

Agenda
Public Policy Committee
September 15, 2021 – 12:00 p.m. to 1:00 p.m.
Via Zoom Meetings

Public Policy Committee.....Dana M. Warnez, Chairperson

A. Reports

1. Approval of July 22, 2021 minutes
2. Public Policy Report

B. Court Rules

1. ADM File No. 2020-29: Proposed Amendment of Rule 410 of the Michigan Rules of Evidence

The proposed amendments in this file would add vacated pleas to the list of guilty pleas that may not be used against defendant. Also, the proposed addition of a reference to MCR 6.310 in subsection (3) would add a prohibition on using a statement made during defendant's *withdrawal* of plea to the prohibition on using statements made under MCR 6.302 in *entering* a plea, which would make the rule more consistent with FRE 410.

Status: 10/01/21 Comment Period Expires.
Referrals: 06/14/21 Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Valerie R. Newman

2. ADM File No. 2020-13: Proposed Amendment of MCR 6.005

The proposed amendment of MCR 6.005 would clarify the duties of attorneys in preconviction appeals.

Status: 10/01/21 Comment Period Expires.
Referrals: 06/14/21 Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comment provided to the Supreme Court is included in materials.
Liaison: Takura N. Nyamfukudza

C. Legislation

1. HB 4620 (Lightner) Criminal procedure: indigent defense; indigent defense department; create. Creates new act.

Status: 04/13/21 Referred to House Judiciary Committee.
Referrals: 04/20/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section
Liaison: Lori A. Buiteweg

2. HB 5098 (Reilly) Criminal procedure: indigent defense; Michigan indigent defense commission; require to post online revenue data paid to attorney and law firms for indigent defense services annually. Amends 2013 PA 93 (MCL 780.981 - 780.1003) by adding sec. 19a.

Status: 06/23/21 Referred to House Judiciary Committee.
Referrals: 06/29/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Kim Warren Eddie

D. Consent Agenda

To support the positions submitted by Criminal Jurisprudence & Practice Committee and Criminal Law Section on each of the following items:

1. M Crim JI Chapter 2

The Committee on Model Criminal Jury Instructions proposes a revision of Chapter 2 (Procedural Instructions) of the Model Criminal Jury Instructions. The current instructions have evolved over several decades with a number of additions, and have become quite repetitious. The Committee offers a slight re-write and re-organization of the procedural instructions that reduces linguistic duplication and flows more logically.

The instructions below are divided into two sets on the site in hopes of making them more convenient to compare and review. They are preceded by a summary of the changes being proposed (pages 2-3). The first set of instructions (pages 4-14) are the current instructions, M Crim JI 2.1 through 2.26. Those are followed (pages 16-27) by the proposed revised procedural instructions, M Crim JI 2.1 through 2.28, including two new instructions: M Crim JI 2.2 (Written Copy of Instructions per MCR 2.513(D)) and M Crim JI 2.13 (Notifying Court of Inability to Hear or See Witness).

2. M Crim JI 37.12, 37.13, and 37.14

The Committee proposes new instructions, M Crim JI 37.12 [Jury Tampering: MCL 750.120a(1)], M Crim JI 37.13 [Jury Tampering Through Intimidation: MCL 750.120a(2)], and M Crim JI 37.14 [Retaliating Against a Juror: MCL 750.120a(4)] for the crimes found in the Bribery and Corruption chapter of the Penal Code.

3. M Crim JI 38.2, 38.3, and 38.3a

The Committee proposes new instructions, M Crim JI 38.2 [Hindering Prosecution of Terrorism (MCL 750.543h)], M Crim JI 38.3 [Soliciting Material Support for an Act of Terrorism (MCL 750.543k)], and M Crim JI 38.3a [Providing Material Support for an Act of Terrorism (MCL 750.543k)] for crimes found in the Michigan Anti-Terrorism Act.

MINUTES
Public Policy Committee
July 22, 2021 – 12 p.m. to 1:30 p.m.

Committee Members: Dana M. Warnez, Lori A. Buiteweg, Kim Warren Eddie, E. Thomas McCarthy, Jr., Takura N. Nyamfukudza, Nicholas M. Ohanesian, Brian D. Shekell, Thomas G. Sinas, Hon. Cynthia D. Stephens (9)
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Reports

1. Approval of June 9, 2021 minutes

The minutes were approved unanimously (9).

2. Public Policy Report

A written report was provided.

B. Court Rules

1. ADM File No. 2021-12: Proposed Amendments of MCR 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, and 6.938

The proposed amendments would generally shift the responsibility for appointment of counsel for an indigent defendant in a criminal proceeding to the local funding unit's appointing authority. These proposed amendments were submitted by the Michigan Indigent Defense Commission, and are intended to implement recently-approved Standard Five of the MIDC Standards.

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

The committee voted unanimously (9) to support, with an amendment that when the appointing authority assigns an individual attorney, that attorney should file their appearance indicating they are now the attorney of record.

2. ADM File No. 2020-36: Proposed Amendment of MCR 3.945 and Proposed Addition of MCR 3.947

The proposed amendment of MCR 3.945 and the proposed addition of MCR 3.947 would make procedural changes involving the placement of foster care children in a qualified residential treatment program as required by newly-enacted 2021 PA 5.

The following entities offered recommendations: Access to Justice Policy Committee.

The committee voted unanimously (9) to support ADM File No. 2020-36 as drafted.

3. ADM File No. 2019-06: Proposed Amendments of MCR 6.302 and 6.310

The proposed amendment of MCR 6.302 would eliminate the Court's previously-adopted language requiring a trial court to advise defendant whether the law permits or requires the court to sentence defendant consecutively. This language was added following the Court's opinion in *People v Warren*. However, in considering the practical application of that language, it may be more appropriate to allow a defendant to withdraw a plea under MCR 6.310 if such advisement is not given rather than require an advisement in all cases. Thus, the proposal would add language providing for such an outcome in MCR 6.310 instead of imposing an advisement in all cases under MCR 6.302.

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

The committee voted unanimously (9) to oppose the proposed amendments to MCR 6.302 and 6.310.

4. ADM File No. 2021-14: Proposed Administrative Order No. 2021-X

This administrative order would make it mandatory for all courts to submit case information to the Judicial Data Warehouse in a uniform manner as required by SCAO.

The committee voted unanimously (9) to support ADM File No. 2021-14.

5. ADM File No. 2021-15: Addition of MCR 8.128

The addition of MCR 8.128 establishes the Michigan Judicial Council to strategically plan for Michigan's Judiciary. The following entities offered recommendations: Alternative Dispute Resolution Section.

The committee voted 7 in favor with 1 abstention to support ADM File No. 2021-15.

6. ADM File No. 2019-34: Proposed Amendments of Rule 2, 3, 4, 5, 6, and 7 and Proposed Addition of Rule 3a and Rule 4a of the Rules for the Board of Law Examiners

The proposed amendments would implement a Uniform Bar Examination in Michigan.

The committee voted 8 to 1 to support ADM File No. 2019-34.

C. Other

1. Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021 – Findings, Best Practices, and Recommendations

The following entities offered recommendations: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Alternative Dispute Resolution Section; Negligence Law Section; Probate & Estate Planning Section.

The committee voted unanimously (9) to authorize committees and sections to weigh in and encourage them to submit their comments directly to the State Court Administrative Office (SCAO), and encourage SCAO consider those concerns presented.

D. Model Criminal Jury Instructions

1. M Crim JI 25.7

The Committee proposes a new instruction, M Crim JI 25.7 [Trespassing], for the crimes delineated in MCL 750.552.

The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.

The committee supported the Criminal Jurisprudence & Practice Committee position.

Order

Michigan Supreme Court
Lansing, Michigan

June 9, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2020-29

Proposed Amendment of
Rule 410 of the Michigan
Rules of Evidence

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

On order of the Court, this is to advise that the Court is considering an amendment of Rule 410 of the Michigan Rules of Evidence. 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 public hearing are posted at [Administrative Matters & Court Rules page](#).

