

EXPANDING SUPERVISED PRACTICE TO INDIVIDUALS ALREADY BARRED IN OTHER STATES AND TO CIVIL LEGAL AID SERVICES AND PROGRAMS

Amendments to Michigan Court Rule 8.120

Issue

Should Michigan Court Rule 8.120 be amended to permit individuals barred (licensed) in other U.S. states to staff, under supervision by a member of the State Bar of Michigan, public and nonprofit defender offices, legal aid clinics, and civil legal aid services and programs, subject to certain requirements, as provided in Attachment A?

Proponent

The State Bar of Michigan Standing Committees on Civil Procedure and Courts and Access to Justice (“ATJ”) Policy.

Synopsis

The unmet need for civil legal representation for indigent individuals is significant in Michigan, as it is across the United States. Programs and services that provide indigent representation face considerable difficulties recruiting and hiring qualified attorneys. As it stands today, MCR 8.120 allows law students and recent law graduates to staff public and nonprofit defender offices, legal aid clinics organized under a city or county bar association or accredited law school, or for the primary purpose of providing free legal services to indigent persons. The current rule does not provide a mechanism for attorneys barred in other U.S. states, who may or may not meet the existing reciprocity requirements for admission to the State Bar of Michigan without examination, but who would otherwise be highly qualified to provide representation for indigent clients, to practice law. Additionally, the existing rule does not permit supervised practice in all civil legal aid programs and services. The proposed amendments to MCR 8.120 aim to address both of these issues and thereby expand the availability of legal services to those in need. The proposal also sets forth a procedure for an attorney to obtain a limited license to practice law under these circumstances, as well as provisions related to the duration and revocation of a limited license.

Background

The Legal Services Corporation’s 2022 Justice Gap Report¹ estimates that low-income Americans did not receive any or enough legal help for 92% of their civil legal problems. Most (74%) low-income households have experienced one or more civil legal problems in the past year, including consumer issues, health care, housing, and income maintenance. The chasm between the civil legal needs of low-income Americans and the resources available to meet their needs is breathtaking. Increasing the capacity of civil legal aid programs and services is essential to closing this civil justice gap. In order to grow capacity, these organizations must be able to hire qualified attorneys, some of whom are interested and

¹ Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans (April 2022)* <<https://lsc-live.app.box.com/s/xl2v2uraitobbzrhwtjlgioemp3myz1>> (accessed on August 5, 2022).

willing to practice in Michigan, but who may not meet the reciprocity requirements for admission without examination. Allowing individuals licensed to practice law in other U.S. states to practice with a limited license under the supervision of a Michigan attorney is a simple, common-sense solution to overcoming existing barriers. Several other states have adopted rules allowing for limited or temporary licenses for attorneys hired by specified types of employers serving indigent clients. The proposal included as Attachment A was based on court rules from Washington², Nevada³, and Minnesota⁴.

It should be noted that Rule 5(E) of the Rules for the Board of Law Examiners does provide for the Board to issue a “special certificate” for certain attorneys practicing law in “an institutional setting.” The rule lists counsel to a corporation or instructors in a law school as examples of contemplated institutional settings. On March 16, 2022, the Michigan Supreme Court adopted ADM File No. 2021-40, an amendment to Rule 5(E), that specified that attorneys granted a special certificate who are teaching or supervising law students in a clinical program may represent the clients of that clinical program. The amendment was given immediate effect and the Court concurrently invited comment on the merits of the amendment. The comment period for this amendment elapsed on July 1, 2022. The Board of Commissioners of the State Bar of Michigan voted unanimously to support the amendment with a further recommendation that additional language be added to require an attorney representing clients under the authority granted by a special certificate to designate that fact on any court filings. Unfortunately, while the availability of special certificates is beneficial to clinical programs it does not address the full scope of programs and services who provide direct representation to indigent individuals in Michigan. The proposed amendments to MCR 8.120 providing for a limited license to practice law will apply to a broader range of attorneys employed outside the law school clinical setting. While this proposal was inspired chiefly by the needs of civil legal aid services and programs, it should be noted that it will also benefit public and nonprofit defender offices and clinics by giving these organizations the option to hire individuals already barred in other U.S. states to represent clients under the supervision of a Michigan attorney.

The State Bar of Michigan’s Standing Committees on Civil Procedure and Courts and Access to Justice (“ATJ”) Policy both reviewed the amendments to MCR 8.120, which were proposed by Supervising Attorney Elisa Gomez of Lakeshore Legal Aid. Both committees voted unanimously to support the proposal.

Opposition

None known at this time.

Prior Action by Representative Assembly

None.

² Wash R Ct APR 8, available at <https://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_08_00_00.pdf> (accessed on August 5, 2022).

³ State Bar of Nevada, *Limited Practice Rules & Specialty Admissions*, <https://www.nvbar.org/wp-content/uploads/Special%20Admissions%20Rules_1.pdf> (accessed August 5, 2022).

⁴ Minn R Ct 8, available at <<https://www.ble.mn.gov/rules/#8>> (accessed August 2, 2022).

Fiscal and Staffing Impact on State Bar of Michigan

None.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 17, 2022

Should Michigan Court Rule 8.120 be amended to permit individuals barred in other U.S. states to staff, under supervision by a member of the State Bar of Michigan, public and nonprofit defender offices, legal aid clinics, and civil legal aid services and programs, subject to certain requirements, as provided in Attachment A?

