CASA programs throughout the state of Michigan to ensure every child that needs a volunteer, has one.

768
Current Michigan CASA volunteers

5,244
Additional volunteers needed to meet the needs of unserved children

3,000+
Years of CASA advocacy experience

14,569
Abused and neglected children

1,459
Children served by CASA

13,110
Unserved children in Michigan

Growth Opportunities

Once equipped with the economic resources required, Michigan CASA will focus its growth activities in unserved counties with the most need and in grossly underserved counties.

Michigan CASA Service Areas Unserved Counties

54,853
Hours contributed annually by Michigan CASA volunteers

$1,744,325
Annual economic impact of current CASA volunteers

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 12, 2024

Re: **HB 5431 – Wrongful Imprisonment Compensation Act Amendments**

Background

Michigan's Wrongful Imprisonment Compensation Act ("WICA") was signed into law in 2016. Since that time, according to the Department of Treasury, the state has paid $50.5 million to 77 exonerees under the provisions of WICA. Twenty-one additional claims have been dismissed and seven claims are presently pending.

In the seven years since WICA went into effect, six cases concerning the interpretation and application of the statute have reached the Michigan Supreme Court. House Bill 5431 was developed by its sponsor in collaboration with the Cooley Law School Innocence Project in large part to clarify the statutory text of WICA and align it with the Court's holdings, as well as to address areas of confusion or ambiguity raised by the justices in these cases. The bill also makes other reforms identified by its proponents after reviewing the state's experience with WICA to date.

Among the provisions of HB 5431 that directly address Michigan Supreme Court opinions are:

- An amendment to the definition of "new evidence" to strike "in the proceedings leading to plaintiff's conviction" and replace that language with "to a trier of fact during a proceeding that determined guilt."[1]

- Adding "but relief was granted on another basis" to Sec. 5(1)(c)(iii).[2] In *Perry*, then-Chief Justice McCormack pointedly wrote: "I don't like administering legal rules that I can't explain to the people they impact. Please fix it, legislators."

- Adding "including time served in pretrial detention" in Sec. 5(4)(a) regarding calculation of compensation awards.[3]

- Adding language clarifying the proper treatment of concurrent or consecutive sentences when calculating compensation awards. More specifically, adding the italicized language that follows:

[1] See *Maples v State*, 507 Mich 461; 968 NW2d 446 (2021).
[2] See *Tomasik v State*, 505 Mich 956; 936 NW2d 829 (2020) (McCormack, C.J., concurring); *Perry v State*, ___ Mich ___; 982 NW2d 398 (2022) (McCormack, C.J., concurring).
[3] See *Sanford v State*, 506 Mich 10; 954 NW2d 82 (2020).

> Compensation may not be awarded . . . for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction, *whether running before or after the sentence on the conviction that is the basis of the claim. If the plaintiff was on parole for a prior offense at the time of the wrongful conviction and parole was revoked solely on the basis of the wrongful conviction, any concurrent or consecutive sentence relating to the prior offense is not covered by this subsection.*[4]

The sixth WICA case to reach the Michigan Supreme Court is presently scheduled for MOAA argument on April 17, 2024.[5]

In addition, HB 5431 would:

- Add a trustee or conservator of an individual making a claim for compensation under the act, if the individual is not competent to act as plaintiff, to the definition of "plaintiff" for the purposes of WICA.

- Require the prosecuting attorney for the county where the plaintiff was convicted to file an appearance within 60 days of being served with the plaintiff's complaint if they wish to participate in the action. Additionally, the bill would require an answer to be filed not later than 60 days after service of the complaint. A request may be granted for additional time to answer if good cause is shown that it is required for the attorney general to determine whether compensation is appropriate before discovery in the matter begins. Discovery must not be conducted before the attorney general files an answer. Current law provides little structure to this stage of a WICA proceeding stating only that "the attorney general and prosecuting attorney may answer and contest the complaint" and that they "may conduct discovery in an action" under WICA.

- Permit a reversal or vacation of a conviction on the basis of insufficient evidence supporting the conviction (as opposed to new evidence) to serve as grounds upon which a plaintiff may make a WICA claim.

- Align the burden of proof in a WICA action with other claims that are civil in nature. The bill would change the burden of proof that the plaintiff must satisfy for each required element from clear and convincing evidence to a preponderance of the evidence. In determining whether the plaintiff has met their burden of proof, the bill would permit a judge to consider the entire record of the plaintiff's criminal case and evidence sized in violation of the Fourth Amendment. In exercising its discretion regarding the weight and credibility of evidence, a court would be required under the bill to "give due consideration to the difficulties of proof caused by the passage of time, the loss or destruction of evidence, the death or unavailability of witnesses, and other factors not caused by the parties." In particular, the bill provides that the court "shall not find a witness incredible who testified at the plaintiff's criminal trial or in

[4] See *Ricks v State*, 507 Mich 387; 968 NW2d 428 (2021).

[5] *Avery v State* (Docket No. 165554).

post-trial proceedings based solely on the fact that the witness is not testifying at the trial" on the plaintiff's WICA claim.

- Remove the existing provision that prohibits an award of reasonable attorney fees unless the plaintiff has actually paid the amount awarded to the attorney in the WICA action.

- Remove the existing provision that makes a plaintiff's acceptance of an award under WICA, or of a compromise or settlement of the claim, a complete release of all claims against the state. Plaintiffs could still initiate an action in federal court against a political subdivision of the state or an individual.

- Permit the parties to stipulate to the entry of an expungement order without an award of compensation.

- Provide an exception to the general rule that a WICA claim must be brought within three years after the entry of a verdict, order, judgment, or pardon exonerating the plaintiff. Under the bill, an plaintiff would be permitted to file a WICA claim within 18 months after the effective date of the bill if that individual can show that they qualify for an award because the reversal or vacation of the judgment of conviction was on the basis of insufficient evidence, and they did not perpetrate the crime and were not an accomplice or accessory to the acts that were the basis of the conviction.

On March 12, the House Criminal Justice Committee reported HB 5431 with recommendation and with a substitute (H-1). The only change to the bill in the substitute is that "on the basis of actual innocence" was deleted from p. 5, lines 9-10 concerning gubernatorial pardons. The vote was 8-3-2. The bill is presently awaiting action by the full House on second reading.

HB 5431 is supported by the Michigan Department of Attorney General, the Cooley Law School Innocence Project, the University of Michigan Law Innocence Clinic, The Innocence Project, Criminal Defense Attorneys of Michigan, the State Appellate Defender Office, Safe and Just Michigan, and the Organization of Exonerees. There was no opposition testimony in committee and no cards of opposition were submitted.

Keller Considerations

The United States Supreme Court held in *Keller* that "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and *improving the quality of legal services*. The State Bar may therefore constitutionally fund activities *germane* to those goals out of the mandatory dues of all members."[6] The Court defined germane as being "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State."[7] Michigan Supreme Court Administrative Order 2004-1 further elucidates the matter of germaneness by identifying several permissible issue areas for Bar public policy advocacy, including the improvement in the functioning of the courts and availability of legal services to society. Importantly, while they are sometimes used as convenient heuristics or proxies for these discussions,

[6] *Keller v State Bar of California*, 496 US 1, 13–14; 110 S Ct 2228, 2236; 110 L Ed 2d 1 (1990) (emphasis added).
[7] *Id.*

neither *Keller* nor AO 2004-1 establishes either a strict substance vs procedure distinction or the level of controversy/division surrounding a policy issue as the relevant test for *Keller*-permissibility. A reasonable relationship requires the connection to be ordinary, usual, or to a fair or moderate degree, as opposed to one that is distantly attenuated. With those guardrails in mind, the question is whether HB 5431 is reasonably related to the functioning of Michigan courts or access to legal services.

Some provisions of HB 5431 are reasonably related to access to legal services. For example, making awards of reasonable attorney fees more readily availing in WICA proceedings is reasonably related to access to legal services. HB 5431 also have numerous provisions that are reasonably related to the functioning of the courts. As noted above, for example, WICA provides little procedural guidance about how either the attorney general or the prosecuting attorney are to be involved in these proceedings. HB 5431 provides procedural clarity to both the bench and bar, as well as to exonerees, about this involvement. The permissible timeline for filing an answer or other pleading is a quintessential example of a public policy related to court functioning. Furthermore, HB 5431 also has the potential to provide greater clarity to the law by updating the statutory text to reflect several Michigan Supreme Court holdings interpreting WICA (or in some cases posing questions to the Legislature about its intent). The Board of Commissioners has repeatedly determined in both the legislative and court rule context that it is both desirable and *Keller*-permissible to align divergent/conflicting sources of legal authority concerning an area of law or particular procedure. Court functioning is poorly served when attorneys, judges, and plaintiffs are required to consult multiple sources of authority to ascertain the meaning of a statute. Such is the case with WICA today. One might argue that had some of these questions been raised in the first instance by the Legislature as a bill, that the policy question would have been too removed from court functioning to satisfy *Keller*. But that is not the circumstance presented by HB 5431. Instead, in several key provisions, the bill aims to harmonize statute and case law.

In some areas that have not yet come before the Court, the bill also aims to improve court functioning by clarifying the scope of judicial authority. For example, making it explicit that a judge may approve an order of expungement based on the stipulation of the parties without an award of compensation. Even the bill's provision changing the plaintiff's burden of proof in a WICA action serves a purpose that is reasonably related to the functioning of the courts: promoting greater procedural consistency across civil actions by applying the same burden.

The Bar committees that reviewed HB 5431 reached differing conclusions as to *Keller*. Generally speaking, the Access to Justice Policy Committee believed the bill (or at least significant portions thereof) was *Keller*-permissible, while the Criminal Jurisprudence & Practice Committee ultimately concluded the bill was not *Keller*. Both committee votes were split. The *Keller* discussion in both committees revolved principally around which provisions of HB 5431 were properly categorized as substantive in nature and which were procedural. However, as noted above, a strict substance vs procedure distinction is not the appropriate test for *Keller*-permissibility. It is also the case that upon even cursory examination nearly every bill coded as procedural implicates substantive questions of public policy. It is for that reason that *Keller* requires a reasonable relationship to a permissible subject, not a brightline test of black or white, substance or procedure.

It is also fair to say that much of the discussion in the committees revolved around the potential controversy (including disagreement between lawyers) likely to be involved in any WICA legislation. Here again, while that may be a relevant consideration for the Board of Commissioners when weighing whether or not to adopt a public policy position on HB 5431, and what that position is, it is not

relevant to the threshold question of *Keller*-permissibility. While not all of the provisions of HB 5431 may satisfy the higher standard of being necessarily related to court functioning or access to legal services, as outlined above, they do meet the standard of being reasonably related to either functioning of the courts, availability of legal services to society, or both, depending on the particular provision in question.

***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 5431 is reasonably related to both improvement in functioning of the courts and availability of legal services to society. As such, the bill is *Keller*-permissible and may be considered on its merits.

SUBSTITUTE FOR

HOUSE BILL NO. 5431

A bill to amend 2016 PA 343, entitled

"Wrongful imprisonment compensation act,"

by amending sections 2, 4, 5, and 7 (MCL 691.1752, 691.1754, 691.1755, and 691.1757), section 7 as amended by 2020 PA 43.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2. As used in this act:

(a) "Charges" means the criminal complaint filed against the plaintiff by a county prosecutor or the attorney general on behalf of the people of this state that resulted in the conviction and imprisonment of the plaintiff that are the subject of the claim for compensation under this act.

(b) "New evidence" means any evidence that was not presented ~~in the proceedings leading to plaintiff's conviction,~~ **to a trier of**

fact during a proceeding that determined guilt, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented ~~in the proceedings leading to plaintiff's conviction.~~ **to a trier of fact when guilt was decided.** New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation.

(c) "Plaintiff" means the individual making a claim for compensation under this act. **Plaintiff includes a trustee or conservator for that individual if the individual is not competent to act as plaintiff.** Plaintiff does not include the estate of ~~an~~ **a deceased** individual entitled to make a claim for compensation under this act, the personal representative of the estate, or any heir, devisee, beneficiary, or other person who is entitled under other law to pursue a claim for damages, injury, or death suffered by the individual.

(d) "State correctional facility" means a correctional facility maintained and operated by the department of corrections.

(e) ~~"This~~ **For the purpose of state court actions related to this act, "this** state" means the state of Michigan and its political subdivisions, and the agencies, departments, commissions, and courts of this state and its political subdivisions.

Sec. 4. (1) In an action under this act, the plaintiff shall attach to his or her verified complaint documentation that establishes ~~all of the following:~~

~~(a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.~~

~~(b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the plaintiff was found to be not guilty.~~

~~(c) New evidence demonstrates that the plaintiff was not the perpetrator of the crime or crimes and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges, finding of not guilty, or gubernatorial pardon.~~**the facts that the plaintiff alleges entitle the plaintiff to judgment under section 5.**

(2) A complaint filed under this section must be verified by the plaintiff.