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

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

Rule 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn or vacated;
- (2) [Unchanged.]
- (3) Any statement made in the course of any proceedings under MCR 6.302 or MCR 6.310 or comparable state or federal procedure regarding either of the foregoing pleas; or
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn or vacated.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Staff Comment: The proposed amendments in this file would add vacated pleas to the list of guilty pleas that may not be used against defendant. Also, the proposed addition of a reference to MCR 6.310 in subsection (3) would add a prohibition on using a statement made during defendant's *withdrawal* of plea to the prohibition on using statements made under MCR 6.302 in *entering* a plea, which would make the rule more consistent with FRE 410.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 9, 2021

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

Clerk

Public Policy Position
ADM File No. 2020-29

Oppose

Explanation:

The committee voted 9 to 8 to oppose the proposed amendments presented in ADM File No. 2020-29.

The amendment seeks to add “vacated” pleas to Rule 410 prohibiting the future use of the plea or statements made in the course of the plea that is later vacated or withdrawn. The amendment would also add to this prohibition any statements made during the court of a hearing under Rule 6.310.

There was substantial concern that a defendant intent on gaming the system would enter into a plea agreement, tender the guilty plea, fail to comply with the requirements (for example, testimony or other future cooperation), and then still benefit from the plea when the state seeks to subsequently vacate the plea as currently allowed under Rule 6.310.

As the proposed amendment to Rule 410 is written, it would seemingly conflict with the previous state intent of the legislature in its recent expansion of the state’s set-aside statutes, and preclude the use of set-aside convictions in any future criminal cases, as well as enhance subsequent convictions under specific statutes or the habitual offender, and impede the scoring of those offenses in the sentencing guidelines.

It should be noted that eight members of the committee strongly favored this rule change in the interest of due process.

Position Vote:

Voted For position: 9

Voted against position: 8

Abstained from vote: 0

Did not vote (absence): 6

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org

**Public Policy Position
ADM File No. 2020-29**

Support

Explanation

The Criminal Law Section of the State Bar of Michigan supports ADM File No. 2020-29.

Position Vote:

Voted for position: 14

Voted against position: 3

Abstained from vote: 1

Did not vote (absent): 8

Contact Person: Kahla Crino

Email: krino@ingham.org

Order

Michigan Supreme Court
Lansing, Michigan

June 9, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2020-13

Proposed Amendment of
Rule 6.005 of the Michigan
Court Rules

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

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.005 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

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

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

Rule 6.005 Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities.

(1) The responsibilities of the trial lawyer who represents the defendant include

(a) representing the defendant in all trial court proceedings through initial sentencing,

(b) filing of interlocutory appeals the lawyer deems appropriate, and

(c) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, the defendant's trial lawyer must either:

(i) file a substantive brief in response to the prosecutor's interlocutory any application for leave to appeal, appellant's brief, or substantive motion; or

- (ii) notify the Court of Appeals ~~that the lawyer will not be filing a brief in response to the application~~ in writing that the defendant has knowingly elected not to file a response.

(24) [Renumbered by otherwise unchanged.]

(35) ~~When~~ When an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available for copying upon request of the appellate ~~that~~ lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff comment: The proposed amendment of MCR 6.005 would clarify the duties of attorneys in preconviction appeals.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).

WELCH, J. (*concurring*). I concur in the Court's order publishing for comment proposed changes to MCR 6.005 that are designed to clarify a criminal-defense trial attorney's responsibilities in handling preconviction appeals. I write separately because, while I recognize several longstanding problems linked to defendants being unrepresented before the Court of Appeals during preconviction appeals, I am concerned that the proposed amendments may not get to the root of the problem and may have unintended consequences. Currently, a criminal-defense trial attorney can withdraw from representing his or her client in a preconviction appeal, MCR 6.005(H)(4), or simply "notify the Court of Appeals that the lawyer will not be filing a brief in response to the application." MCR 6.005(H)(3)(ii). While I support a higher level of responsibility than

what is set forth in our current rule, I question whether the proposed amendment may create additional problems. For example:

(1) Can an attorney, who has only been paid to handle trial court proceedings and whose client is unwilling to pay more for the preconviction appeal (but who is not indigent), withdraw as counsel and notify the Court of Appeals that the lawyer or the defendant will not file a response?

(2) What if an attorney petitions the trial court for extra funding to handle an appeal for a retained but poor client and the trial court rejects the request? Is that attorney still required to handle the appeal?

(3) Can an attorney (whether court-appointed or retained) make a referral to appellate counsel and opt out of handling the appeal even if the client decides not to hire the recommended appellate counsel? Would this be a basis to notify the Court of Appeals that the defendant has knowingly elected to not file a response?

(4) Can an attorney, who prefers to focus on trial-level work only, make it clear in an engagement agreement that the attorney does not handle appeals and will refer such matters out if needed? If so, would such an agreement be enforceable in light of the proposed amendments?

As a final matter, it is not clear to me how the proposed rule would mesh with MRPC 1.1, which states that an attorney has an ethical obligation not to litigate matters he or she is not competent to handle, or with MRPC 1.16, which discusses an attorney's obligation to withdraw in certain circumstances and discretion to withdraw in others (including a client's failure to abide by payment terms in a retention agreement).

I applaud the Court's efforts to help ensure that defendants in criminal cases will have representation during preconviction appeals. While I recognize that in most cases a transition to or partnership with appellate counsel will likely occur, it also seems predictable that there will be situations in which one of the scenarios I have outlined above could arise. I hope that the public comment process will, at a minimum, address and clarify the concerns that I have outlined above.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 9, 2021

Clerk

Public Policy Position
ADM File No. 2020-13

Support

Explanation:

The committee voted 16 in favor, with one abstention to support the proposed amendment of Rule 6.005 as drafted. The committee agreed that the proposed amendments would improve the efficiency of the court, saving time as the appeal process moves forward. The requirement of notification in writing and on record ensures that things don't fall through the cracks in filing an appeal.

Position Vote:

Voted For position: 16

Voted against position: 0

Abstained from vote: 1

Did not vote (absence): 6

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org

**Public Policy Position
ADM File No. 2020-13**

Support

Explanation

The Criminal Law Section of the State Bar of the State Bar of Michigan supports ADM File No. 2020-13.

Position Vote:

Voted for position: 17

Voted against position: 0

Abstained from vote: 1

Did not vote (absent): 7

Contact Person: Kahla Crino

Email: krino@ingham.org

From: [McGinnis, Maureen Martha](#)
To: [ADMcomment](#)
Subject: ADM File No. 2020-13
Date: Monday, June 28, 2021 3:55:38 PM

Thank you for the opportunity to comment on this proposed rule change. I share the concerns raised by Justice Welch in her concurring opinion. As it currently stands, we are woefully ill-equipped to provide a suitable roster of appellate attorneys that can handle post-conviction appeals. Last time I inquired, we had around four appellate attorneys that are rotated between to accept appellate attorney requests received in a timely manner from defendants. These attorneys have demonstrated a willingness to accept appellate appointments and appear to have more expertise and experience in this area, which has been the basis for adding attorneys to a list of “appellate” attorneys. This is in contrast to dozens of criminal defense attorneys that have asked to be considered for appointment on district court criminal matters where the defendant is indigent. When asked by court administration if they will accept appointments on appeal, many public defenders have advised that they do not feel they are in a position to adequately represent their clients on appellate matters. This rule change would essentially compel those public defenders to represent their clients on appellate matters that they do not feel that they have the skill or knowledge to represent them on.

The only way that this solution will improve the representation given to indigent defendants is to also require a minimum level of training for an attorney that may be required to raise a preconviction appellate issue. In the alternative, I would ask that you consider expanding the oversight of an appellate defenders office to qualify and assign appellate attorneys to handle appellate issues from the district courts so that there is a more uniform system of appointment and a way to ensure that the attorney possesses the requisite skill and experience to handle appellate matters.

Thank you for considering my input.

Sincerely,

Hon. Maureen M. McGinnis
52-4 District Court
520 W. Big Beaver Road
Troy, MI 48084

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To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: September 10, 2021

Re: HB 4620 – Juvenile Indigent Defense Department

Background

HB 4620 would create the Michigan Indigent Juvenile Defense Department within the State Court Administrative Office that would propose and enforce minimum standards to ensure the provision of indigent juvenile defense services that meet constitutional requirements for effective assistance of counsel. The bill is modeled after the Michigan Indigent Defense Commission Act, which was enacted in 2013, with the support of the State Bar of Michigan, to develop standards for local indigent defense systems for adults.

***Keller* Considerations**

SBM has a long history of supporting improvements to Michigan’s indigent defense system, including supporting the published standards for indigent defense systems as well as the underlying legislation and amendments to the statute, and the executive budget recommendations.