(a) Yes

or

(b) No

ATTACHMENT A

RULE 8.120 LAW STUDENTS, AND RECENT GRADUATES, AND INDIVIDUALS ALREADY BARRED; PARTICIPATION IN LEGAL SERVICES AND CLINICS AND PROGRAMS, DEFENDER OFFICES, AND LEGAL TRAINING PROGRAMS

(A) Legal Aid Clinics; Defender Offices. Effective legal service for each person in Michigan, regardless of that person's ability to pay, is important to the directly affected person, to our court system, and to the whole citizenry. Law students, ~~and~~ recent law graduates, and individuals licensed to practice law in U.S. states other than Michigan, under supervision by a member of the state bar, may staff public and nonprofit defender offices, ~~and~~ legal aid clinics that are organized under a city or county bar association or an accredited law school, organized legal services programs approved by the Access to Justice Commission or its designee and funded from local, state, federal, or recognized charitable sources that provide legal assistance to indigents in civil matters or for the primary purpose of providing free legal services to indigent persons.

(B) Legal Training Programs. Law students, ~~and~~ recent law graduates, and individuals licensed to practice law in U.S. states other than Michigan may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, municipal/township attorneys, the Attorney Grievance Commission, and the Attorney General.

(C) ~~Eligible Students~~ Individuals.

(1) A student in a law school approved by the American Bar Association who has received a passing grade in law school courses and has completed the first year is eligible to participate in a clinic or program listed in subrules (A) and (B) if the student meets the academic and moral standards established by the dean of that school.

(2) ~~For the purpose of this rule, a~~ A "recent law graduate" is a person who has graduated from an ABA-accredited law school within the last year 15 months.

(3) An individual already barred is a person who has received a law license from another U.S. state, subject to the conditions of this subpart. Persons barred in non-U.S. foreign jurisdictions and persons who received a U.S. state bar license based on reciprocity rules of that jurisdiction regarding non-U.S. foreign licensures shall not be eligible to practice under this rule.

(D) Any individual eligible under subsection (C) ~~The student or graduate~~ must certify in writing that he or she has read and is familiar with the Michigan Rules of Professional Conduct and the Michigan Court Rules, and shall take an oath which is reasonably equivalent to the Michigan Lawyer's Oath in requiring at a

minimum the promise to: (a) support the Constitution of the United States; (b) support the Constitution of the State of Michigan; (c) maintain the respect due to courts of justice and judicial officers; (d) never seek to mislead a judge or jury by any artifice or false statement of fact or law; (e) maintain the confidence and preserve inviolate the secrets of the client; (f) abstain from all offensive personality; (g) advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause; and (h) in all other respects conduct himself or herself personally and professionally in conformity with the high standards of conduct imposed upon members of the state bar of Michigan.

(D E) Scope; Procedure; Duration; Revocation.

(1) A law ~~member of the legal aid clinic~~ student or recent graduate, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the Supreme Court. Except as otherwise provided in this rule, the indigent person that will be assisted by the student must consent in writing to the representation. In a situation in which a law student provides short-term, limited-scope legal advice by telephone in the context of a clinical program intended to assist indigent persons offered as part of a law school curriculum, the clinic patron shall be informed that:

- (a) the advice provided may be rendered by a law student; and
- (b) by proceeding to the consultation following notification that the advice may be provided by a law student, the clinic patron consents to such representation.

(2) Representation by a law student or recent graduate must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present:

- (a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf; or
- (b) during a courtroom appearance of a law student or graduate, except:
 - (i) during an appellate argument; or
 - (ii) in a criminal or juvenile case exposing the client to a penalty of imprisonment.

The supervising attorney shall assume all personal professional responsibility for the student's or graduate's work, and should consider purchasing professional liability insurance to cover the practice of such student or graduate.

(3) A law student or recent graduate may not appear in a case in a Michigan court without the approval of the judge or a majority of the panel of judges to which the case is assigned. If the judge or a majority of the panel grants approval, the judge or a majority of the panel may suspend the proceedings at any stage if the judge or a majority of the panel determines that the representation by the law student or graduate:

- (a) is professionally inadequate; and
- (b) substantial justice requires suspension.

In the Court of Appeals, a request for a law student or graduate to appear at oral argument must be submitted by motion to the panel that will hear the case. The panel may deny the request or establish restrictions or other parameters for the representation on a case-by-case basis.

(4) A law student or recent graduate serving in a prosecutor's, county corporation counsel's, city attorney's, Attorney Grievance Commission's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, Attorney Grievance Commission attorney, or Attorney General, except that:

- (a) the law student or graduate is subject to the conditions and restrictions of this rule; and
- (b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, assistant Attorney Grievance Commission attorney, or assistant Attorney General.

(5) An individual already barred, who meets the criteria of subrule (C)(3), may be issued a limited license to practice law in Michigan by the Board of Law Examiners if the following criteria are met:

- (a) An application for a limited license is submitted, with any associated supporting documentation related to graduation from an ABA-accredited law school, successful passage of a bar examination, requisite good moral character and fitness, and fees as set by the Board of Law Examiners;
- (b) Proof of an accepted job offer or current employment with any qualifying entity meeting the criteria of subrule (A);
- (c) A certificate executed by the executive director, their designee, or equivalent that the attorney will be acting in connection with such entity and under the supervision of a member in good standing of the State Bar of Michigan; and

(d) Any such limited license shall authorize the lawyer to practice solely on behalf of clients of the designed employer listed in the application for the temporary license. The limited license shall expire immediately upon termination or resignation of the individual from the designated employer. The employer shall notify the Board of Law Examiners if such a separation occurs. The lawyer may submit a new application for a limited license for a new employer meeting the criteria of subrule (A).

(6) Time in the practice of law in Michigan under this limited license may be counted toward the applicant's eligibility for admission without examination, as administered by the Board of Law Examiners.