(3) A copy of a complaint filed under this section must be served on the attorney general and on the prosecuting attorney for the county in which the plaintiff was convicted. The attorney general and the prosecuting attorney may answer and contest the complaint. **The prosecuting attorney shall file an appearance within 60 days if the prosecuting attorney wishes to participate further in the action.**

(4) An answer to a complaint filed under this section may be served and filed not later than 60 days after service of the complaint, with the opportunity to request additional time extensions if there is a showing of good cause, in order for the attorney general to determine whether compensation under this act is appropriate before formal discovery begins.

(5) ~~(4)~~ If the plaintiff's conviction was for an assaultive crime or a serious misdemeanor, the prosecuting attorney shall notify the victim of the assaultive crime or serious misdemeanor of the application in the same manner as is required for an application to have a conviction set aside under section 22a or 77a of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.772a and 780.827a. The prosecuting attorney shall give the victim notice under this subsection by first-class mail sent to the victim's last known address. The victim or victim's representative has the right to appear at any proceeding under this act concerning the complaint and to make a written or oral statement.

(6) ~~(5)~~ The plaintiff, the attorney general, and the prosecuting attorney for the county in which the plaintiff was convicted may conduct discovery in an action under this act. **Discovery must not be conducted before the attorney general files an answer.**

Sec. 5. (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by ~~clear and convincing~~ **a preponderance of the** evidence:

(a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence, **or was committed to a residential mental health facility in relation to the conviction.**

(b) **One of the following:**

(i) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was

determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.

(*ii*) The plaintiff received a gubernatorial pardon for the crime for which the plaintiff was incarcerated.

(c) **One of the following:**

(*i*) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, ~~results~~ **and the new evidence either resulted** in the reversal or vacation of the charges in the judgment of conviction or **resulted in** a gubernatorial pardon ~~, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.~~**for the crime for which the plaintiff was incarcerated.**

(*ii*) The reversal or vacation of the judgment of conviction was on the basis of insufficient evidence supporting the conviction, and the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction.

(*iii*) New evidence was presented to the court that reversed or vacated the plaintiff's conviction, but relief was granted on another basis, and the new evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction.

(2) In determining whether the plaintiff has met his or her burden under subsection (1) at any stage of the proceedings, including at trial, the court may consider the following:

(a) The entire record of the plaintiff's criminal case, which includes the lower court records, the plea or trial transcripts, the appellate record, and the record of any postconviction proceedings.

(b) Evidence that was seized or obtained in violation of the Fourth Amendment of the United States Constitution or section 11 of article I of the state constitution of 1963.

(3) In exercising its discretion regarding the weight and credibility of the evidence presented by the parties, the court shall give due consideration to the difficulties of proof caused by the passage of time, the loss or destruction of evidence, the death or unavailability of witnesses, and other factors not caused by the parties. The court shall not find a witness incredible who testified at the plaintiff's criminal trial or in post-trial proceedings based solely on the fact that the witness is not testifying at the trial held on the plaintiff's claim under this act.

(4) ~~(2)~~ Subject to subsections ~~(4) and (5),~~ **(6) and (7)**, if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as follows:

(a) Fifty thousand dollars for each year, ~~from the date~~ **prorated as provided in this subdivision as appropriate**, the plaintiff was imprisoned, ~~until the date the plaintiff was released from prison,~~ **including time served in pretrial detention**, regardless of whether the plaintiff was released from imprisonment on parole or because the maximum sentence was served. For incarceration of less than a year in prison, this amount is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated. ~~in prison.~~

(b) Reimbursement of any amount awarded and collected by this state under the state correctional facility reimbursement act, 1935 PA 253, MCL 800.401 to 800.406.

(c) Reasonable attorney fees incurred in an action under this act. ~~All~~ **Both** of the following apply to attorney fees under this act:

~~(*i*) The court shall not award attorney fees unless the plaintiff has actually paid the amount awarded to the attorney.~~

~~(*ii*) It is not necessary that the plaintiff pay the attorney fees before an initial award under this act. The court may award attorney fees on a motion brought after the initial award.~~

(*i*) ~~(*iii*)~~ The attorney fees must not exceed 10% of the total amount awarded under subdivisions (a) and (b) or $50,000.00, whichever is less, plus expenses.

(*ii*) ~~(*iv*)~~ An award of attorney fees under this act may not be deducted from the compensation awarded the plaintiff, and the plaintiff's attorney is not entitled to receive additional fees from the plaintiff.

(5) ~~(3)~~ An award under subsection ~~(2)~~ **(4)** is not subject to a limit on the amount of damages except as stated in this act.

(6) ~~(4)~~ Compensation may not be awarded under subsection ~~(2)~~ **(4)** for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction, **whether running before or after the sentence on the conviction that is the basis of the claim. If the plaintiff was on parole for a prior offense at the time of the wrongful conviction and parole was revoked solely on the basis of the wrongful conviction, any concurrent or consecutive sentence relating to the prior offense is not covered by this subsection.**

(7) ~~(5)~~ Compensation may not be awarded under subsection ~~(2)~~ **(4)** for any injuries sustained by the plaintiff while imprisoned. The making of a claim or receipt of compensation under this act does not preclude a claim or action for compensation because of injuries sustained by the plaintiff while imprisoned.

(8) ~~(6)~~ In the discretion of the court, the total amount awarded under subsection ~~(2)(a)~~ **(4)(a)** and (b) may be paid to the plaintiff in a single payment or in multiple payments. If the court orders the compensation to be paid in multiple payments, the initial payment must be 20% of the total amount awarded or more and the remainder of the payments must be made over not more than 10 years.

(9) ~~(7)~~ An award of compensation, **or a compromise or settlement of a claim**, under this act is not a finding of wrongdoing against anyone. ~~An~~ **The granting or denial of a claim for an** award of compensation, **or a compromise or settlement of a claim**, under this act is not admissible in evidence in a civil action that is related to the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.

(10) ~~(8)~~ The acceptance by the plaintiff of an award under this act, or of a compromise or settlement of the claim, must be in writing and, unless it is procured by fraud, is final and conclusive on the plaintiff ~~, constitutes a complete release of all claims against this state,~~ and is a complete bar to any action in state court by the plaintiff against this state based on the same subject matter. However, the acceptance by the plaintiff of an award under this act, or of a compromise or settlement of the plaintiff's claim, does not operate as a waiver of, or bar to, any action **and recovery** in federal court against ~~an~~ **a political**

subdivision or individual alleged to have been involved in the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.

(11) ~~(9) A~~ compensation award under subsection ~~(2)~~ **(4), or compensation under a compromise or settlement of a claim under this act,** may not be offset by any of the following:

(a) Expenses incurred by this state or any political subdivision of this state, including, but not limited to, expenses incurred to secure the plaintiff's custody or to feed, clothe, or provide medical services for the plaintiff while imprisoned, including expenses required to be collected under the state correctional facility reimbursement act, 1935 PA 253, MCL 800.401 to 800.406. The attorney general is specifically excused from complying with the state correctional facility reimbursement act, 1935 PA 253, MCL 800.401 to 800.406.

(b) The value of any services awarded to the plaintiff under this section.

(c) The value of any reduction in fees for services awarded to the plaintiff under this act.

(12) ~~(10) An~~ award under subsection ~~(2)~~ **(4), or compensation under a compromise or settlement of a claim under this act,** is not subject to income taxes.

(13) ~~(11) A~~ compensation award, **or compensation under a compromise or settlement of a claim,** under this act is subject to the payment of child support, including child support arrearages, owed by the plaintiff. The plaintiff remains liable for any child support or arrearage under the office of child support act, 1971 PA 174, MCL 400.231 to 400.240, and the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650, except for

any child support or arrearage that erroneously accrued while the plaintiff was imprisoned. Child support must be deducted from an award, **or compensation under a compromise or settlement of a claim,** under this act before the plaintiff receives any of the money from the award, **compromise, or settlement.** This subsection does not affect any ongoing child support obligation of the plaintiff.

(14) ~~(12)~~ This act does not impair or limit the right of a state or local government to collect a debt of a plaintiff from the plaintiff's award of compensation, **or compensation under a compromise or settlement of a claim,** under this act.

(15) ~~(13)~~ An award of compensation, **or compensation under a compromise or settlement of a claim,** under this act is subject to setoff or reimbursement for damages **received directly by the plaintiff that were** obtained for the wrongful conviction or imprisonment from any other person **or political subdivision, after the damage award is reduced for attorney fees.**

(16) ~~(14)~~ If a court determines that a plaintiff was wrongfully convicted and imprisoned, the court shall enter an order that provides that any record of the arrest, fingerprints, conviction, and sentence of the plaintiff related to the wrongful conviction be expunged from the criminal history record. **The parties may stipulate to the entry of an order under this subsection without an award of compensation under subsection (4)(a).** A document that is the subject of an order entered under this subsection is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 7. (1) An action for compensation under this act must be commenced within 3 years after **the** entry of a verdict, order, ~~or~~ judgment, **or pardon** as the result of an event described in section

~~4(1)(b).~~ **5(1)(b)**. Any action by this state challenging or appealing a verdict, order, or judgment entered as the result of an event described in section ~~4(1)(b)~~ **5(1)(b)** tolls the 3-year period.

(2) An individual convicted, imprisoned, and released from custody before March 29, 2017 must commence an action under this act ~~within 18 months after the effective date of the 2020 amendatory act that amended this section.~~**before September 3, 2021.**

(3) An individual may, irrespective of any other provision of this act, bring a claim within 18 months after the effective date of the amendatory act that added this subsection, if the individual can show that he or she qualifies for an award as a result of section 5(1)(c)(*ii*).

Legislative Analysis

WRONGFUL IMPRISONMENT COMPENSATION ACT

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

House Bill 5431 as introduced
Sponsor: Rep. Joey Andrews
Committee: Criminal Justice
Revised 3-6-24

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

SUMMARY:

House Bill 5431 would amend the Wrongful Imprisonment Compensation Act, which allows individuals who were convicted under a state law and imprisoned in a state correctional facility for a crime they did not commit to sue the state in the Court of Claims for compensation for their wrongful imprisonment. Among other things, the bill would change procedures for an action brought under the act, the evidence that merits a favorable judgment and the criteria for considering it, and the time frame in which certain actions may be brought.

Plaintiff

The act uses the term ***plaintiff***, which it defines as the individual making a claim for compensation under the act. The bill would add that ***plaintiff*** includes a trustee or conservator for that individual if the individual is not competent to act as plaintiff.

Answer to complaint, discovery

Under the act, a copy of the complaint the plaintiff has filed to initiate the lawsuit must be served on the attorney general and on the prosecuting attorney for the county where the plaintiff was convicted. The attorney general and prosecuting attorney may answer and contest the complaint.

The bill would require the prosecuting attorney to file an appearance within 60 days if they wish to participate further in the action. An answer to a complaint would have to be served and filed no later than 60 days after service of the complaint, but time extensions could be requested if there is a showing of good cause, to allow the attorney general to determine whether compensation under the act is appropriate before formal discovery begins. The bill would prohibit discovery from being conducted before the attorney general files an answer.

Proof entitling judgment in plaintiff's favor

Currently, in an action under the act, the plaintiff is entitled to judgment in their favor if they prove all of the following[1] by *clear and convincing evidence*:[2]

- That they were convicted of one or more crimes under state law for which they were sentenced to a term of imprisonment in a state correctional facility and served at least part of the sentence.
- That their judgment of conviction was reversed or vacated and the charges were dismissed or they were determined upon retrial to be not guilty. (However, the plaintiff is not entitled to compensation under the act if they were convicted of another criminal

[1] Under both the act and the bill, the plaintiff also must attach to their verified complaint documentation that establishes these facts.

[2] In this context, something is proven by *clear and convincing evidence* if it is shown to be highly probable to be true.

offense arising from the same transaction and that offense was not dismissed or they were convicted of that offense on retrial.)

- That ***new evidence*** demonstrates that they did not perpetrate the crime and were not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a pardon from the governor, and results in either dismissal of all the charges or a finding of not guilty on all the charges upon retrial.

  New evidence means any evidence that was not *presented in the proceedings leading to plaintiff's conviction*, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was *presented in the proceedings leading to plaintiff's conviction*. New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or the attorney general (if the Department of the Attorney General prosecuted the case) agrees that the recantation constitutes new evidence without other evidence to support the recantation. [The bill would change the italicized phrase to, in the first instance, *presented to a trier of fact during a proceeding that determined guilt* and, in the second instance, *presented to a trier of fact when guilt was decided*.]