Both the Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee reviewed HB 4620 and found the legislation was *Keller* permissible in the regulation of the legal profession and functioning of the courts.

The committee agreed that HB 4620 is *Keller* permissible on the grounds that it is related to the improvement of the functioning of the courts as well as the regulation of the legal profession with respect to the competency of the profession. This can be found in Section 5(3) which provides in part:

The MIJDD shall propose minimum standards for the local delivery of indigent juvenile defense services providing *effective assistance of counsel to juveniles* throughout this state. These minimum standards must be designed to ensure the provision of indigent juvenile defense services that meet constitutional requirements for effective assistance of counsel. (emphasis added)

Additional support regarding functioning of the courts may be found in Section 11(3) (e) which provides in part:

(e) The MIJDD shall promulgate objective standards for indigent juvenile defense systems to determine whether a juvenile is indigent or partially indigent. *These standards must include availability of prompt judicial review, under the*

direction and supervision of the supreme court, if the indigent juvenile defense system is making the determination regarding a juvenile's indigency or partial indigency. (emphasis added)

For these reasons, HB 4620 is *Keller* permissible.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER <i>KELLER</i>:		
	Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	<ul style="list-style-type: none">✓ Regulation and discipline of attorneys• Ethics• Lawyer competency• Integrity of the Legal Profession• Regulation of attorney trust accounts	<ul style="list-style-type: none">✓ Improvement in functioning of the courts• Availability of legal services to society

Staff Recommendation

The bill satisfies the requirements of *Keller* and may be considered on its merits.

House Bill 4620 (2021) rss?

Friendly Link: <http://legislature.mi.gov/doc.aspx?2021-HB-4620>

Sponsors

Sarah Lightner (district 65)
Karen Whitsett, Kelly Breen, Padma Kuppa, Mary Whiteford, Tenisha Yancey
(click name to see bills sponsored by that person)

Categories

Criminal procedure: indigent defense; State agencies (proposed): other;

Criminal procedure: indigent defense; indigent defense department; create. Creates new act.

Bill Documents

Bill Document Formatting Information

[x]

The following bill formatting applies to the 2021-2022 session:

- New language in an amendatory bill will be shown in **bold**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue, such as: House amended text.
- Amendments made by the Senate will be red, such as: Senate amended text.

(gray icons indicate that the action did not occur or that the document is not available)

Documents



House Introduced Bill

Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.



As Passed by the House

As Passed by the House is the bill, as introduced, that includes any adopted House amendments.



As Passed by the Senate

As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.



House Enrolled Bill

Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

History

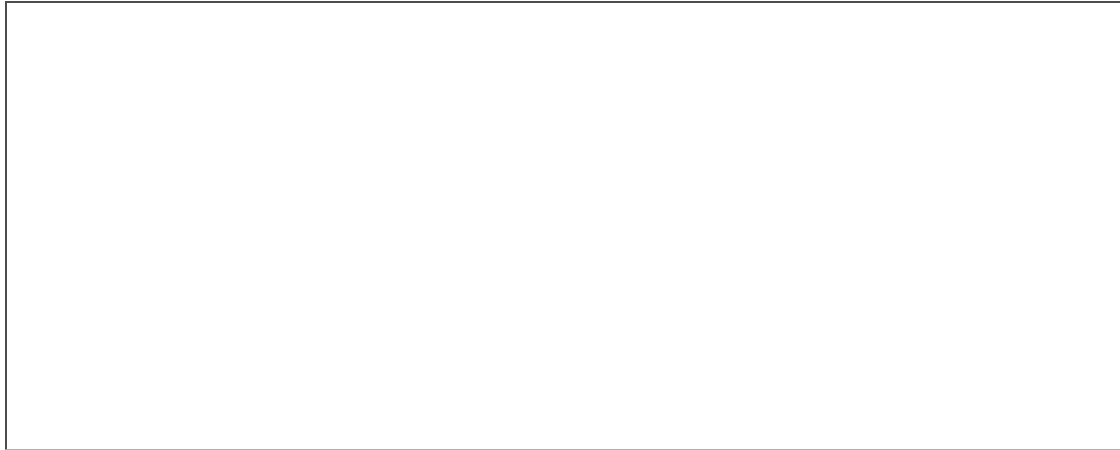
(House actions in lowercase, Senate actions in UPPERCASE)

NOTE: a page number of 1 indicates that the page number is soon to come.

Date ▲	Journal	Action
4/13/2021	HJ 29 Pg. 475	introduced by Representative Sarah Lightner
4/13/2021	HJ 29 Pg. 475	read a first time
4/13/2021	HJ 29 Pg. 475	referred to Committee on Judiciary
4/14/2021	HJ 30 Pg. 490	bill electronically reproduced 04/13/2021

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HOUSE BILL NO. 4620



A bill to create the Michigan indigent juvenile defense department; to provide for its powers and duties; to provide indigent juveniles in juvenile matters with effective assistance of counsel; to provide standards for the appointment of legal counsel; to provide for and limit certain causes of action; to provide for certain appropriations and grants; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "Michigan indigent juvenile defense department act".

Sec. 3. As used in this act:

(a) "Consumer Price Index" means the annual United States Consumer Price Index for all urban consumers as defined and reported by the United States Department of Labor, Bureau of Labor Statistics.

(b) "Department" means the Michigan indigent juvenile defense department created in section 5.

(c) "Director" means the director the department.

(d) "Effective assistance of counsel" or "effective representation" means legal representation that is compliant with standards established by the appellate courts of this state and the United States Supreme Court.

(e) "Indigent" means meeting 1 or more of the conditions described in section 11(3).

(f) "Indigent juvenile defense services" means local legal defense services provided to a juvenile and to which both of the following conditions apply:

(i) The juvenile is subject to a petition for an offense for which proceedings

are pending under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(ii) The juvenile is determined to be indigent under section 11(3).

(g) Indigent juvenile defense services do not include services authorized to be provided under the appellate defender act, 1978 PA 620, MCL [780.711](#) to 780.719.

(h) "Indigent juvenile defense system" or "system" means either of the following:

(i) The local unit of government that funds a trial court.

(ii) If a trial court is funded by more than 1 local unit of government, those local units of government, collectively.

(i) "Juvenile" means an individual who is less than 18 years of age who is subject to a petition for an offense for which proceedings are pending under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(j) "Local share" or "share" means an indigent juvenile defense system's average annual expenditure for indigent juvenile defense services in the 3 fiscal years immediately preceding the creation of the MIJDD under this act, excluding money reimbursed to the system by individuals determined to be partially indigent. Beginning on November 1, 2018, if the Consumer Price Index has increased since November 1 of the prior state fiscal year, the local share must be adjusted by that number or by 3%, whichever is less.

(k) "MIJDD" means the department.

(l) "Partially indigent" means a juvenile who is unable to afford the complete cost of legal representation but is able to contribute a monetary amount toward his or her representation.

Sec. 5. (1) The Michigan indigent juvenile defense department is created in the state court administrative office.

(2) The department shall carry out the powers, duties, functions, and responsibilities that are provided in this act and as otherwise provided by law.

(3) The MIJDD shall propose minimum standards for the local delivery of indigent juvenile defense services providing effective assistance of counsel to juveniles throughout this state. These minimum standards must be designed to ensure the provision of indigent juvenile defense services that meet constitutional requirements for effective assistance of counsel. However, these minimum standards must not infringe on the supreme court's authority over practice and procedure in the courts of this state as set forth in section 5 of article VI of the state constitution of 1963.

(4) The department shall convene a public hearing before a proposed minimum standard is recommended by the department. A minimum standard proposed under this subsection must be submitted to the department for approval or rejection. Opposition to a proposed minimum standard may be submitted to the department in a manner prescribed by the department. An indigent juvenile defense system that objects to a recommended minimum standard on the grounds that the recommended minimum standard would exceed the MIJDD's statutory authority shall state specifically how the recommended minimum standard would exceed the MIJDD's statutory authority. A proposed minimum standard is final when it is approved by the MIJDD. An approved minimum standard for the local delivery of indigent juvenile defense services within an

indigent juvenile defense system is not a rule as that term is defined in section 7 of the administrative procedures act of 1969, 1969 PA 306, MCL [24.207](#).

(5) Approval of a minimum standard proposed by the MIJDD is considered a final department action subject to judicial review under section 28 of article VI of the state constitution of 1963 to determine whether the approved minimum standard is authorized by law. Jurisdiction and venue for judicial review are vested in the court of claims. An indigent juvenile defense system may file a petition for review in the court of claims within 60 days after the date of mailing notice of the department's final decision on the recommended minimum standard. The filing of a petition for review does not stay enforcement of an approved minimum standard, but the MIJDD may grant, or the court of claims may order, a stay upon appropriate terms.

(6) The MIJDD shall identify and encourage best practices for delivering the effective assistance of counsel to indigent juveniles against whom a petition is pending under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(7) The MIJDD shall identify and implement a system of performance metrics to assess the provision of indigent juvenile defense services in this state relative to national standards and benchmarks. The MIJDD shall provide an annual report to the governor, legislature, supreme court, and state budget director on the performance metrics not later than December 15 of each year.

Sec. 7. (1) The MIJDD is headed by a director who must be appointed by and serve at the pleasure of the governor.

(2) The director may delegate to an individual within the department a power, duty, function, or responsibility conferred on the director by this act or other state law.

(3) The director shall administer the powers, duties, functions, and responsibilities of the department in a manner that promotes efficient administration. The director may make internal organizational changes within the department as the director considers administratively necessary to complete the responsibilities under this act.

(4) Confidential case information in the possession of the department, including, but not limited to, client information and attorney work product, is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 9. (1) The MIJDD has the following authority and duties:

(a) Developing and overseeing the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent juvenile defense services providing effective assistance of counsel are consistently delivered to all indigent juveniles in this state consistent with the safeguards of the United States Constitution, the state constitution of 1963, and this act.

(b) Investigating, auditing, and reviewing the operation of indigent juvenile defense services to ensure compliance with the department's minimum standards, rules, and procedures. However, an indigent juvenile defense service that is in compliance with the department's minimum standards, rules, and procedures must not be required to provide indigent juvenile defense services in excess of those standards, rules, and procedures.

(c) The director has the following duties:

(i) Establishing an organizational chart, preparing an annual budget, and hiring, disciplining, and firing staff.

(ii) Assisting the MIJDD in developing, implementing, and regularly reviewing the MIJDD's standards, rules, and procedures, including, but not limited to, recommending to the MIJDD suggested changes to the criteria for an indigent juvenile's eligibility for receiving defense services under this act.

(d) Establishing procedures for the receipt and resolution of complaints, and the implementation of recommendations from the courts, other participants in the juvenile justice system, clients, and members of the public.

(e) Establishing procedures for the mandatory collection of data concerning the operation of the MIJDD, each indigent juvenile defense system, and the operation of indigent juvenile defense services.

(f) Establishing rules and procedures for indigent juvenile defense systems to apply to the MIJDD for grants to bring the system's delivery of indigent juvenile defense services into compliance with the minimum standards established by the MIJDD.

(g) Establishing procedures for annually reporting to the governor, the legislature, and the supreme court. The report required under this subdivision must include, but not be limited to, recommendations for improvements and further legislative action.

(2) Upon the appropriation of sufficient funds, the MIJDD shall establish minimum standards to carry out the purpose of this act and collect data from all indigent juvenile defense systems. The MIJDD shall propose goals for compliance with the minimum standards established under this act consistent with the metrics established under this section and appropriations by this state.

(3) In establishing and overseeing the minimum standards, rules, and procedures described in subsection (1), the MIJDD shall emphasize the importance of indigent criminal defense services provided to juveniles under the age of 18 who are tried in the same manner as adults or who may be sentenced in the same manner as adults and to adults with mental impairments.

(4) The MIJDD must be mindful that defense attorneys who provide indigent juvenile defense services are partners with the prosecution, law enforcement, and the judiciary in the criminal justice system.

(5) The MIJDD shall establish procedures for the conduct of its affairs and promulgate policies necessary to carry out its powers and duties under this act.

(6) MIJDD policies must be placed in an appropriate manual, be made publicly available on a website, and be made available to all attorneys and professionals providing indigent juvenile defense services, the supreme court, the governor, the senate majority leader, the speaker of the house of representatives, the senate and house appropriations committees, and the senate and house fiscal agencies.

Sec. 11. (1) The MIJDD shall establish minimum standards, rules, and procedures to effectuate the following:

(a) The delivery of indigent juvenile defense services must be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent juvenile defense services.

(b) If the caseload is sufficiently high, indigent juvenile defense services may consist of both an indigent juvenile defender office and the active participation of other members of the state bar.

(c) Trial courts shall ensure that each juvenile is advised that he or she is entitled to counsel. All juveniles, except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under this act, and counsel must be assigned as soon as an indigent juvenile is determined to be eligible for indigent juvenile defense services.

(2) The MIJDD shall implement minimum standards, rules, and procedures to guarantee the rights of indigent juveniles. In establishing minimum standards, rules, and procedures, the MIJDD shall adhere to the following principles:

(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with a juvenile.

(b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation must be avoided. The MIJDD may develop workload controls to enhance defense counsel's ability to provide effective representation.

(c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed, and that defense counsel has training specifically directed at effective representation of a juvenile.

(d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent juvenile defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.

(e) Indigent juvenile defense systems employ only defense counsel who has attended continuing legal education relevant to counsel's indigent juvenile defense clients.

(f) Indigent juvenile defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIJDD standards.

(3) The following requirements apply to the application for, and appointment of, indigent juvenile defense services under this act:

(a) A preliminary inquiry regarding, and the determination of, the indigency of any juvenile, including a determination regarding whether a juvenile is partially indigent, for purposes of this act must be made as determined by the indigent juvenile defense system not later than at the juvenile's first appearance in court. The determination may be reviewed by the indigent juvenile defense system at any other stage of the proceedings. In determining whether a juvenile is entitled to the appointment of counsel, the indigent juvenile defense system shall consider whether the juvenile is indigent and the extent of his or her ability to pay. Factors to be considered include, but are not limited to, income or funds from employment or any other source, including personal public assistance, to which the juvenile is entitled, property owned by the juvenile or in which he or she has an economic interest, outstanding obligations, the number and ages of the juvenile's dependents, employment and job training history, and his or her level of education. A trial court may play a role in this determination as part of any indigent juvenile defense

system's compliance plan under the direction and supervision of the supreme court, consistent with section 4 of article VI of the state constitution of 1963. If an indigent juvenile defense system determines that a juvenile is partially indigent, the indigent juvenile defense system shall determine the amount of money the juvenile must contribute to his or her defense. An indigent juvenile defense system's determination regarding the amount of money a partially indigent juvenile must contribute to his or her defense is subject to judicial review. Nothing in this act prevents a court from making a determination of indigency for any purpose consistent with article VI of the state constitution of 1963.

(b) A juvenile is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own. Substantial financial hardship is rebuttably presumed if the juvenile receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance, resides in public housing, or earns an income less than 140% of the federal poverty guideline. A juvenile is also rebuttably presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental health or substance abuse facility.

(c) A juvenile not falling below the presumptive thresholds described in subdivision (b) must be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the allegations being faced, his or her monthly expenses, and local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel.

(d) A determination that a juvenile is partially indigent may only be made if the indigent juvenile defense system determines that a juvenile is not fully indigent. An indigent juvenile defense system that determines a juvenile is not fully indigent but may be partially indigent must utilize the screening process under subdivision (c). The provisions of subdivision (e) apply to a partially indigent juvenile.

(e) The MIJDD shall promulgate objective standards for indigent juvenile defense systems to determine whether a juvenile is indigent or partially indigent. These standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent juvenile defense system is making the determination regarding a juvenile's indigency or partial indigency.

(f) The MIJDD shall promulgate objective standards for indigent juvenile defense systems to determine the amount a partially indigent juvenile must contribute to his or her defense. The standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent juvenile defense system is making the determination regarding how much a partially indigent juvenile must contribute to his or her defense.

(g) A juvenile is responsible for applying for indigent juvenile defense counsel and for establishing his or her indigency and eligibility for appointed counsel under this act. Any oral or written statements made by the juvenile in or for use in the juvenile proceeding and material to the issue of his or her indigency must be made

under oath or an equivalent affirmation.