The bill would instead provide that, in an action under the act, the plaintiff is entitled to judgment in their favor if they prove all of the following by *a preponderance of the evidence*:[3]

- That they were convicted of one or more crimes under state law for which they were sentenced to a term of imprisonment in a state correctional facility, and served at least part of the sentence, or in relation to which they were committed to a residential mental health facility.[4]
- Either of the following:
  - That their judgment of conviction was reversed or vacated and the charges were dismissed or they were determined upon retrial to be not guilty. (However, they are not entitled to compensation under the act if they were convicted of another criminal offense arising from the same transaction and that offense was not dismissed or they were convicted of that offense on retrial.)
  - That they received a pardon from the governor on the basis of actual innocence for the crime they were incarcerated for.
- One of the following:
  - That ***new evidence*** demonstrates that they did not perpetrate the crime and were not an accomplice or accessory to the acts that were the basis of the conviction, and the new evidence either resulted in the reversal or vacation of the charges in the judgment of conviction or resulted in a pardon from the governor.
  - That the reversal or vacation of the judgment of conviction was on the basis of insufficient evidence supporting the conviction, and they did not perpetrate the

[3] In this context, something is proven by *a preponderance of the evidence* if it is shown that it is more probable to be true than to be not true.

[4] It seems unclear whether an individual committed to a residential mental health facility could claim compensation under the bill. Section 3 of the act limits the individuals who can bring an action under the act to only those who were wrongfully "convicted under the law of this state and subsequently *imprisoned in a state correctional facility*" (emphasis added). Much of the rest of the act relates to individuals who have, specifically, been *imprisoned*.

crime and were not an accomplice or accessory to the acts that were the basis of the conviction. (See also "Window for insufficient evidence claim," below.)

- That ***new evidence*** was presented to the court that reversed or vacated their conviction, but relief was granted on another basis, and the new evidence demonstrates that they did not perpetrate the crime and were not an accomplice or accessory to the acts that were the basis of the conviction.

Consideration by the court

Under the bill, in determining whether the plaintiff has met their burden of proof at any stage of the proceedings (including at trial), the court could consider the following:

- The entire record of the plaintiff's criminal case, which includes the lower court records, the plea or trial transcripts, the appellate record, and the record of any postconviction proceedings.
- Evidence that was seized or obtained in violation of the Fourth Amendment to the United States Constitution or in violation of section 11 of Article I of the state constitution.

In addition, in exercising its discretion regarding the weight and credibility of evidence, the court would have to give due consideration to the difficulties of proof caused by the passage of time, the loss or destruction of evidence, the death or unavailability of witnesses, and other factors not caused by the parties. The court could not find that a witness who testified at the plaintiff's criminal trial or in post-trial proceedings is not credible solely because the witness is not testifying at the trial held on the plaintiff's claim under this act.

Compensation

Currently, a court that finds that a plaintiff was wrongfully convicted and imprisoned must award the plaintiff $50,000 for each year they were imprisoned (with a prorated amount for partial years), reimbursement for any money collected by the state from the plaintiff for a share of their cost of care as provided under the State Correctional Facility Reimbursement Act, and reasonable attorney fees incurred in bringing an action under the act.

The bill would provide that, for purposes of calculating compensation, the time a plaintiff was imprisoned must include time they served in pretrial detention. The bill also would remove a provision that now prohibits a court from awarding attorney fees unless the plaintiff has actually paid the amount awarded to the attorney

In addition, the act now provides that compensation cannot be awarded for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction. The bill would add that this applies regardless of whether the sentence for that other conviction was running before or after the sentence for the conviction the claim is based on. However, these provisions would *not* apply to any concurrent or consecutive sentence relating to any prior offense that the plaintiff was on parole for at the time of the wrongful conviction, if that parole was revoked solely on the basis of the wrongful conviction.

Release of claims against the state

The act now provides that the acceptance by the plaintiff of an award under the act, or of a compromise or settlement of the claim, unless procured by fraud, is final and conclusive on the

plaintiff, *constitutes a complete release of all claims against the state,* and is a complete bar to any action in state court by the plaintiff against the state based on the same subject matter.

The bill would delete the language italicized above.

Action in federal court

The act now provides that the acceptance by the plaintiff of an award under the act, or of a compromise or settlement of the claim, does not operate as a waiver of, or bar to, any action in federal court against an individual alleged to have been involved in the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.

The bill would amend the above to change "action in federal court" to "action and recovery in federal court," and to provide that the action and recovery in federal court could be against a political subdivision as well as an individual.

Setoff

The act now provides that an award of compensation under the act is subject to setoff or reimbursement for damages obtained for the wrongful conviction or imprisonment from any other person.

The bill would modify this language to account for attorney fees and recovery from political subdivisions. Under the bill, an award of compensation, or compensation under a compromise or settlement of a claim, under the act would be subject to setoff or reimbursement for damages received directly by the plaintiff that were obtained for the wrongful conviction or imprisonment from any other person or political subdivision, after the damage award is reduced for attorney fees.

Expungement

Under the act, if a court determines that a plaintiff was wrongfully convicted and imprisoned, the court must enter an order requiring that any record of the arrest, fingerprints, conviction, and sentence of the plaintiff related to the wrongful conviction be expunged from the criminal history record.

The bill would add that the parties could stipulate to the entry of such an order without an award of compensation under the act.

Window for insufficient evidence claim

Generally under the act, an action for compensation must be commenced within three years after the entry of a verdict, order, judgment, or pardon exonerating the plaintiff. (This three-year period is tolled if the state challenges or appeals the verdict, order, judgment, or pardon.)

The bill would provide an exception from the general three-year rule to allow an individual to bring a claim within 18 months after the bill takes effect if the individual can show that they qualify for an award because, as provided above, the reversal or vacation of the judgment of conviction was on the basis of insufficient evidence supporting the conviction, and that they did not perpetrate the crime and were not an accomplice or accessory to the acts that were the basis of the conviction.

Compensation under a compromise or settlement of a claim

Finally, in several places where the act now refers only to an award off compensation under the act (for example, to provide that it is not a finding of wrongdoing, or that it is not subject to income taxes), the bill would add "or compensation under a compromise or settlement of a claim" under the act. Note that the phrase is already included in some provisions of the act.

MCL 691.1752 et seq.

FISCAL IMPACT:

The bill would result in an indeterminate, but likely marginal, annual increase in claims and awards for compensation from the Wrongful Imprisonment Compensation Fund (WICF). The current balance in the fund would be expected to cover an anticipated increase of claims and payments in the short term. However, an ongoing increase would likely require a corresponding increase to the average annual appropriated deposit into the WICF. In FY 2023-24, $10.0 million was deposited into the WICF, and the executive recommended budget includes $10.0 million for deposit in FY 2024-25. Average yearly compensation amounts over the last four fiscal years have been approximately $9.8 million.

As of the end of December 2023, there were 11 claims seeking a total of nearly $10.0 million in compensation in FY 2023-24, including attorney fees. Additional claims will likely later be identified and paid within the fiscal year. The balance of the WICF at the end of December was $19.8 million. If annual average claims exceed $10.0 million in future years, an increase in the annually appropriated deposit would be needed to support it.

The bill also would have an indeterminate fiscal impact on local court funding units. To the extent that there is an increase in the number of petitions filed in courts and a corresponding increase in the number of petitions granted by courts, costs would be incurred as a result of increased court caseloads and related administrative costs.

Legislative Analyst: Rick Yuille
Fiscal Analysts: Michael Cnossen
Robin Risko

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

Public Policy Position
HB 5431

Support in Concept; Recommend Amendments

Explanation

The Committee voted to support the bill in concept with recommended amendments regarding the statute of limitations provisions. As introduced, there is no avenue in this legislation for relief for individuals whose convictions were vacated if they were exonerated prior to March 29, 2017. The Committee believes the bill should be amended to include these individuals in the eighteen-month window.

Additionally, in considering whether a litigant met their burden of proof, courts should also consider whether evidence was obtained in violation of other constitutional provisions.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 3

***Keller*-Permissibility Explanation:**

The committee voted 19 in favor with 1 in opposition and 1 abstaining that the following portions of the bill are *Keller* permissible: (1) procedural processes; (2) statute of limitation; and (3) burden of proof.

Contact Persons:

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

Public Policy Position
HB 5431

Not *Keller*-Permissible

Explanation

A majority of the Committee voted that HB 5431 was not *Keller*-permissible. The Committee believes that the proposed amendments of Michigan's Wrongful Imprisonment Compensation Act are substantive in nature, as opposed to procedural amendments impacting the functioning of the courts.

Position Vote:

Voted For position: 11
Voted against position: 4
Abstained from vote: 2
Did not vote (absence): 7

Contact Persons:

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

AFTER INNOCENCE

To: House Committee on Criminal Justice (Rep. Hope, Chair)

Re: House Bill 5431 (Andrews)

March 5, 2024

Dear Rep. Hope and Committee Members,

We welcome this effort to fix Michigan's Wrongful Incarceration Compensation Act (WICA). First enacted in 2016 to provide compensation to individuals who prove they were innocent of the crimes for which they had been incarcerated, problems with the structure and provisions of WICA – including its "new evidence of innocence" requirement – have led to repeated and extensive litigation, including before the Michigan Supreme Court, which called on the Legislature to reform WICA.

After Innocence is a nonprofit that since 2015 has provided free post-release assistance to hundreds of exonerees nationwide, including more than 40 exonerees in Michigan. In working directly with exonerees across the country, we have seen how wrongful conviction compensation statutes do – and do not – achieve the goal of fairly and efficiently identifying and compensating individuals who have been imprisoned for crimes they did not commit. We have worked with lawmakers in many states interested in improving their compensation laws, often by incorporating best practices from other jurisdictions.

We have met with Michigan exonerees and reviewed the current version of HB 5431. While it includes some very important reforms, several miss the mark. In particular, even with the proposed changes in this bill, the "new evidence of innocence" requirement will continue to bar deserving exonerees from compensation, and lead to needless litigation. Other problems with WICA are not yet addressed by HB 5431, including with regard to who is eligible to make a claim for compensation, what they must prove in order to be compensated, and the compensation they receive.

We have prepared a set of proposals for amendment in that regard – endorsed by the Michigan exonerees we have convened so far – and look forward to collaborating with the bill sponsors and other stakeholders on the details of this bill, to ensure that the revised WICA draws on best practices from around the country to ensure that deserving Michigan exonerees receive compensation for what they endured.

Thank you,

Jon Eldan
Founder and Executive Director
After Innocence
(415) 307-3386
www.after-innocence.org

My name is Laurie Moore. 3/5/24 RE: HB 5431
I am 70 years old and live in Otsego County.
Please bear with me as I make this statement – I had a stroke that sometimes interferes with my ability to speak.

I appreciate that this bill is trying to fix the Wrongful Incarceration Compensation Act. I am here to ask you to remember those of us who were harmed by those problems, and amend this bill to allow us to benefit from those reforms.

Here is my story.

In November 1987, I was convicted of a crime I did not commit.

I appealed my conviction on numerous grounds.

The appellate court overturned my conviction and ordered a new trial, after finding that the judge in my case had given an improper instruction to the jury. The appellate court went no further, and did not address the many other issues I raised in my appeal.

The prosecution then dismissed the charges against me.

I was free, but I received no reentry help from the state or compensation, and I have struggled in many ways as a result of my wrongful conviction.

I had hoped that the Wrongful Incarceration Compensation Act would have been available to people like me: individuals whose convictions had been reversed and who could, given a fair chance, establish that they were factually innocent of the crime for which they were incarcerated.

Unfortunately, WICA excludes cases like mine. It requires that we show that our convictions were overturned on grounds of "new evidence of innocence." My case shows how unfair that is: I am innocent, but had no control over how the appellate court decided to overturned my conviction.

As the deadline to apply for WICA compensation was approaching, I decided to apply, if for no other reason than on principle: I am innocent and I can prove it.

I accepted $25,000 in exchange for dismissing my claim. Not nothing, but roughly one-tenth of what I was due under WICA, had I been given a chance to prove my innocence.

I understand that this bill tries to fix that particular problem, and that IN THE FUTURE, all people with overturned convictions may be able to apply and have the chance to prove their innocence and be compensated.

That is good. But what about me and others like me, some who did apply for WICA, and some who didn't, and who were harmed by the problems you are now fixing?

Justice must look back as well as forward. Rather than leave me and others behind, I ask you to amend this bill to allow those of us who were harmed by the problems you are fixing to benefit from those reforms.

Thank you.

Organization of Exonerees

March 11, 2024

Dear Chair Hope, Vice Chairs Andrews and Filler and Members of the House Criminal Justice Committee,

Thank you for considering House Bill 5431, an amendment to the Wrongful Imprisonment Compensation Act (WICA) statute.

For the Organization of Exonerees it is critical that any WICA reform be written in such a way that it can be fairly and evenly applied to all exonerated individuals in Michigan, and that it will be clearly and consistently applied in the future regardless of who is serving as Michigan's Attorney General.

At the bill sponsor's suggestion, we have outlined our specific concerns with House Bill 5431 below, with proposed solutions and amendment language. Our Board of Directors, on behalf of the members of our organization which is composed entirely of exonerated individuals from across the state of Michigan, requests the following 4 amendments.

We look forward to discussing these changes with you, and collaborating with you and other stakeholders on the details of this bill as the legislative process unfolds.

Thank you,

Kenneth Nixon
Co-Founder and President
Organization of Exonerees

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Concerns with WICA and Recommended Amendments to HB 5431

1) Compensation should be based on whether the claimant proves that he/she was innocent of the crime, not whether that proof was made through "new evidence" of innocence.