(4) The MIJDD shall establish standards for trainers and organizations conducting training that receive MIJDD funds for training and education. The standards established under this subsection must require that the MIJDD analyze the quality of the training and must require that the effectiveness of the training be capable of being measured and validated.

(5) An indigent juvenile defense system may include in its compliance plan a request that the MIJDD serve as a clearinghouse for experts and investigators. If an indigent juvenile defense system makes a request under this subsection, the MIJDD may develop and operate a system for determining the need and availability for an expert or investigator in individual cases.

Sec. 13. (1) All indigent juvenile defense systems and, at the direction of the supreme court, attorneys engaged in providing indigent juvenile defense services shall cooperate and participate with the MIJDD in the investigation, audit, and review of their indigent juvenile defense services.

(2) An indigent juvenile defense system may submit to the MIJDD an estimate of the cost of developing the plan and cost analysis for implementing the plan under subsection (3) to the MIJDD for approval. If approved, the MIJDD shall award the indigent juvenile defense system a grant to pay the approved costs for developing the plan and cost analysis under subsection (3).

(3) No later than 180 days after a standard is approved by the department, each indigent juvenile defense system shall submit a plan to the MIJDD for the provision of indigent juvenile defense services in a manner as determined by the MIJDD and shall submit an annual plan for the following state fiscal year on or before October 1 of each year. A plan submitted under this subsection must specifically address how the minimum standards established by the MIJDD under this act will be met and must include a cost analysis for meeting those minimum standards. The standards to be addressed in the annual plan are those approved not less than 180 days before the annual plan submission date. The cost analysis must include a statement of the funds in excess of the local share, if any, necessary to allow its system to comply with the MIJDD's minimum standards.

(4) The MIJDD shall approve or disapprove all or any portion of a plan or cost analysis, or both a plan and cost analysis, submitted under subsection (3), and shall do so within 90 calendar days of the submission of the plan and cost analysis. If the MIJDD disapproves any part of the plan, the cost analysis, or both the plan and the cost analysis, the indigent juvenile defense system shall consult with the MIJDD and, for any disapproved portion, submit a new plan, a new cost analysis, or both within 60 calendar days of the mailing date of the official notification of the MIJDD's disapproval. If after 3 submissions a compromise is not reached, the dispute must be resolved as provided in section 15. All approved provisions of an indigent juvenile defense system's plan and cost analysis must not be delayed by any disapproved portion and must proceed as provided in this act. The MIJDD shall not approve a cost analysis or portion of a cost analysis unless it is reasonably and directly related to an indigent juvenile defense function.

(5) The MIJDD shall submit a report to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the

senate and house of representatives requesting the appropriation of funds necessary to implement compliance plans after all the systems compliance plans are approved by the MIJDD. The MIJDD shall include a cost analysis for each minimum standard in the report. The amount requested under this subsection must be equal to the total amount required to achieve full compliance as agreed upon by the MIJDD and the indigent juvenile defense systems under the approval process provided in subsection (4). The information used to create this report must be made available to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives.

(6) The MIJDD shall submit a report to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives not later than October 31, 2021 that includes a recommendation regarding the appropriate level of local share, expressed in both total dollars and as a percentage of the total cost of compliance for each indigent juvenile defense system.

(7) Except as provided in subsection (9), an indigent juvenile defense system shall maintain not less than its local share. If the MIJDD determines that funding in excess of the indigent juvenile defense system's share is necessary in order to bring its system into compliance with the minimum standards established by the MIJDD, that excess funding must be paid by this state. The legislature shall appropriate to the MIJDD the additional funds necessary for a system to meet and maintain those minimum standards, which must be provided to indigent juvenile defense systems through grants as described in subsection (8). The legislature may appropriate funds that apply to less than all of the minimum standards and may provide less than the full amount of the funds requested under subsection (5). Notwithstanding this subsection, it is the intent of the legislature to fund all of the minimum standards contained in the report under subsection (5) within 3 years of the date on which the minimum standards were adopted.

(8) An indigent juvenile defense system must not be required to provide funds in excess of its local share. The MIJDD shall provide grants to indigent juvenile defense systems to assist in bringing the systems into compliance with minimum standards established by the MIJDD.

(9) An indigent juvenile defense system is not required to expend its local share if the minimum standards established by the MIJDD may be met for less than that share, but the local share of a system that expends less than its local share under these circumstances is not reduced by the lower expenditure.

(10) This state shall appropriate funds to the MIJDD for grants to the local units of government for the reasonable costs associated with data required to be collected under this act that is over and above the local unit of government's data costs for other purposes.

(11) Within 180 days after receiving funds from the MIJDD under subsection (8), an indigent juvenile defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIJDD for effective assistance of counsel. The terms of a grant may allow an indigent juvenile defense system to exceed 180 days for compliance with a specific item needed to meet minimum standards if necessity is demonstrated in the indigent juvenile

defense system's compliance plan. The MIJDD has the authority to allow an indigent juvenile defense system to exceed 180 days for implementation of items if an unforeseeable condition prohibits timely compliance.

(12) If an indigent juvenile defense system is awarded no funds for implementation of its plan under this act, the MIJDD shall nevertheless issue to the system a zero grant reflecting that it will receive no grant funds.

(13) The MIJDD may apply for and obtain grants from any source to carry out the purposes of this act. All funds received by the MIJDD, from any source, are state funds and must be appropriated as provided by law.

(14) The MIJDD shall ensure proper financial protocols in administering and overseeing funds utilized by indigent juvenile defense systems, including, but not limited to, all of the following:

(a) Requiring documentation of expenditures.

(b) Requiring each indigent juvenile defense system to hold all grant funds in a fund that is separate from other funds held by the indigent juvenile defense system.

(c) Requiring each indigent juvenile defense system to comply with the standards promulgated by the governmental accounting standards board.

(15) If an indigent juvenile defense system does not fully expend a grant toward its costs of compliance, its grant in the second succeeding fiscal year must be reduced by the amount equal to the unexpended funds. Identified unexpended grant funds must be reported by indigent juvenile defense systems on or before October 31 of each year. Funds subject to extension under subsection (11) must be reported but not included in the reductions described in this subsection. Any grant money that is determined to have been used for a purpose outside of the compliance plan must be repaid to the MIJDD, or, if not repaid, must be deducted from future grant amounts.

(16) If an indigent juvenile defense system expends funds in excess of its local share and the approved MIJDD grant to meet unexpected needs in the provision of indigent juvenile defense services, the MIJDD shall recommend the inclusion of the funds in a subsequent year's grant if all expenditures were reasonably and directly related to indigent juvenile defense functions.

(17) The court shall collect contribution or reimbursement from juveniles determined to be partially indigent under applicable court rules and statutes. Reimbursement under this subsection is subject to section 22 of chapter XV of the code of criminal procedure, 1927 PA 175, MCL [775.22](#). The court shall remit 100% of the funds it collects under this subsection to the indigent juvenile defense system in which the court is sitting. Twenty percent of the funds received under this subsection by an indigent juvenile defense system must be remitted to the department in a manner prescribed by the department and reported to the department by October 31 of each year. The funds received by the department under this subsection must be expended by the department in support of indigent juvenile defense systems in this state. The remaining 80% of the funds collected under this subsection may be retained by the indigent juvenile defense system for purposes of reimbursing the costs of collecting the funds under this subsection and funding indigent juvenile defense in the subsequent fiscal year. The funds collected under this subsection must not alter the calculation of the local share.

Sec. 15. (1) Except as provided in section 5, if a dispute arises between the

MIJDD and an indigent juvenile defense system concerning the requirements of this act, including a dispute concerning the approval of an indigent juvenile defense system's plan, cost analysis, or compliance with section 13 or 17, the parties shall attempt to resolve the dispute by mediation. The state court administrator, as authorized by the supreme court, shall appoint a mediator agreed to by the parties within 30 calendar days of the mailing date of the official notification of the third disapproval by the MIJDD under section 13(4) to mediate the dispute and shall facilitate the mediation process. The MIJDD shall immediately send the state court administrative office a copy of the official notice of that third disapproval. If the parties do not agree on the selection of the mediator, the state court administrator, as authorized by the supreme court, shall appoint a mediator of his or her choosing. Mediation must commence within 30 calendar days after the mediator is appointed and terminate within 60 calendar days of its commencement. Mediation costs associated with mediation of the dispute must be paid equally by the parties.