The "new evidence" requirement in WICA has been a source of unfairness, confusion and significant litigation, including before the Michigan Supreme Court.

The goal of a fair compensation statute should be to fairly and efficiently determine whether an individual has proven actual innocence and eligibility under other criteria. Whether an individual raised "new evidence" in a prior proceeding is simply irrelevant to that inquiry, leads to wasteful litigation, and – most importantly – will continue to deny compensation to individuals fully able to prove they did time for a crime they did not in fact commit.

HB5431 modifies the "new evidence" requirement to address two known problems: (1) it creates an exception for cases overturned on grounds of "insufficient evidence," and (2) it allows claims where "new evidence" was presented to the court that reversed the conviction, but relief was granted on another basis. But even with these modifications, WICA would still block compensation to innocent people in a variety of situations.

Suppose you had your conviction overturned, or you got a pardon, and you face no further criminal prosecution. And suppose you are ready to present a WICA claim and have evidence sufficient to meet your burden of proving that you did not in fact commit the crime. Under HB 5431, you may have been innocent, but you would still would be denied compensation in these circumstances:

- Your case was reversed on direct appeal (which, by definition, will not include new evidence) on grounds other than "insufficient evidence." These include: an improper jury instruction, improper inclusion/exclusion of evidence, and ineffective assistance of counsel based on the trial record alone (e.g., a failure to cross examine a witness).

- Your case was reversed on collateral appeal, but you did not raise new evidence in that collateral appeal.

- You received a pardon, but the pardon did not state that it was on the basis of new evidence.

- After your conviction was overturned, you obtain evidence that enables you to prove your factual innocence, on its own or together with evidence previously raised. Because that "new" evidence wasn't raised in the appeal that reversed your conviction, you are still barred from bringing a WICA claim.

The "new evidence" requirement presents further problems to fair and efficient administration of exoneree compensation: Even if you can show that "new evidence" was raised in the proceeding that led to your reversal, you would still lose unless you can also prove that this new evidence "demonstrates that [you] did not perpetrate the crime and [were] not an accomplice or accessory to the acts that were the basis of the conviction." In some cases, that "new evidence" will not suffice, even if given the chance, you could prove factual innocence.

For example, suppose your conviction was overturned on a *Brady* violation when you showed that potentially exculpatory evidence – e.g., the police incentivized testimony from a jailhouse snitch – was withheld from the defense. Under HB 5431, you would have to show that this new evidence "demonstrates" that you did not commit the crime, and that you were not an accomplice or an accessory to that crime. It's easy to see how this new evidence of innocence – sufficient to get you a new trial – does not prove that you did not do the crime, nor were an accomplice or an accessory to the crime. You lose, even if you can prove your factual innocence.

Finally, there remains the likelihood of needless litigation over whether an item of evidence is or is not "new."

At bottom, the problem here is not how "new evidence" is applied, but that WICA requires it in the first instance. While "new evidence" may have a legitimate place in post-conviction criminal litigation, as a bulwark against re-litigation of settled issues, it serves no fair purpose in a

wrongful conviction compensation statute, when in nearly every case, the issue of factual innocence has not previously been litigated.

HB 5431 should eliminate the "new evidence" requirement and compensate where a claimant shows they were factually innocent of the crime, irrespective of whether that proof comes by evidence that was or wasn't part of a prior proceeding. That is a workable solution: thirty-eight other jurisdictions have wrongful conviction compensation statutes. None of them require the claimant to establish eligibility for compensation through "new evidence," and none of them have had a flood of non-meritorious claims as a result.

Suggested Amendment #1: Strike the new evidence requirement at Section 2(b), at pg. 2, line 2 through pg. 2, line 14, and Section 5(c), at pg. 5, line 12 through pg. 6, line 1. At Section 5 (1)(c), at pg. 5, line 12, insert: **"THAT THE PLAINTIFF DID NOT COMMIT, NOR WAS AN ACCOMPLICE TO, 1 OR MORE OF THE CRIMES FOR WHICH HE OR SHE WAS CONVICTED."**

2) The amounts provided for compensation should be adjusted annually for inflation, and the base amount should be increased to the national average of $65,000 per year.

If the state is to pay compensation at a fixed dollar amount per year, then that amount should be indexed for inflation so the award does not lose value in real dollars over time. Six other jurisdictions adjust their annual amounts for inflation.

WICA was adopted in 2016, at a time when the national average compensation paid by states was approximately $50,000 per year of wrongful incarceration. Eight years later, as a result of inflation, that amount is not worth as much. 14 states and DC pay more than $50K/year, including Kansas ($65K/year), Oregon ($65K/year) and Idaho ($62K/year).

HB 5431 should be amended to increase the annual amount to $65,000/year, and the annual amount should be increased to account for inflation.

Suggested Amendment #2: To Section 5(4)(a), at pg.6, line 25, strike "Fifty thousand dollars" and replace with "Sixty-five thousand dollars" and later in that subsection strike "$50,000" and replace with "$65,000."

To Section 5, add a new subsection: "Beginning in 2025, and every year thereafter, the State Court Administrator shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on changes in the Consumer Price Index for All Urban Consumers, as published by the Bureau of Labor Statistics of the United States Department of Labor. On or before July 1 of the year in which the State Court Administrator makes the determination required by this subsection, the State Court Administrator shall adjust the amounts prescribed under paragraphs ___ through ___ of this section for the following calendar year by multiplying the amounts applicable to the calendar year in which the adjustment is made by the percentage amount determined under this subsection. The State Court Administrator shall round the adjusted limitation amount to the nearest $100, but the unrounded amount shall be used to calculate the adjustments to the amounts in subsequent calendar years. The adjusted amounts become effective on July 1 the year in which the adjustment is made, and apply to all claims filed under this section on or after July 1 of that year and before July 1 of the subsequent year."

3) Past claimants and potential claimants should have the benefit of the reforms in this bill.

Fairness requires that the positive changes to WICA benefit all exonerees, not just those with claims in the future. To that end, HB 5431 provides for supplemental claims for exonerees whose convictions were reversed based on insufficient evidence, but not for the other changes the bill would make. For example, it provides no supplemental claim for an exoneree whose claim was denied (or who had to compromise who had to take a compromised settlement for less than the full amount) because the court reversed the conviction on grounds other than innocence or insufficient evidence. Nor does it provide a supplemental claim for exonerees who made successful claims, but didn't receive compensation for their time in pre-trial detention or court-ordered hospitalization.

An individual who previously made a claim under WICA, irrespective of whether that claim was denied, granted or compromised, should be allowed a two-year window after enactment of this bill in which to bring a supplementary claim, upon a showing that the individual is due an

award, or additional sums, as a result of the revisions made under this bill, other than the change in the burden of proof.

Likewise, an exoneree who did not bring a prior claim should also receive the benefit of the new changes, if they can show that their claim would have been denied under the version of WICA that applied when the statute of limitations ran on their claim. For example, it would have been futile for an exoneree who received a pardon rather than a reversal, or who served all of their time in court-ordered hospitalization, to bring a WICA claim before passage of this bill. These exonerees, too, deserve the opportunity to bring a claim once the amendments make their claims viable.

Suggested Amendment #3: For Section (3), at pg. 11, line 12, substitute the following language: "An individual who previously made a claim under this Act, irrespective of whether that claim was denied, granted or compromised, irrespective of any waiver or release by plaintiff made in connection thereto, and irrespective of any other provision in this Act, may bring a supplementary claim under this Act for any award due to a plaintiff who has not received an award, or additional sums due to a plaintiff who becomes eligible for additional sums, as a result of the revisions made under this amendatory act, other than the standard of proof. Such supplementary claim must be brought within two years after the effective date of this amendatory act."

4**) There should be no compensation awarded for time served on an intact concurrent sentence, except to the extent that such time was longer than it would have been without one or more of the former convictions at issue in the petition.**

WICA excludes payment for time the claimant would have served under an intact conviction. However, in certain instances that concurrent or successive time served was longer than it would have been but for the wrongful conviction. For example, the sentence for the intact conviction may have been enhanced as a result of the (now) former conviction, or the individual may have been paroled on the intact conviction but for the former conviction. A successful claimant should have the opportunity to prove that such time would not have been served but for the wrongful conviction, and be compensated for it.

Suggested Amendment #4: To Section (5)(6), at pg. 7, line 25, add the following language in **ALL CAPS:** "Compensation may not be awarded under subsection ~~(2)~~ **(4)** for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction**, whether running before or after the sentence on the conviction that is the basis of the claim, EXCEPT TO THE EXTENT THE TIME SERVED FOR THAT OTHER CRIME WAS LONGER THAN IT WOULD HAVE BEEN WITHOUT ONE OR MORE OF THE CRIMES AT ISSUE IN THE PETITION. If the plaintiff was on parole for a prior offense at the time of the wrongful conviction and parole was revoked solely on the basis of the wrongful conviction, any concurrent or consecutive sentence relating to the prior offense is not covered by this subsection.**

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 12, 2024

Re: **HJR O and HB 5565 – Judicial Incumbency Ballot Designation**

Background
Article VII, Section 23 of the Michigan Constitution of 1908 introduced ballot designations for judicial incumbency:

> There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office.

A similar provision was then adopted in Article VI, Section 24 of the Michigan Constitution of 1963, as amended. Today, it requires that:

> There shall be printed upon the ballot under the name of each incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office.

House Joint Resolution O proposes an amendment to the Constitution to end incumbency ballot designations for justices and judges and submit that question to the people for their consideration at the next general election. Constitutional amendments proposed by the Legislature must be approved by a vote of two-thirds of the members elected to and serving in each house.

House Bill 5565 would amend the Michigan Election Law, 1954 PA 116, to strike provisions that implement the incumbency ballot designation for justices and judges. As noted in enacting section 2, if passed, this bill cannot become law unless HJR O first becomes a part of the state constitution via voter approval.

***Keller* Considerations**
Proponents of the incumbency ballot designation argue that it promotes stability and continuity in the judiciary by providing voters with information about candidate experience. They argue that this is particularly important in judicial races that tend to have significant drop-off in voter participation and there is less information readily available for voters to educate themselves about the candidates for the bench. Finally, they argue that a stable bench counteracts some measure of the pressure to inject partisanship into judicial races.

Opponents of the designation argue that it provides incumbents with an unearned and undeserved advantage that leads to valuing stability over ensuring that the best qualified candidate for a judicial office is elected. They also argue that the designation results in a judiciary that is resistant to change

and that does not reflect the communities being served by incumbent judges. Since the designation applies to appointed judges as well, this benefit is conferred on individuals who have never been selected to serve by the voters. The intricacies of properly identifying whether an individual is running for an incumbent or nonincumbent judicial seat on a candidate's affidavit of identity have also led to confusion in recent years resulting in candidate disqualifications. Such disqualifications for this reason would not occur if the designation were eliminated.

Regardless of whether one supports or opposes the designation as a policy question, the issues outlined briefly above that are implicated by that question are substantial and necessarily related to the composition of the bench and by extension the functioning of Michigan courts.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

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

Staff Recommendation

HJR O and HB 5565 are reasonably related to the functioning of the courts and therefore *Keller*-permissible. Both may be considered on their merits.

HOUSE JOINT RESOLUTION O

March 13, 2024, Introduced by Reps. Phil Green, Bezotte, Wozniak and Bierlein and referred to the Committee on Government Operations.

A joint resolution proposing an amendment to the state constitution of 1963, by amending section 24 of article VI, to eliminate the designation of incumbency on judicial ballots.

Resolved by the Senate and House of Representatives of the state of Michigan, That the following amendment to the state constitution of 1963, to eliminate the designation of incumbency on judicial ballots, is proposed, agreed to, and submitted to the people of the state:

ARTICLE VI

Sec. 24. There shall **not** be printed ~~upon~~ **on** the ballot under

the name of ~~each~~ **any** incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office.

Resolved further, That the foregoing amendment shall be submitted to the people of the state at the next general election in the manner provided by law.

HOUSE BILL NO. 5565

March 13, 2024, Introduced by Reps. Phil Green, Bezotte, Wozniak and Bierlein and referred to the Committee on Government Operations.

A bill to amend 1954 PA 116, entitled

"Michigan election law,"

by amending sections 409b, 409*l*, 424, 424a, 433, 444, 467b, 467c, 467m, 561, and 696 (MCL 168.409b, 168.409*l*, 168.424, 168.424a, 168.433, 168.444, 168.467b, 168.467c, 168.467m, 168.561, and 168.696), sections 409b, 433, 467b, and 467c as amended by 2018 PA 120, sections 409*l*, 424, 444, and 467m as amended by 2014 PA 94, section 424a as amended by 1999 PA 218, section 561 as amended by 2002 PA 163, and section 696 as amended by 2017 PA 113; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 409b. (1) To obtain the printing of the name of a qualified ~~person~~ **individual** other than an incumbent judge of the court of appeals as a candidate for nomination for the office of judge of the court of appeals ~~upon~~ **on** the official nonpartisan primary ballots, there must be filed with the secretary of state nominating petitions containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the appellate court district as determined under section 544f. The provisions of sections 544a and 544b apply. The secretary of state shall receive nominating petitions up to 4 p.m. on the fifteenth Tuesday before the primary.