(2) If the parties do not come to a resolution of the dispute during mediation under subsection (1), all of the following apply:

(a) The mediator may submit his or her recommendation of how the dispute should be resolved to the MIJDD within 30 calendar days of the conclusion of mediation for the MIJDD's consideration.

(b) The MIJDD shall consider the recommendation of the mediator, if any, and shall approve a final plan or the cost analysis, or both, in the manner the MIJDD considers appropriate within 30 calendar days, and the indigent juvenile defense system shall implement the plan as approved by the MIJDD.

(c) The indigent juvenile defense system that is aggrieved by the final plan, cost analysis, or both, may bring an action seeking equitable relief as described in subsection (3).

(3) The MIJDD, or an indigent juvenile defense system may bring an action seeking equitable relief in the circuit court only as follows:

(a) Within 60 days after the MIJDD's issuance of an approved plan and cost analysis under subsection (2)(b).

(b) Within 60 days after the system receives grant funds under section 13(8), if the plan, cost analysis, or both, required a grant award for implementation of the plan.

(c) Within 30 days of the MIJDD's determination that the indigent juvenile defense system has breached its duty to comply with an approved plan.

(d) The action must be brought in the judicial circuit where the indigent juvenile defense service is located. The state court administrator, as authorized by the supreme court, shall assign an active or retired judge from a judicial circuit other than the judicial circuit where the action was filed to hear the case. Costs associated with the assignment of the judge must be paid equally by the parties.

(e) The action must not challenge the validity, legality, or appropriateness of the minimum standards approved by the department.

(4) If the dispute involves the indigent juvenile defense system's plan, cost analysis, or both, the court may approve, reject, or modify the submitted plan, cost analysis, or the terms of a grant awarded under section 13(8) other than the amount of the grant, determine whether section 13 has been complied with, and issue any

orders necessary to obtain compliance with this act. However, the system must not be required to expend more than its local share in complying with this act.

(5) If a party refuses or fails to comply with a previous order of the court, the court may enforce the previous order through the court's enforcement remedies, including, but not limited to, its contempt powers, and may order that the state undertake the provision of indigent juvenile defense services in lieu of the indigent juvenile defense system.

(6) If the court determines that an indigent juvenile defense system has breached its duty under section 17(1), the court may order the MIJDD to provide indigent juvenile defense services on behalf of that system.

(7) If the court orders the MIJDD to provide indigent juvenile defense services on behalf of an indigent juvenile defense system, the court shall order the system to pay the following amount of the state's costs that the MIJDD determines are necessary in order to bring the indigent juvenile defense system into compliance with the minimum standards established by the MIJDD:

(a) In the first year, 20% of the state's costs.

(b) In the second year, 40% of the state's costs.

(c) In the third year, 60% of the state's costs.

(d) In the fourth year, 80% of the state's costs.

(e) In the fifth year, and any subsequent year, not more than the dollar amount that was calculated under subdivision (d).

(8) An indigent juvenile defense system may resume providing indigent juvenile defense services at any time as provided under section 13. When a system resumes providing indigent juvenile defense services, it is no longer required to pay an assessment under subsection (7) but must be required to pay no less than its local share.

Sec. 17. (1) Except as provided in subsection (2), every local unit of government that is part of an indigent juvenile defense system shall comply with an approved plan under this act.

(2) A system's duty of compliance with 1 or more standards within the plan under subsection (1) is contingent upon receipt of a grant in the amount sufficient to cover that particular standard or standards contained in the plan and cost analysis approved by the MIJDD.

(3) The MIJDD may proceed under section 15 if an indigent juvenile defense system breaches its duty of compliance under subsection (1).

Sec. 19. The MIJDD shall publish and make available to the public on a website its annual report, its budget, and a listing of all expenditures. Publication and availability of the listing of expenditures must be on a quarterly basis, except for the annual report and salary information, which may be published and made available on an annual basis. As used in this section, "expenditures" means all payments or disbursements of MIJDD funds, received from any source, made by the MIJDD.

Sec. 21. Both of the following apply to the MIJDD:

(a) The freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, except as provided in section 7.

(b) The open meetings act, 1976 PA 267, MCL 15.261 to 15.275.

Sec. 23. (1) The Michigan indigent juvenile defense fund is created within the

state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the fund, including private gifts, bequests, and donations. The state treasurer shall direct the investment of the fund. The state treasurer shall credit to the fund interest and earnings from fund investments.

(3) Money in the fund at the close of the fiscal year lapses to the general fund.

(4) The department shall be the administrator of the fund for auditing purposes.

(5) The department shall expend money from the fund to carry out its responsibilities under this act.

Sec. 25. (1) Nothing in this act overrules, expands, or extends, either directly or by analogy, any decisions reached by the United States Supreme Court or the supreme court of this state regarding the effective assistance of counsel.

(2) Nothing in this act overrides section 29 or 30 of article IX of the state constitution of 1963.

(3) Except as otherwise provided in this act, the failure of an indigent juvenile defense system to comply with statutory duties imposed under this act does not create a cause of action against the government or a system.

(4) Statutory duties imposed that create a higher standard than that imposed by the United States Constitution or the state constitution of 1963 do not create a cause of action against a local unit of government, an indigent juvenile defense system, or this state.

(5) Violations of MIJDD rules that do not constitute ineffective assistance of counsel under the United States Constitution or the state constitution of 1963 do not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel.

Public Policy Position

HB 4260

Support in Principle, but Oppose as Currently Drafted

Explanation

The committee voted unanimously (20) to support the legislation in principle, but oppose as currently drafted.

The MIJDD bill is an attempt to create a new department in the state government with the sole purpose of addressing indigent juvenile defense in Michigan. This is akin to the MIDC legislation which passed a few years ago. However, rather than creating a commission to address the need for indigent defense reform, the sponsors of this bill have elected to instead create a whole new department under the purview of the Michigan Supreme Court, which likely would be a conflict of interest.

In theory, this bill would do a lot of good for indigent juvenile defense in Michigan. It would centralize the system, it would help create standards which apply on a statewide level, and, potentially, it would work to increase the funding for indigent defense attorneys throughout the state. However, as written, the bill does not come close to meeting those goals.

To start, it appears that the authors of the bill do not adequately understand the role of a defense attorney for a juvenile. There is a paragraph regarding stating that the MIJDD must understand that the defense attorneys are partners in the juvenile defense system with prosecutors, law enforcement, and the judiciary. While it is true that attorneys owe some degree of responsibility to the judiciary, they ultimately should never be considered to be partners in the system with prosecution and law enforcement. Additionally, there is a paragraph immediately preceding that in which there is a discussion of emphasizing the importance of juveniles who are tried as adults. These are certainly important cases, and it's possible that the cases in which a juvenile is tried as an adult could be considered to be more important than your average juvenile delinquency case. However, those are a minuscule fraction of the total number of juvenile delinquency cases throughout the state, and emphasizing their importance runs the risk of minimizing the importance of providing proper defense in the vast majority of cases.

This bill does not adequately address funding for an indigent juvenile defense system. There is some discussion of funding; however, it is not adequately addressed through the bill. It remains unknown to what degree counties will be responsible for the funding versus the state. There is also no indication of whether this would lead to an increase in funding for attorneys throughout the state. It is well established that one of the major drawbacks to Michigan's indigent defense system in its current iteration is a lack of funding. There is not adequate funding for investigators or for expert witnesses, and there appears to be nothing in the bill which would address the lack of funding for those services. Of greater concern, there appears to be nothing in the bill which would address the lack of funding for attorneys. Without increasing funding for attorneys, actual improvement of the juvenile indigent system will remain an uphill battle. Without language more adequately addressing the funding

concerns, the bill as written fails to provide remedies for some of the most serious shortcomings of Michigan's juvenile defense system, nor does it provide a viable path toward passage as legislation.

All those concerns being said, there is much to like about this legislation. The simple fact that there is an attempt at creating a more centralized system geared toward improving juvenile representation throughout the state is inherently a positive. The movement toward something akin to the MIDC system for juveniles has the potential to vastly improve a system which has been recognized on a national level to be severely flawed. There are also little things throughout the legislation which seem to be steps in the right direction. For example, there is a provision that would allow the MIJDD to create a clearinghouse of the names of experts and investigators for access by juvenile defense attorneys. This would create a centralized list of those names and contact information which could prove to be a significant benefit to attorneys who are sorely lacking in those resources as it stands.