~~(2) Nominating petitions filed under this section are valid only if they clearly indicate for which of the following offices the candidate is filing, consistent with subsection (8):~~

~~(a) An unspecified existing judgeship for which the incumbent judge is seeking election.~~

~~(b) An unspecified existing judgeship for which the incumbent judge is not seeking election.~~

~~(c) A new judgeship.~~

(2) ~~(3) Nominating petitions specifying a new or existing court of appeals judgeship may not be used to qualify a candidate for another judicial office of the same court in the same judicial district. A person~~ **An individual** who files nominating petitions for election to more than 1 court of appeals judgeship has not more than 3 days following the close of filing to withdraw from all but 1 filing.

~~(4) In a primary and general election for 2 or more judgeships where more than 1 of the categories in subsection (2) could be~~

~~selected, a candidate shall apply to the bureau of elections for a written statement of office designation to correspond to the judgeship sought by the candidate. The office designation provided by the secretary of state must be included in the heading of all nominating petitions. Nominating petitions containing an improper office designation are invalid.~~

~~(5) The secretary of state shall issue an office designation of incumbent position for any judgeship for which the incumbent judge is eligible to seek reelection. If an incumbent judge does not file an affidavit of candidacy by the deadline, the secretary of state shall notify all candidates for that office that a nonincumbent position exists. All nominating petitions circulated for the nonincumbent position subsequent to the deadline must bear an office designation of nonincumbent position. All signatures collected before the affidavit of candidacy filing deadline may be filed with the nonincumbent nominating petitions.~~

(3) ~~(6)~~ An incumbent judge of the court of appeals may become a candidate in the primary election for the office of which ~~he or she~~ **the judge** is the incumbent by filing with the secretary of state an affidavit of candidacy not less than 134 days before the date of the primary election. However, if an incumbent judge of the court of appeals was appointed to fill a vacancy and the judge entered upon the duties of the office less than 137 days before the date of the primary election but before the fifteenth Tuesday before the primary election, the incumbent judge may file the affidavit of candidacy not more than 3 days after entering upon the duties of office. The affidavit of candidacy must contain statements that the affiant is an incumbent judge of the court of appeals, is domiciled within the district, will not attain the age

of 70 by the date of election, and is a candidate for election to the office of judge of the court of appeals.

~~(7) In the primary and general November election for 2 or more judgeships of the court of appeals in a judicial district, each of the following categories of candidates must be listed separately on the ballot, consistent with subsection (8):~~

~~(a) The names of candidates for the judgeship or judgeships for which the incumbent is seeking election.~~

~~(b) The names of candidates for the judgeship or judgeships for which the incumbent is not seeking election.~~

~~(c) The names of candidates for a newly created judgeship or judgeships.~~

~~(8) If the death or disqualification of an incumbent judge triggers the application of section 409d(2), then for the purposes of subsections (2) and (7), that judgeship must be regarded as a judgeship for which the incumbent judge is not seeking election. The application of this subsection includes, but is not limited to, circumstances in which the governor appoints an individual to fill the vacancy and that individual seeks to qualify as a nominee under section 409d(2).~~

Sec. 409*l*. (1) If a vacancy occurs in the office of judge of the court of appeals, the governor shall appoint a successor to fill the vacancy. ~~Except as otherwise provided in section 409b(8), the person~~ **The individual** appointed by the governor ~~shall be considered~~ **is** an incumbent for purposes of this act. The ~~person~~ **individual** appointed by the governor shall hold office until 12 noon of January 1 following the next general November election at which a successor is elected and qualified.

(2) Except as otherwise provided in section 409d(2), if the

vacancy occurs more than 7 days before the nominating petition filing deadline as provided in section 409b for the general November election that is not the general November election at which a successor in office would be elected if there were no vacancy, the ~~person~~ **individual** appointed shall hold office only until a successor is elected at the next general November election in the manner provided for in this chapter for the election of judges of the court of appeals. The ~~person~~ **individual** elected shall hold office for the remainder of the unexpired term.

Sec. 424. (1) If a vacancy occurs in the office of circuit judge, the governor shall appoint a successor to fill the vacancy. ~~Except as otherwise provided in section 424a(3), the person~~ **The individual** appointed by the governor ~~shall be considered~~ **is** an incumbent for purposes of this act. The ~~person~~ **individual** appointed by the governor shall hold office until 12 noon of January 1 following the next general November election at which a successor is elected and qualified.

(2) Except as otherwise provided in section 415(2), if the vacancy occurs more than 7 days before the nominating petition filing deadline as provided in section 413 for the general November election that is not the general November election at which a successor in office would be elected if there were no vacancy, the ~~person~~ **individual** appointed shall hold office only until a successor is elected at the next general November election in the manner provided in this chapter for the election of circuit judges. The ~~person~~ **individual** elected shall hold office for the remainder of the unexpired term.

Sec. 424a. ~~(1) In the primary and general election for 2 or more judgeships of the circuit court, each of the following~~

~~categories of candidates shall be listed separately on the ballot, consistent with subsection (3):~~

~~(a) The names of candidates for the judgeship or judgeships for which the incumbent is seeking election.~~

~~(b) The names of candidates for an existing judgeship or judgeships for which the incumbent is not seeking election.~~

~~(c) The names of candidates for a newly created judgeship or judgeships.~~

~~(2) Nominating petitions filed under section 413 are valid only if they clearly indicate for which of the following offices the candidate is filing, consistent with subsection (3):~~

~~(a) An unspecified existing judgeship for which the incumbent judge is not seeking election.~~

~~(b) A new judgeship.~~

~~(c) An unspecified existing judgeship for which the incumbent judge is seeking election.~~

~~(3) If the death or disqualification of an incumbent judge triggers the application of section 415(2), then for the purposes of subsections (1) and (2), that judgeship shall be regarded as a judgeship for which the incumbent judge is not seeking election. The application of this subsection includes, but is not limited to, circumstances in which the governor appoints an individual to fill the vacancy and that individual seeks to qualify as a nominee under section 415(2).~~

~~(4) A person~~ **An individual** who files nominating petitions for election to more than 1 circuit judgeship ~~shall have~~ **has** not more than 3 days following the close of filing to withdraw from all but 1 filing.

~~(5) In a primary and general election for 2 or more judgeships~~

~~where more than 1 of the categories in subsection (2) could be selected, a candidate shall apply to the bureau of elections for a written statement of office designation to correspond to the judgeship sought by the candidate. The office designation provided by the secretary of state shall be included in the heading of all nominating petitions. Nominating petitions containing an improper office designation are invalid.~~

~~(6) The secretary of state shall issue an office designation of incumbent position for any judgeship for which the incumbent judge is eligible to seek reelection. If an incumbent judge does not file an affidavit of candidacy by the deadline, the secretary of state shall notify all candidates for that office that a nonincumbent position exists. All nominating petitions circulated for the nonincumbent position subsequent to the deadline shall bear an office designation of nonincumbent position. All signatures collected prior to the affidavit of candidacy filing deadline may be filed with the nonincumbent nominating petitions.~~

Sec. 433. (1) Except as otherwise provided in this subsection, to obtain the printing of the name of ~~a person~~ **an individual** as a candidate for nomination for the office of judge of probate ~~upon~~ **on** the official nonpartisan primary ballots, there must be filed with the county clerk of each county nominating petitions containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the county as determined under section 544f or by the filing of an affidavit according to section 433a. In the case of a probate court district, to obtain the printing of the name of ~~a person~~ **an individual** as a candidate for nomination for the office of judge of probate ~~upon~~ **on** the official nonpartisan primary ballots, there must be filed with

the secretary of state nominating petitions containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the probate court district as determined under section 544f or by the filing of an affidavit according to section 433a. The county clerk or, in the case of a probate court district, the secretary of state shall receive nominating petitions up to 4 p.m. on the fifteenth Tuesday before the August primary. The provisions of sections 544a and 544b apply.

~~(2) Nominating petitions filed under this section are valid only if they clearly indicate for which of the following offices the candidate is filing, consistent with section 435a(2):~~

~~(a) An unspecified existing judgeship for which the incumbent judge is seeking election.~~

~~(b) An unspecified existing judgeship for which the incumbent judge is not seeking election.~~

~~(c) A new judgeship.~~

(2) ~~(3) A person~~ **An individual** who files nominating petitions for election to more than 1 probate judgeship has not more than 3 days following the close of filing to withdraw from all but 1 filing.

~~(4) In a primary and general election for 2 or more judgeships where more than 1 of the categories in subsection (2) could be selected, a candidate shall apply to the bureau of elections for a written statement of office designation to correspond to the judgeship sought by the candidate. The office designation provided by the secretary of state must be included in the heading of all nominating petitions. Nominating petitions containing an improper office designation are invalid.~~

~~(5) The secretary of state shall issue an office designation of incumbent position for any judgeship for which the incumbent judge is eligible to seek reelection. If an incumbent judge does not file an affidavit of candidacy by the deadline, the secretary of state shall notify all candidates for that office that a nonincumbent position exists. All nominating petitions circulated for the nonincumbent position after the deadline must bear an office designation of nonincumbent position. All signatures collected before the affidavit of candidacy filing deadline may be filed with the nonincumbent nominating petitions.~~

(3) ~~(6)~~ If a candidate for nomination for the office of judge of probate receives incorrect or inaccurate written information from the county clerk or, in the case of a probate court district, the secretary of state concerning the number of nominating petition signatures required under section 544f and that incorrect or inaccurate written information is published or distributed by the county clerk or, in the case of a probate court district, the secretary of state, the candidate may bring an action in a court of competent jurisdiction for equitable relief. A court may grant equitable relief to a candidate under this subsection if all of the following occur:

(a) The candidate brings the action for equitable relief within 6 days after the candidate is notified by the county clerk or, in the case of a probate court district, the secretary of state that the candidate's nominating petition contains insufficient signatures.

(b) The candidate files an affidavit certifying that ~~he or she~~ **the candidate** contacted and received from the county clerk or, in the case of a probate court district, the secretary of state

incorrect or inaccurate written information concerning the number of nominating petition signatures required under section 544f.

(c) The county clerk or, in the case of a probate court district, the secretary of state published or distributed the incorrect or inaccurate written information concerning the number of nominating petition signatures required under section 544f before the filing deadline under subsection (1).

(d) The county clerk or, in the case of a probate court district, the secretary of state did not inform the candidate at least 14 days before the filing deadline under subsection (1) that incorrect or inaccurate written information concerning the number of nominating petition signatures required under section 544f had been published or distributed.

(4) ~~(7)~~ If a court grants equitable relief to a candidate under subsection ~~(6),~~ **(3),** the candidate must be given the opportunity to obtain additional nominating petition signatures to meet the requirements under section 544f. The additional nominating petition signatures obtained by a candidate must be filed with the county clerk or, in the case of a probate court district, the secretary of state no later than 4 p.m. on the fifth business day after the date that the court order granting equitable relief is filed.

(5) ~~(8)~~ The nominating petition signatures filed under this section are subject to challenge as provided in section 552.

Sec. 444. (1) If a vacancy occurs in the office of judge of probate, the governor shall appoint a successor to fill the vacancy. ~~Except as otherwise provided in section 435a(2), the person~~ **The individual** appointed by the governor ~~shall be considered~~ **is** an incumbent for purposes of this act and shall hold office

until 12 noon of January 1 following the next general November election at which a successor is elected and qualified.

(2) Except as otherwise provided in section 435(2), if the vacancy occurs more than 7 days before the nominating petition filing deadline as provided in section 433 for the general November election that is not the general November election at which a successor in office would be elected if there were no vacancy, the ~~person~~ **individual** appointed shall hold office only until a successor is elected at the next general November election in the manner provided for in this chapter for the election of judges of probate. The ~~person~~ **individual** elected shall hold office for the remainder of the unexpired term.

Sec. 467b. (1) To obtain the printing of the name of ~~a person~~ **an individual** as a candidate for nomination for the office of judge of the district court ~~upon~~ **on** the official nonpartisan primary ballots, there must be filed with the secretary of state nominating petitions containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the judicial district or division as determined under section 544f. An incumbent district court judge may also become a candidate by the filing of an affidavit in lieu of petitions according to section 467c. The secretary of state shall receive nominating petitions up to 4 p.m. on the fifteenth Tuesday before the primary. The provisions of sections 544a and 544b apply.

~~(2) Nominating petitions filed under this section are valid only if they clearly indicate for which of the following offices the candidate is filing, consistent with section 467c(4):~~

~~(a) An unspecified existing judgeship for which the incumbent judge is seeking election.~~

~~(b) An unspecified existing judgeship for which the incumbent judge is not seeking election.~~

~~(c) A new judgeship.~~

(2) ~~(3) A person~~ **An individual** who files nominating petitions for election to more than 1 district judgeship has not more than 3 days following the close of filing to withdraw from all but 1 filing.

~~(4) In a primary and general election for 2 or more judgeships where more than 1 of the categories in subsection (2) could be selected, a candidate shall apply to the bureau of elections for a written statement of office designation to correspond to the judgeship sought by the candidate. The office designation provided by the secretary of state must be included in the heading of all nominating petitions. Nominating petitions containing an improper office designation are invalid.~~

~~(5) The secretary of state shall issue an office designation of incumbent position for any judgeship for which the incumbent judge is eligible to seek reelection. If an incumbent judge does not file an affidavit of candidacy by the deadline, the secretary of state shall notify all candidates for that office that a nonincumbent position exists. All nominating petitions circulated for the nonincumbent position after the deadline must bear an office designation of nonincumbent position. All signatures collected before the affidavit of candidacy filing deadline may be filed with the nonincumbent nominating petitions.~~

(3) ~~(6)~~ If a candidate for nomination for the office of judge of the district court receives incorrect or inaccurate written information from the secretary of state or the bureau of elections concerning the number of nominating petition signatures required

under section 544f and that incorrect or inaccurate written information is published or distributed by the secretary of state or the bureau of elections, the candidate may bring an action in a court of competent jurisdiction for equitable relief. A court may grant equitable relief to a candidate under this subsection if all of the following occur:

(a) The candidate brings the action for equitable relief within 6 days after the candidate is notified by the secretary of state or the bureau of elections that the candidate's nominating petition contains insufficient signatures.

(b) The candidate files an affidavit certifying that ~~he or she~~ **the candidate** contacted and received from the secretary of state or the bureau of elections incorrect or inaccurate written information concerning the number of nominating petition signatures required under section 544f.

(c) The secretary of state or the bureau of elections published or distributed the incorrect or inaccurate written information concerning the number of nominating petition signatures required under section 544f before the filing deadline under subsection (1).

(d) The secretary of state or bureau of elections did not inform the candidate at least 14 days before the filing deadline under subsection (1) that incorrect or inaccurate written information concerning the number of nominating petition signatures required under section 544f had been published or distributed.

(4) ~~(7)~~ If a court grants equitable relief to a candidate under subsection ~~(6),~~ **(3),** the candidate must be given the opportunity to obtain additional nominating petition signatures to meet the requirements under section 544f. The additional nominating

petition signatures obtained by a candidate must be filed with the secretary of state no later than 4 p.m. on the fifth business day after the date that the court order granting equitable relief is filed.

(5) ~~(8)~~ The nominating petition signatures filed under this section are subject to challenge as provided in section 552.

Sec. 467c. ~~(1)~~ An incumbent district court judge may become a candidate in the primary election for the office of which ~~he or she~~ **the judge** is an incumbent by filing with the secretary of state an affidavit of candidacy in lieu of nominating petitions not less than 134 days before the date of the primary election. However, if an incumbent district court judge was appointed to fill a vacancy and the judge entered upon the duties of the office less than 137 days before the date of the primary election but before the fifteenth Tuesday before the primary election, the incumbent judge may file the affidavit of candidacy not more than 3 days after entering upon the duties of office. The affidavit of candidacy must contain statements that the affiant is an incumbent district court judge for the district or election division in which election is sought, that ~~he or she~~ **the affiant** is domiciled within the district or election division, and that ~~he or she~~ **the affiant** will not attain the age of 70 by the date of election, and a declaration that the affiant is a candidate for election to the office of district court judge.

~~(2) There must be printed upon the ballot under the name of each incumbent district judge who is a candidate for nomination or election to the same office the designation of that office.~~

~~(3) In the primary and general election for 2 or more judgeships of the district court, each of the following categories~~

~~of candidates must be listed separately on the ballot, consistent with subsection (4):~~

~~(a) The names of candidates for the judgeship or judgeships for which the incumbent is seeking election.~~

~~(b) The names of candidates for an existing judgeship or judgeships for which the incumbent is not seeking election.~~

~~(c) The names of candidates for a newly created judgeship or judgeships.~~

~~(4) If the death or disqualification of an incumbent judge triggers the application of section 467c(2), then for the purposes of subsection (3) and section 467b(2), that judgeship must be regarded as a judgeship for which the incumbent judge is not seeking election. The application of this subsection includes, but is not limited to, circumstances in which the governor appoints an individual to fill the vacancy and that individual seeks to qualify as a nominee under section 467c(2).~~

Sec. 467m. (1) If a vacancy occurs in the office of district judge, the governor shall appoint a successor to fill the vacancy. ~~Except as otherwise provided in section 467c(4), the person~~ **The individual** appointed by the governor ~~shall be considered~~ **is** an incumbent for purposes of this act and shall hold office until 12 noon of January 1 following the next general November election at which a successor is elected and qualified.

(2) Except as otherwise provided in section 467e(2), if the vacancy occurs more than 7 days before the nominating petition filing deadline as provided in section 467b for the general November election that is not the general November election at which a successor in office would be elected if there were no vacancy, the ~~person~~ **individual** appointed shall hold office only

until a successor is elected at the next general November election in the manner provided for in this chapter for the election of district court judges. The ~~person~~ **individual** elected shall hold office for the remainder of the unexpired term.

Sec. 561. (1) The ballots prepared by the board of election commissioners in each county for use by the electors of a political party at a primary election ~~shall~~ **must** include the name of each candidate of the political party for the office of governor, United States ~~senator,~~ **Senator**, and district offices; for the county, the name of each candidate of the political party for county offices; and for each township, the name of each candidate of the political party for township offices.

(2) If, in a district that is a county or entirely within 1 county, 2 or more candidates, including candidates for nonpartisan offices, for the same office have the same or similar surnames, a candidate may file a written request with the board of county election commissioners for a clarifying designation. The request ~~shall~~ **must** be filed not later than 3 days after the last date for filing nominating petitions. Not later than 3 days after the filing of the request, the board of county election commissioners shall determine whether a similarity exists and whether a clarifying designation should be granted. In a district located in more than 1 county, the board of state canvassers shall make a determination whether to grant a clarifying designation ~~upon~~ **on** the written request of a candidate who files nominating petitions with the secretary of state. The request ~~shall~~ **must** be filed with the ~~state~~ board of **state** canvassers not later than 5 days after the last date for filing nominating petitions. The board of state canvassers shall make ~~its~~ **a** determination at the same time ~~it~~ **the board** makes

a declaration of the sufficiency or insufficiency of nominating petitions in compliance with section 552.

(3) In each instance, the determining board shall immediately notify each candidate for the same office as the requester that a request for a clarifying designation has been made and of the date, time, and place of the hearing. The requester and each candidate for the same office ~~shall~~ **must** be notified of the board's determination by first-class mail sent within 24 hours after the final date for the determination. A candidate who is dissatisfied with the determination of the board of county election commissioners may file an appeal in the circuit court of the county where the board is located. A candidate who is dissatisfied with the determination of the board of state canvassers may file an appeal in the Ingham ~~county~~ **County** circuit court. The appeal ~~shall~~ **must** be filed within 14 days after the final date for determination by the board. The court shall hear the matter de novo. Except as provided in subsection (4), **and subject to section 24 of article IV of the state constitution of 1963**, in the case of the same surname or of a final determination by the board or by the court before the latest date that the board can arrange the ballot printing of the existence of similarity, the board shall print the occupation, date of birth, or residence of each of the candidates on the ballot or ballot labels under ~~their~~ **the** respective ~~names. The term~~ **name of each candidate. As used in this subsection**, "occupation" includes a currently held political office, even though it is not the candidate's principal occupation, but does not include reference to a previous position or occupation.

(4) ~~If there are 2 candidates with the same or similar surnames and 1 of the candidates is entitled to an incumbency~~

~~designation by section 24 of article VI of the state constitution of 1963, no other designation shall be provided for the other candidate with the same or similar surname. If there are more than 2 candidates with the same or similar surname and 1 of the candidates is entitled to an incumbency designation by section 24 of article VI of the state constitution of 1963, a clarifying designation may be given to the other candidates with the same or similar surname. Except for an incumbency designation under section 24 of article VI of the state constitution of 1963, if~~ **If** 2 or more candidates with the same or similar surnames are related, the board shall only print the residence or date of birth of each of the candidates as a clarifying designation. As used in this subsection, "related" means that the candidates with the same or similar surnames are related within the third degree of consanguinity.

(5) The board of state canvassers shall issue guidelines to ensure fairness and uniformity in the granting of designations and may issue guidelines relating to what constitutes the same or similar surnames. The board of state canvassers and the boards of county election commissioners shall follow the guidelines.

Sec. 696. (1) The board of election commissioners in each county shall have the name of each candidate for federal, state, district, county, and township offices at an election printed on 1 ballot, separate from any other ballot. The name of each candidate of each political party must be placed under the name of the office for which the candidate was certified to have been nominated along with the political party name under the candidate's name.

(2) If, in a district that is a county or entirely within 1 county, 2 or more candidates nominated by the same political party or by different political parties for the same office, or

nonpartisan candidates for the same office, have the same or similar surnames, a candidate may file a written request with the board of county election commissioners for a clarifying designation. The request must be filed not later than 3 days after the certification of the relevant candidates. Not later than 3 days after the filing of the request, the board of county election commissioners shall determine whether a similarity exists and whether a clarifying designation should be granted. In a district located in more than 1 county, the board of state canvassers shall make a determination whether to grant a clarifying designation ~~upon~~ **on** the written request of a candidate who is certified by the secretary of state. The request must be filed with the board of state canvassers not later than 3 days after the board of state canvassers completes the canvass of the primary election in compliance with section 581 and the certification of nominees in compliance with section 687. The board of state canvassers shall make ~~its~~ **the board's** determination not later than 3 days after the request is filed.

(3) In each instance, the determining board shall immediately notify each candidate for the same office as the requester that a request for a clarifying designation has been made and of the date, time, and place of the hearing. The requester and each candidate for the same office must be notified of the board's determination by first-class mail sent within 24 hours after the final date for the determination. A candidate who is dissatisfied with the determination of the board of county election commissioners may file an appeal in the circuit court of the county where the board is located. A candidate who is dissatisfied with the determination of the board of state canvassers may file an appeal in the Ingham

County circuit court. The appeal must be filed within 14 days after the final date for determination by the board. The court shall hear the matter de novo. Except as provided in subsection (4), **and subject to section 24 of article IV of the state constitution of 1963,** in the case of the same surname or of a final determination by the board or by the court before the latest date that the board can arrange for the ballot printing of the existence of similarity, the board shall print the occupation, date of birth, or residence of each of the candidates having the same or similar surnames on the ballot or ballot labels or slips to be placed on the voting machine, when used, under ~~their~~ **the** respective ~~names.~~ **name of each candidate.** The request may not be made by a candidate of a political party whose candidate for secretary of state received less than 10% of the total vote cast in the state for all candidates for secretary of state in the most recent November election in which a secretary of state was elected. As used in this subsection, "occupation" includes a currently held political office, even though it is not the candidate's principal occupation, but does not include reference to a previous position or occupation.

(4) ~~If there are 2 candidates with the same or similar surnames and 1 of the candidates is entitled to an incumbency designation by section 24 of article VI of the state constitution of 1963, no other designation shall be provided for the other candidate with the same or similar surname. If there are more than 2 candidates with the same or similar surname and 1 of the candidates is entitled to an incumbency designation by section 24 of article VI of the state constitution of 1963, a clarifying designation may be given to the other candidates with the same or~~

~~similar surname. Except for an incumbency designation under section 24 of article VI of the state constitution of 1963, if~~ **If** 2 or more candidates with the same or similar surnames are related, the board shall only print the residence or date of birth of each of the candidates as a clarifying designation. As used in this subsection, "related" means that the candidates with the same or similar surnames are related within the third degree of consanguinity.

(5) The board of state canvassers shall issue guidelines to ensure fairness and uniformity in the granting of designations and may issue guidelines relating to what constitutes the same or similar surnames. The board of state canvassers and the boards of county election commissioners shall follow the guidelines.

Enacting section 1. Section 435a of the Michigan election law, 1954 PA 116, MCL 168.435a, is repealed.

Enacting section 2. This amendatory act does not take effect unless Senate Joint Resolution ____ or House Joint Resolution O (request no. 04469'23) of the 102nd Legislature becomes a part of the state constitution of 1963 as provided in section 1 of article XII of the state constitution of 1963.

Public Policy Position
HJR O and HB 5565

No Position

Explanation
A majority of the Committee voted to recommend that the State Bar of Michigan take no position on the elimination of judicial incumbency designations. They believed that this was fundamentally a political question that should be left for the Legislature to decide.

Position Vote:
Voted For position: 14
Voted against position: 5
Abstained from vote: 2
Did not vote (absence): 9

Keller Permissibility Explanation:
The constitutionally mandated judicial incumbency designation has a demonstrated impact on the composition of the judiciary and its stability over time; as such HJR O and HB 5565 are reasonably related to the functioning of the courts and *Keller*-permissible.