Based on the concerns about some of the specific provisions of the legislation and the lack of provisions that would adequately address the funding issues, the committee cannot in good faith support this legislation as it is currently written. However, the simple fact there is a movement in the direction toward a better system for juvenile defense in Michigan is inherently a positive.

The committee is fully willing to work with the sponsor to resolve any issues.

Keller Explanation

The committee agreed that HB 4620 is Keller permissible on the grounds that it is related to the improvement of the functioning of the courts as well as the regulation of the legal profession with respect to the competency of the profession. This can be found in Section 5(3) which provides in part:

The MIJDD shall propose minimum standards for the local delivery of indigent juvenile defense services providing *effective assistance of counsel to juveniles* throughout this state. These minimum standards must be designed to ensure the provision of indigent juvenile defense services that meet constitutional requirements for effective assistance of counsel. (emphasis added)

Additional support regarding functioning of the courts may be found in Section 11(3) (e) which provides in part:

(e) The MIJDD shall promulgate objective standards for indigent juvenile defense systems to determine whether a juvenile is indigent or partially indigent. *These standards must include availability of prompt judicial review, under the direction and supervision of the supreme court*, if the indigent juvenile defense system is making the determination regarding a juvenile's indigency or partial indigency. (emphasis added)

For these reasons, HB 4620 is Keller permissible.

Position Vote:

Voted For position: 20

Voted against position: 0

Abstained from vote: 0

Did not vote (absence): 8



ACCESS TO JUSTICE POLICY COMMITTEE

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**Public Policy Position
HB 4620**

Adopt the Position of Access to Justice Policy Committee

Explanation

The committee voted to adopt the Access to Justice Policy Committee's position on HB 4620, which is to support HB 4620 in principle, but oppose the legislation as currently drafted. The full position is presented below:

The MIJDD bill is an attempt to create a new department in the state government with the sole purpose of addressing indigent juvenile defense in Michigan. This is akin to the MIDC legislation which passed a few years ago. However, rather than creating a commission to address the need for indigent defense reform, the sponsors of this bill have elected to instead create a whole new department under the purview of the Michigan Supreme Court, which likely would be a conflict of interest.

In theory, this bill would do a lot of good for indigent juvenile defense in Michigan. It would centralize the system, it would help create standards which apply on a statewide level, and, potentially, it would work to increase the funding for indigent defense attorneys throughout the state. However, as written, the bill does not come close to meeting those goals.

To start, it appears that the authors of the bill do not adequately understand the role of a defense attorney for a juvenile. There is a paragraph regarding stating that the MIJDD must understand that the defense attorneys are partners in the juvenile defense system with prosecutors, law enforcement, and the judiciary. While it is true that attorneys owe some degree of responsibility to the judiciary, they ultimately should never be considered to be partners in the system with prosecution and law enforcement. Additionally, there is a paragraph immediately preceding that in which there is a discussion of emphasizing the importance of juveniles who are tried as adults. These are certainly important cases, and it's possible that the cases in which a juvenile is tried as an adult could be considered to be more important than your average juvenile delinquency case. However, those are a minuscule fraction of the total number of juvenile delinquency cases throughout the state, and emphasizing their importance runs the risk of minimizing the importance of providing proper defense in the vast majority of cases.

This bill does not adequately address funding for an indigent juvenile defense system. There is some discussion of funding; however, it is not adequately addressed through the bill. It remains unknown to what degree counties will be responsible for the funding versus the state. There is also no indication of whether this would lead to an increase in funding for attorneys throughout the state. It is well established that one of the major drawbacks to Michigan's indigent defense system in its current iteration is a lack of funding. There is not adequate funding for investigators or for expert witnesses, and there appears to be nothing in the bill which would address the lack of funding for those services. Of greater concern, there appears

to be nothing in the bill which would address the lack of funding for attorneys. Without increasing funding for attorneys, actual improvement of the juvenile indigent system will remain an uphill battle. Without language more adequately addressing the funding concerns, the bill as written fails to provide remedies for some of the most serious shortcomings of Michigan's juvenile defense system, nor does it provide a viable path toward passage as legislation.

All those concerns being said, there is much to like about this legislation. The simple fact that there is an attempt at creating a more centralized system geared toward improving juvenile representation throughout the state is inherently a positive. The movement toward something akin to the MIDC system for juveniles has the potential to vastly improve a system which has been recognized on a national level to be severely flawed. There are also little things throughout the legislation which seem to be steps in the right direction. For example, there is a provision that would allow the MIJDD to create a clearinghouse of the names of experts and investigators for access by juvenile defense attorneys. This would create a centralized list of those names and contact information which could prove to be a significant benefit to attorneys who are sorely lacking in those resources as it stands.

Based on the concerns about some of the specific provisions of the legislation and the lack of provisions that would adequately address the funding issues, the committee cannot in good faith support this legislation as it is currently written. However, the simple fact there is a movement in the direction toward a better system for juvenile defense in Michigan is inherently a positive.

The committee is fully willing to work with the sponsor to resolve any issues.

Keller Explanation

The committee agreed that HB 4620 is Keller permissible on the grounds that it is related to the improvement of the functioning of the courts as well as the regulation of the legal profession with respect to the competency of the profession. This can be found in Section 5(3) which provides in part:

The MIJDD shall propose minimum standards for the local delivery of indigent juvenile defense services providing *effective assistance of counsel to juveniles* throughout this state. These minimum standards must be designed to ensure the provision of indigent juvenile defense services that meet constitutional requirements for effective assistance of counsel. (emphasis added)

Additional support regarding functioning of the courts may be found in Section 11(3) (e) which provides in part:

(e) The MIJDD shall promulgate objective standards for indigent juvenile defense systems to determine whether a juvenile is indigent or partially indigent. *These standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent juvenile defense system is making the determination regarding a juvenile's indigency or partial indigency.* (emphasis added)

For these reasons, HB 4620 is Keller permissible.

Position Vote:

Voted For position: 12

Voted against position: 0

Abstained from vote: 0

Did not vote (absence): 11

Contact Persons:

Mark A. Holsomback mahols@kalcouny.com

Sofia V. Nelson snelson@sado.org

**Public Policy Position
HB 4620**

Support

Explanation

The Children's Law Section Council voted to support HB 4620.

Position Vote:

Voted for position: 13

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 2

Keller Permissibility

The improvement of the functioning of the courts

The availability of legal services to society

Contact Person: Lynn M. Perry

Email: lynn.perry@kentcountymi.gov



To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: September 10, 2021

Re: HB 5098 – Online Revenue Data Paid to Attorneys for Indigent Defense Services

Background

HB 5098 amends the Michigan Indigent Defense Act to require the Michigan Indigent Defense Commission (MIDC) to maintain an online system that allows for indigent defense systems to publicly post payments to contracted defense attorneys within that indigent criminal defense system. The online system must be searchable, sortable, and downloadable, and indigent defense systems would be required to utilize the system.

***Keller* Considerations**

The legislation was reviewed by the Access to Justice Policy Committee and the Criminal Jurisprudence & Practice Committee.

The Criminal Jurisprudence & Practice Committee decided that the legislation was *Keller*-permissible because it affected “the functioning of the courts with attorney compensation, as well as improving access to justice in providing representation for the indigent.”

However, the Access to Justice Policy Committee argued that while “the increase the availability of legal services to society and financial provision for indigent defense may be of great public interest,” the bill’s purpose is unclear. And “the issue of payment of fees to specific attorneys or law firms is not likely *recognized* for *Keller* purposes.”

This bill would create transparency about how tax dollars are spent by local indigent defense systems. Although this information might be of interest to the public, it does not have a direct impact on either the regulation of attorneys or the improvement in quality of legal services.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER <i>KELLER</i>:	
Regulation of Legal Profession	Improvement in Quality of Legal Services
<p>As interpreted by AO 2004-1</p> <ul style="list-style-type: none">• Regulation and discipline of attorneys• Ethics• Lawyer competency• Integrity of the Legal Profession• Regulation of attorney trust accounts	<ul style="list-style-type: none">• Improvement in functioning of the courts• Availability of legal services to society

Staff Recommendation

The legislation does not meet the criteria of *Keller* and should not be considered.

House Bill 5098 (2021) rss?