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
HJR O

Oppose

Explanation:
The Section opposes removal of "incumbent" designations on ballots primarily out of concern for maintaining consistency among family court cases, and the concept of "one family, one judge". Experienced family court judges lead to better, more consistent outcomes, and removal of "incumbent" designation from ballots may result in election of new judges with little or no family law experience, often based on candidate name alone.

Position Vote:
Voted for position: 14
Voted against position: 3
Abstained from vote: 2
Did not vote: 2

Keller-Permissibility Explanation:
The improvement of the functioning of the courts
The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

FLS believes that experienced family court judges generally leads to better, more predictable outcomes for Michigan families. Incumbent designations arguably provide voters with information that the incumbent possesses some measure of judicial experience, and may prevent judicial turnover based purely on candidate names.

Contact Person: James Chryssikos
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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 10, 2024

Re: **SB 665 - District Court Magistrate Qualifications**

Background

Senate Bill 665 would amend the Revised Judicature Act, 1961 PA 236, to modify the residency qualifications for appointment to the office of district court magistrate. The bill strikes language from MCL 600.8501(2) that presently requires a person to be a registered election in the *district* for which the person is appointed magistrate or in an adjoining district if the appointment is made under a plan of concurrent jurisdiction. Instead, SB 665 would require an individual to *reside in or be employed in the county* to which the individual would be appointed magistrate or in an adjoining district if the appointment is made under a plan of concurrent jurisdiction. The bill also amends MCL 600.8507 to likewise expand the magistrate qualification to include residence in the county in which a magistrate is appointed or employment in the county of appointment.

Keller Considerations

District court magistrate qualifications impact who is able to serve in this judicial office, the size of the pool of potential appointees, and the nature and strength of the connection between the magistrate and the community they are appointed to serve. Each of these considerations is necessarily related to the functioning of the courts. Senate Bill 665 is therefore *Keller*-permissible.

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

Senate Bill 665 is necessarily related to the functioning of the courts and therefore *Keller*-permissible. The bill may be considered on its merits.

SENATE BILL NO. 665

November 09, 2023, Introduced by Senator HOITENGA and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending sections 8501 and 8507 (MCL 600.8501 and 600.8507), section 8501 as amended by 2016 PA 165 and section 8507 as amended by 2005 PA 326.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 8501. (1) In a county ~~that elects by itself~~ **with** fewer than 2 district judges, the county board of commissioners shall provide for 1 district court magistrate. In all other counties in districts of the first and second class, the county board of commissioners shall provide for not less than 1 magistrate if

recommended by the judges of the district. Additional magistrates may be provided by the board ~~upon~~ **on** recommendation of the judges. All magistrates provided for ~~shall~~ **must** be appointed by the judges of the district and the appointments ~~shall be~~ **are** subject to approval by the county board of commissioners before ~~a person~~ **an individual** assumes the duties of the office of magistrate.

(2) In each district of the third class, the judge or judges of the district may appoint 1 or more district court magistrates. ~~A person shall not be appointed magistrate unless the person is a registered elector in the district for which the person was appointed or in an adjoining district if the appointment is made under a plan of concurrent jurisdiction adopted under chapter 4.~~ Before ~~a person~~ **an individual** assumes the duties of the office of magistrate in a district of the third class, the appointment of that ~~person~~ **individual** as a district court magistrate is subject to approval by the governing body or bodies of the district control unit or units that, individually or in the aggregate, contain more than 50% of the population of the district. This subsection does not apply to the thirty-sixth district.

(3) Until the effective date of the amendatory act that added this subsection, an individual must not be appointed as a district court magistrate under subsection (1) or (2) unless the individual is a registered elector in the district for which the individual would be appointed or in an adjoining district if the appointment is made under a plan of concurrent jurisdiction adopted under chapter 4. Beginning on the effective date of the amendatory act that added this subsection, an individual must not be appointed as a district court magistrate under subsection (1) or (2) unless the individual resides in or is employed in the county to which the

individual would be appointed or in an adjoining district if the appointment is made under a plan of concurrent jurisdiction adopted under chapter 4.

(4) ~~(3)~~ The thirty-sixth district ~~shall~~ **must not** have ~~not~~ more than 6 district court magistrates. The chief judge of the thirty-sixth district may appoint 1 or more magistrates as permitted by this subsection. If a vacancy occurs in the office of district court magistrate, the chief judge may appoint a successor. Each magistrate appointed under this subsection ~~shall serve~~ **serves** at the pleasure of the chief judge of the thirty-sixth district.

(5) ~~(4) A person shall~~ **An individual must** not be appointed district court magistrate under subsection ~~(3)~~ **(4)** unless the ~~person~~ **individual** is a registered elector in the district or in an adjoining district if the appointment is made under a plan of concurrent jurisdiction adopted under chapter 4.

Sec. 8507. (1) ~~Magistrates shall~~ **Until the effective date of the amendatory act that amended this subsection, a magistrate must** be **a** registered ~~electors~~ **elector** in the county in which ~~they are~~ **a magistrate is** appointed. **Beginning on the effective date of the amendatory act that amended this subsection, a magistrate must reside in the county in which a magistrate is appointed or be employed in the county in which a magistrate is appointed.** All magistrates ~~appointed shall~~ serve at the pleasure of the judges of the district court. Before assuming office, ~~persons appointed magistrates shall~~ **a magistrate must** take the constitutional oath of office and file a bond with the treasurer of a district funding unit of that district in an amount determined by the state court administrator. The bond ~~shall~~ also ~~apply~~ **applies** to temporary service in another county under subsection (2), (3), or (4), or

~~pursuant to~~ **authorized by** a multiple district plan under subsection (5).

(2) In a district of the first class that consists of more than 1 county, if a magistrate is temporarily absent or incapacitated, the chief or only district judge may ~~direct~~ **issue a written order to** a magistrate of another county of the same district to serve temporarily in the county where the magistrate is temporarily absent or incapacitated. ~~The district judge shall make his or her order in writing.~~ A magistrate serving temporarily under this subsection is not entitled to additional compensation but, ~~shall~~ **on certification and approval by the state court administrator, must** be reimbursed for actual and necessary expenses incurred during the authorized temporary service. ~~upon certification and approval by the state court administrator. Upon allowance,~~ **On approval,** the reimbursement ~~shall~~ **must** be paid by the state treasurer out of the appropriation for the state court administrative office.

(3) In a district of the first class that consists of more than 1 county, the chief or only district judge may authorize a magistrate appointed in 1 county to serve in another county in the district.

(4) ~~Pursuant to~~ **Under** a multiple district plan **created** under section 8320 involving adjoining districts of the first class, a district court magistrate appointed in a county of 1 district may be authorized to serve in a county of the adjoining district. While serving in the adjoining district, the magistrate ~~shall be~~ **is** subject to the superintending control of the chief or only district judge of that district.

(5) ~~Pursuant to~~ **Under** a multiple district plan **created** under

section 8320 involving districts in the same county, a district court magistrate may be authorized to serve in any participating district of the county.

Public Policy Position
SB 665

Oppose as Drafted

Explanation

The Committee voted to oppose Senate Bill 665 as drafted. While the Committee understands the practical concern being raised by the bill sponsor, the Committee believes that the legislation is overly broad to the extent that the new magistrate residency requirements would apply uniformly across Michigan, as opposed to targeting those regions of the state with a demonstrated difficulty filling magistrate positions (e.g., rural areas). In addition, the Committee believes that the proposed residency standard ("resides in or is employed in the county to which the individual would be appointed or in an adjoining district") is problematic for two reasons: (1) the contemporary reality of virtual/remote employment arrangements would potentially result in magistrates residing anywhere in the state and still serving in this role; and (2) an individual residing in an adjoining county, but outside an adjoining district, would be excluded from serving.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 2
Did not vote (absence): 8

Keller Permissibility Explanation:

The Committee agreed that Senate Bill 665 is *Keller* permissible as necessarily related to the functioning of the courts.

Contact Person:

Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
SB 665

Support with Amendment

Explanation
The Committee voted to support Senate Bill 665 with an amendment requiring that district court magistrates be residents of either the district court district in which they are appointed or a contiguous district court district. The Committee felt that a magistrate should have some connection to the district they serve and that removing any residency limitation would therefore be undesirable.

Position Vote:
Voted For position: 15
Voted against position: 2
Abstained from vote: 0
Did not vote (absence): 7

***Keller* Permissible Explanation**
The Committee agreed that the legislation is *Keller* permissible in affecting the functioning of the courts.

Contact Persons:
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John A. Shea jashea@earthlink.net

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: April 10, 2024

Re: **SB 688 – Authorizing Diversion Act Research Requests**

Background

Senate Bill 688 would amend the Juvenile Diversion Act, 1988 PA 13, to permit a researcher to submit a request to the State Court Administrative Office or an individual court for a record kept under the Act. The bill requires the parties involved in such a request to negotiate a data use agreement for the requested records in the event that the research request is granted. In addition, if the records involved in such a request contain personally identifiable information (a term defined in the bill as "information about an individual that would reveal the individual's identity, including, but not limited to, an individual's name, date of birth, social security number, address, and other information unique to the individual"), SB 688 outlines redaction requirements. Under existing law, a record kept under the Juvenile Diversion Act may not be used by any person for any purpose except to make a decision on whether to divert a minor. Misuse of such records is (and would remain under SB 688) a criminal offense punishable by not more than an 18-day imprisonment, a fine of not more than $1,000, or both.

***Keller* Considerations**

The SBM committees that reviewed SB 688 were divided on the question of *Keller*-permissibility. The Access to Justice Policy Committee determined that the connection between facilitating research based on records kept under the Juvenile Diversion Act, 1988 PA 13, and court functioning was too attenuated to qualify as "reasonably related" under *Keller*. On the other hand, the Criminal Jurisprudence & Practice and Civil Procedure & Courts Committees both believed that legislation facilitating research into how Michigan courts are functioning—in this case specifically related to juvenile diversions—will promote data-driven policymaking (by both courts and the Legislature) that will lead directly to improved court functioning. As a result, these committees determined that SB 688 was *Keller*-permissible. As to prior practice, the Board of Commissioners has historically found legislation facilitating judicial system data collection and research to be *Keller*-permissible based on the same rationale cited by the Criminal Jurisprudence & Practice and Civil Procedure & Courts Committees.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1

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

Staff Recommendation

SB 688 is reasonably related to the improvement in the functioning of the courts and is therefore *Keller*-permissible. The bill may be considered on its merits.

SENATE BILL NO. 688

January 11, 2024, Introduced by Senator CHANG and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to amend 1988 PA 13, entitled

"Juvenile diversion act,"

by amending section 9 (MCL 722.829), as amended by 2023 PA 287.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 9. (1) ~~A~~ **Except as provided in subsection (2), a** record kept under this act must not be used by any person, including a court official or law enforcement official, for any purpose except ~~in making~~ **to make** a decision on whether to divert a minor.

(2) A researcher may submit a research request for a record kept under this act to the state court administrative office or an

individual court, as applicable. If the research request is granted, the applicable parties shall negotiate a data use agreement for the requested records. The researcher shall abide by all terms and conditions set forth in the data use agreement.

(3) If records kept under this act are collected by a court official to be provided to a researcher in accordance with subsection (2), the records must be redacted of personally identifiable information as follows:

(a) If all of the collected records have a common unique identifier, such as a court case record number, petition number, or another identifier that is determined to be sufficient by the court and the researcher, the state court administrator or court official, as applicable, shall redact the personally identifiable information before the records are provided to the researcher.

(b) If all of the collected records do not have a common unique identifier, the state court administrative office or court official, as applicable, shall work with the researcher to match the records and subsequently to redact the personally identifiable information.

(4) ~~(2)~~ A person that violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 180 days, a fine of not more than $1,000.00, or both.

(5) ~~(3)~~ A risk screening tool and a mental health screening tool conducted as part of a proceeding under this act and any information obtained from a minor in the course of those screenings or provided by the minor in order to participate in a diversion program, including, but not limited to, any admission, confession, or incriminating evidence, are not admissible into evidence in any adjudicatory hearing in which the minor is accused and are not

subject to subpoena or any other court process for use in any other proceeding or for any other purpose.

(6) As used in this section, "personally identifiable information" means information about an individual that would reveal the individual's identity, including, but not limited to, an individual's name, date of birth, Social Security number, address, and other information unique to an individual.

Enacting section 1. This amendatory act takes effect October 1, 2024.

Public Policy Position
SB 688

Not *Keller*-Permissible

Explanation
The Committee determined that the connection between facilitating research based on records kept under the Juvenile Diversion Act, 1988 PA 13, and court functioning was too attenuated to qualify as "reasonably related" under *Keller*.

Should Board of Commissioners conclude that the bill is *Keller*-permissible, the Committee voted unanimously (20) to recommend the following additions to the bill:

- Specific requirements for data-sharing agreements (specifically limitations on time and use of such records, and security and record destruction requirements);

- An additional provision requiring courts to maintain comprehensive records identifying all entities that have made requests to see records and what records are released; and

- A sanction provision (or extension of the sanction provision at MCL 722.829(4)) that would apply to researchers and their universities, agencies, or organizations who violate the data-sharing agreement required in subsection (2).

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

Public Policy Position
SB 688

Oppose as Drafted

Explanation
A majority of the Committee voted to oppose Senate Bill 688 as drafted, citing four areas of concern. The Committee agreed with the Access to Justice Policy Committee that the following three provisions should be added to the bill:

> Specific requirements for data-sharing agreements (specifically limitations on time and use of such records, and security and record destruction requirements);
>
> An additional provision requiring courts to maintain comprehensive records identifying all entities that have made requests to see records and what records are released; and
>
> A sanction provision (or extension of the sanction provision at MCL 722.829(4)) that would apply to researchers and their universities, agencies, or organizations who violate the data-sharing agreement required in subsection (2).

The Committee also agreed with the Criminal Jurisprudence & Practice Committee that the bill needed to define the term "researcher."

Position Vote:
Voted For position: 11
Voted against position: 1
Abstained from vote: 6
Did not vote (absence): 12

Keller Permissibility Explanation:
The Committee determined that legislation facilitating research into how Michigan courts are functioning will facilitate policymaking (by both courts and the Legislature) that is data-driven. As such, SB 688 is reasonably related to the functioning of the courts and therefore *Keller*-permissible. The Committee also took note of the fact that the Board of Commissioners has historically taken this same approach to other legislation related to the collection and analysis of judicial system data.

Contact Person:
Marla Linderman Richelew lindermanlaw@sbcglobal.net

Public Policy Position
SB 688

Oppose at This Time

Explanation

The Committee voted unanimously to oppose SB 688 at this time. The Committee felt that the bill raised too many unanswered questions and was too underdeveloped to take a substantive position and would prefer to monitor how the legislation develops, if at all. Among the Committee's specific concerns were the lack of a definition of "researcher" and questions about whether demographic information would be required to be redated before being released to researchers under the bill as introduced.

Position Vote:

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

***Keller* Permissible Explanation**

The Committee determined that legislation facilitating research into how Michigan courts are functioning will facilitate policymaking (by both courts and the Legislature) that is data-driven. As such, SB 688 is reasonably related to the functioning of the courts and therefore *Keller*-permissible. The Committee also took note of the fact that the Board of Commissioners has historically taken this same approach to other legislation related to the collection and analysis of judicial system data.

Contact Persons:

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

SBM State Bar of Michigan | CHILDREN'S LAW SECTION

Public Policy Position
SB 688

Oppose

Explanation:
The Children's Law Section Council voted to oppose SB 688. While the Council supports efforts to gather data on juvenile justice matters such as diversion, it was concerned that the redaction of all personal identifying information would render the data collected on diversion throughout the state meaningless. Information such as age of the youth, racial demographics, and which communities they live in is important for making comparisons of who is receiving the benefit of diversion and who is not.

Position Vote:
Voted for position: 11
Voted against position: 1
Abstained from vote: 0
Did not vote: 7

Contact Person: Joshua Pease
Email: jpease@sado.org

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 September 1, 2023. Comments may be sent in writing to Andrea Crumback, 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 the Reasonable Doubt instructions found in M Crim JI 1.9(3) and 3.2(3) to add the sentence, "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." The amendment was prompted by research showing that the clear-and-convincing standard was considered by the general public to be higher than the beyond-a-reasonable-doubt standard. The Model Jury Instruction Committee proposes the additional sentence to impress upon the jurors the level of certainty required for a criminal conviction. A number of Committee members preferred not to make any change to the instruction, but agreed to publication of the proposal for public consideration. Comments suggesting other wording for the reasonable-doubt instructions are welcome, but the Committee is only considering whether to adopt the change proposed, or wording substantially similar to the proposal. The added language is underlined. There is an extended comment period for this proposal.

[AMENDED] M Crim JI 1.9(3) and 3.2(3) Reasonable Doubt

(3) Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Public Policy Position
M Crim JI 1.9(3) and 3.2(3)

Support

Explanation
The committee voted 13 to 4 to support the adoption of the Criminal Jury Instruction.

Position Vote:
Voted For position: 13
Voted against position: 4
Abstained from vote: 0
Did not vote (absence): 7

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

Public Policy Position
M Crim JI 1.9(3) and 3.2(3)

Support

Explanation:
Council's prior position on M Crim JI 1.9(3) and 3.2(3) on reasonable doubt that was taken on 21 March, 2023, Council move instead to support the amendment as proposed.

Position Vote:
Voted for position: 15
Voted against position:3
Abstained from vote: 0
Did not vote: 0

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

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 May 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

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PROPOSED

The Committee proposes amending jury instructions M Crim JI 20.2 (Criminal Sexual Conduct in the Second Degree [MCL 750.520c]) and M Crim JI 20.13 (Criminal Sexual Conduct in the Fourth Degree [MCL 750.520e]) to add definitional "sexual contact" language from MCL 750.520a(q). Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 20.2 Criminal Sexual Conduct in the Second Degree

(1) The defendant is charged with the crime of second-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [touched (*name complainant*)'s / made, permitted, or caused (*name complainant*) to touch (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.

(3) Second, that ~~this touching was done~~ the defendant touched [*name complainant*] for any of these reasons: (1) for sexual arousal or gratification, (2) in a sexual manner for revenge, humiliation, or out of anger, or (3) for a sexual purpose~~s~~ or what could reasonably be construed as having been done for a sexual purpose~~s~~.

(4) [*Follow this instruction with one or more of the 13 alternatives, M Crim JI 20.3 – 20.11d, as warranted by the charges and evidence.*]

M Crim JI 20.13:

[AMENDED] M Crim JI 20.13 Criminal Sexual Conduct in the Fourth Degree

(1) The defendant is charged with the crime of fourth-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [touched (*name complainant*)'s / made, permitted, or caused (*name complainant*) to touch (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.

(3) Second, that ~~this touching was done~~ the defendant touched (*name complainant*) for any of these reasons: (1) for sexual arousal or gratification, (2) in a sexual manner for revenge, humiliation, or out of anger, or (3) for a sexual purpose~~s~~ or what could reasonably be construed as having been done for a sexual purpose~~s~~.

(4) [*Follow this instruction with M Crim JI 20.14a, M Crim JI 20.14b, M Crim JI 20.14c, M Crim JI 20.14d, M Crim JI 20.15, M Crim JI 20.16, or M Crim JI 20.16a, as warranted by the charges and evidence*.]

Use Note

Use this instruction where the facts describe an offensive touching not included under criminal sexual conduct in the second degree.

Public Policy Position
M Crim JI 20.2 and 20.13

Support

Explanation
The committee voted unanimously (17) to support the adoption of the Model Criminal Jury Instructions.

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

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

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by May 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes two jury instructions, M Crim JI 40.7 (loitering where prostitution is practiced) and M Crim JI 40.7a (loitering where an illegal occupation or business is practiced or conducted) for the "loitering" crimes found in the Disorderly Person statute at MCL 750.167(i) and (j). The instructions are entirely new.

[NEW] M Crim JI 40.7 Loitering Where Prostitution Is Practiced

(1) The defendant is charged with the crime of loitering where acts of prostitution were taking place. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that acts of prostitution were allowed or being committed at [*provide location where prostitution was being performed*].

> An act of prostitution is sexual conduct with another person for a fee or something of value.

(3) Second, that the defendant was present at that location and knew or learned that prostitution was allowed or being committed there.

(4) Third, that the defendant remained at [*provide location of illegal conduct*] without a lawful purpose[1] knowing that prostitution was allowed or being committed there.

Use Note

1. Lawful purposes could include, among other things, gathering information to report illegal conduct to the police or attempting to dissuade persons engaging in illegal conduct from continuing their illegal activity.

[NEW] M Crim JI 40.7a Loitering Where an Illegal Occupation or Business Is Practiced or Conducted

(1) The defendant is charged with the crime of loitering where an illegal occupation or business was being practiced or conducted. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify illegal occupation or business*][1] was being practiced or conducted at [*provide location*].

(3) Second, that the defendant was present at that location and the defendant knew or learned that [*illegal occupation or business*] was being practiced or conducted.

(4) Third, that the defendant remained at [*location of illegal conduct*] without a lawful purpose[2] knowing that [*illegal occupation or business*] was being practiced or conducted there.

Use Note

1. Whether an *occupation or business* is illegal appears to be a question that is decided by the court. Whether that *occupation or business* was occurring at the location alleged is a question of fact for the jury.
2. Lawful purposes could include, among other things, gathering information to report an illegal business to the police or attempting to dissuade persons engaging in an illegal occupation from continuing their illegal activity.

Public Policy Position
M Crim JI 40.7 and 40.7a

Support

Explanation
The committee voted unanimously (17) to support the adoption of the Model Criminal Jury Instructions.

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

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

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by May 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes three jury instructions, M Crim JI 41.3 (placing eavesdropping devices), 41.3a (placing eavesdropping devices for a lewd or lascivious purpose), and 41.3b (disseminating images obtained by eavesdropping devices) for the crimes found in an eavesdropping and surveillance statute: MCL 750.539d. These instructions are entirely new.

[NEW] M Crim JI 41.3 Placing Eavesdropping or Surveillance Devices

(1) The defendant is charged with the crime of placing an eavesdropping or surveillance device. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [installed / placed / used] a device for observing, recording, transmitting, photographing, or eavesdropping on the sounds or events[1] of others[2] at or in a private place.[3]

> A private place is one where a person could reasonably expect to be safe from casual or unwanted intrusion or surveillance. It does not include a place where the public or a substantial group of the public has access.

(3) Second, that the defendant did not have the permission or consent of [(*identify complainant(s) if possible*) / the person or persons entitled to privacy at (*provide location of device*)] to be observed, recorded, transmitted, photographed, or eavesdropped on.[3]

Use Note

Use M Crim JI 41.3a in cases where the defendant is the owner or principal occupant of the premises where an eavesdropping device was alleged to have been placed. Questions regarding whether a defendant has status as an "owner or principal occupant" appear to be legal questions decided by the court.

1. MCL 750.539d(1)(a).

2. The Committee on Model Criminal Jury Instructions believes that the statute does not encompass recording conversations or events under MCL 750.539a(2) where the person recording them is a participant because Michigan appears to be a one-party consent state. *See Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982), cited in *Lewis v LeGrow*, 258 Mich App 175; 670 NW2d 675 (2003), and *Fisher v Perron*, 30 F4th 289 (6th Cir 2022).

3. *Private place* is defined in MCL 750.539a(1).

[NEW] M Crim JI 41.3a Placing Eavesdropping or Surveillance Devices for a Lewd or Lascivious Purpose

(1) The defendant is charged with the crime of placing an eavesdropping or surveillance device for a lewd or lascivious purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [installed / placed / used] a device for observing, recording, transmitting, photographing, or eavesdropping on the sounds or events in a residence.

(3) Second, that the location that the device could observe, record, photograph, or eavesdrop was a private place in or around the residence.[1]

> A private place is one where a person could reasonably expect to be safe from casual or unwanted intrusion or surveillance.

(4) Third, that the defendant did not have the permission or consent of [(*identify complainant(s) if possible*) / the person or persons entitled to privacy at (*provide location of device*)] to be observed, recorded, photographed, or eavesdropped on.

(5) Fourth, that the defendant installed, placed, or used the device for a lewd or lascivious purpose.

> A lewd or lascivious purpose means that the device was placed to observe or record [(*identify complainant*) / a person] under indecent or sexually provocative circumstances.

Use Note

This instruction should only be given when the defendant is the owner or principal occupant of the residence where an eavesdropping device was alleged to have been placed. Questions regarding whether a defendant has status as an "owner or principal occupant" appear to be legal questions decided by the court.

1. *Private place* is defined in MCL 750.539a(1).

[NEW] M Crim JI 41.3b Transmitting Images or Recordings Obtained by Surveillance or Eavesdropping Devices

(1) The defendant is charged with the crime of transmitting images or recordings obtained by surveillance or eavesdropping devices. To prove this charge, the prosecutor must prove both of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally distributed, disseminated, or transmitted a recording, photograph, or visual image of [*identify person or complainant*] so that the recording or visual image could be accessed by other persons.

(3) Second, that the defendant knew or had reason to know the recording or visual image of [*identify person or complainant*] that [he / she] transmitted was obtained using a device for eavesdropping[1] that had been placed or used where a person would have a reasonable expectation of privacy that was safe from casual or unwanted intrusion or surveillance.[2]

Use Note

1. MCL 750.539d(1)(a) describes these devices as "any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place."

2. *Private place* and *surveillance* are defined in MCL 750.539a(1) and (3).

Public Policy Position
M Crim JI 41.3, 41.3a, and 41.3b

Support

Explanation
The committee voted unanimously (17) to support the adoption of the Model Criminal Jury Instructions.

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

Contact Persons:
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John A. Shea jashea@earthlink.net

Public Policy Position
M Crim JI 41.3, 41.3a, and 41.3b

Support

Position Vote:
Voted for position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

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