Friendly Link: <http://legislature.mi.gov/doc.aspx?2021-HB-5098>

Sponsors

John Reilly (district 46)

Steven Johnson

(click name to see bills sponsored by that person)

Categories

Criminal procedure: indigent defense; Corrections: other; State agencies (existing): corrections;

Criminal procedure: indigent defense; Michigan indigent defense commission; require to post online revenue data paid to attorney and law firms for indigent defense services annually. Amends 2013 PA 93 (MCL 780.981 - 780.1003) by adding sec. 19a.

Bill Documents

Bill Document Formatting Information

[x]

The following bill formatting applies to the 2021-2022 session:

- New language in an amendatory bill will be shown in **bold**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue, such as: House amended text.
- Amendments made by the Senate will be red, such as: Senate amended text.

(gray icons indicate that the action did not occur or that the document is not available)

Documents



House Introduced Bill

Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.



As Passed by the House

As Passed by the House is the bill, as introduced, that includes any adopted House amendments.



As Passed by the Senate

As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.



House Enrolled Bill

Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

History

(House actions in lowercase, Senate actions in UPPERCASE)

NOTE: a page number of 1 indicates that the page number is soon to come.

Date ▲	Journal	Action
6/23/2021	HJ 60	Pg. 1211 introduced by Representative John Reilly
6/23/2021	HJ 60	Pg. 1211 read a first time
6/23/2021	HJ 60	Pg. 1211 referred to Committee on Judiciary
6/24/2021	HJ 61	Pg. 1238 bill electronically reproduced 06/23/2021

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HOUSE BILL NO. 5098

A bill to amend 2013 PA 93, entitled
"Michigan indigent defense commission act,"

(MCL 780.981 to 780.1003) by adding section 19a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 19a. (1) Each indigent criminal defense system shall publicly share the information in the time and manner required under this section.

(2) The MIDC shall establish and maintain an online system that allows for indigent criminal defense systems to publicly post each payment made to a defense attorney or private law firm for the provision of indigent criminal defense services within that indigent criminal defense system.

(3) The online system created by the MIDC under subsection (2) must meet both of the following requirements:

(a) Be searchable and sortable by county and by payee.

(b) Provide the information required under this section in a manner that is downloadable by members of the public.

(4) Each indigent criminal defense system shall utilize the system created by the MIDC to publicly post the payments described under subsection (2) annually.

**Public Policy Position
HB 5098**

Support

Explanation:

The committee voted 13 to 2 with 2 abstentions to support the legislation in concept with the inclusion of a funding provision in the statute to provide for implementation. While this is conceptually a good idea, it would be extremely difficult to implement without appropriation. Currently, this is done manually from court to court. For this to be operationally effective, appropriate funding would be necessary.

Position Vote:

Voted For position: 13

Voted against position: 2

Abstained from vote: 2

Did not vote (absence): 5

Keller Permissibility

The committee agreed that this legislation is *Keller* permissible in affecting the functioning of the courts with attorney compensation, as well as improving access to justice in providing representation for the indigent.

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org

**Public Policy Position
HB 5098**

Oppose

Explanation

The Criminal Law Section of the State Bar of Michigan oppose HB 5098, as written. We believe it may create a “Hedley Amendment” violation because it diverts costs to a local unit of government.

Position Vote:

Voted for position: 17

Voted against position: 0

Abstained from vote: 1

Did not vote (absent): 8

Contact Person: Kahla Crino

Email: krino@ingham.org



**FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS**

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2021. 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.

The Committee on Model Criminal Jury Instructions proposes a revision of Chapter 2 (Procedural Instructions) of the Model Criminal Jury Instructions. The current instructions have evolved over several decades with a number of additions, and have become quite repetitious. The Committee offers a slight re-write and re-organization of the procedural instructions that reduces linguistic duplication and flows more logically.

The instructions below are divided into two sets on the site in hopes of making them more convenient to compare and review. They are preceded by a summary of the changes being proposed (pages 2-3). The first set of instructions (pages 4-14) are the current instructions, M Crim JI 2.1 through 2.26. Those are followed (pages 16-27) by the proposed revised procedural instructions, M Crim JI 2.1 through 2.28, including two new instructions: M Crim JI 2.2 (Written Copy of Instructions per MCR 2.513(D)) and M Crim JI 2.13 (Notifying Court of Inability to Hear or See Witness).

Summary:

<u>Proposed MCrimJI#</u>	<u>Action</u>	<u>Relation to current MCrimJI#</u>
2.1	no change	
2.2	re-numbered/revise	¶ (7) of current 2.3
2.3	re-numbered	current 2.2
2.4	re-numbered/revise	¶ (3) of current 2.3
2.5	new	from 1.9
2.6	re-numbered/revise	current 2.3 minus ¶¶ (3) and (7)
2.7	re-numbered	current 2.4
2.8	re-numbered	current 2.6
2.9	re-numbered	current 2.5
2.10	re-numbered	current 2.7
2.11	re-numbered	current 2.8
2.12	re-numbered/revise	current 2.9 minus ¶ (4)
2.13	new	¶ (4) of current 2.9
2.14	re-numbered	current 2.10
2.15	re-numbered	current 2.11
2.16	re-numbered/revise	current 2.12 and 2.13
2.17	re-numbered	current 2.14
2.18	re-numbered	current 2.15
2.19	re-numbered/revise	current 2.16
2.20	re-numbered	current 2.17
2.21	re-numbered/revise	current 2.18
2.22	re-numbered	current 2.19
2.23	re-numbered	current 2.20
2.24	re-numbered/revise	current 2.21
2.25	re-numbered	current 2.22
2.26	re-numbered	current 2.23

2.27	re-numbered/revise	current 2.24 and 2.25
2.28	re-numbered	current 2.26

Current instructions:

M Crim JI 2.1 Juror Oath Following Selection

(1) Ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.

(2) I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict. If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly and reach a true verdict.

(3) Here is your oath: “Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.”

M Crim JI 2.2 Legal Principles

Now I will explain some of the legal principles you will need to know and the procedure we will follow in this trial.

M Crim JI 2.3 Trial Procedure

(1) A trial follows this procedure:

(2) First, the prosecutor makes an opening statement, where [he / she] gives [his / her] theories about the case. The defendant’s lawyer does not have to make an opening statement, but [he / she] may make an opening statement after the prosecutor makes [his / hers], or [he / she] may wait until later. These statements are not evidence. They are only meant to help you understand how each side views the case.

(3) To prove the charge(s) the prosecutor must prove the following beyond a reasonable doubt:

[Read elements of the offense(s). Since the elements of the offense(s) may contain legal terms, definitions of those terms should also be given.]

(4) Next, the prosecutor presents [his / her] evidence. The prosecutor may call witnesses to testify and may show you exhibits like documents or objects. The defendant's lawyer has the right to cross-examine the prosecutor's witnesses.

(5) After the prosecutor has presented all [his / her] evidence, the defendant's attorney may also offer evidence, but does not have to. By law, the defendant does not have to prove [his / her] innocence or produce any evidence. If the defense does call any witnesses, the prosecutor has the right to cross-examine them. The prosecutor may also call witnesses to contradict the testimony of the defense witnesses.

(6) After all the evidence has been presented, the prosecutor and the defendant's lawyer will make their closing arguments. Like the opening statements, these are not evidence. They are only meant to help you understand the evidence and the way each side sees the case. You must base your verdict only on the evidence.

(7) You have been given a written copy of the instructions I have just read to you. You may refer to them during the trial. Since no one can predict the course of a trial, these instructions may change at the end of the trial. At the close of the trial, I will provide you with a copy of my final instructions for your use during deliberations.

M Crim JI 2.4

Function of Court and Jury

(1) My responsibilities as the judge in this trial are to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case. As jurors, you are the ones who will decide this case.

(2) Your responsibility as jurors is to decide what the facts of the case are. This is your job, and no one else's. You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how

important you think it is. This includes how much you believe what each of the witnesses said.

(3) What you decide about any fact in this case is final.

M Crim JI 2.5 Considering Only Evidence / What Evidence Is

When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence.

M Crim JI 2.6 Judging Credibility and Weight of Evidence

(1) It is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness.*

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Does the witness seem to have a good memory?

(c) How does the witness look and act while testifying? Does the witness seem to be making an honest effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers?

- (d) Does the witness's age or maturity affect how you judge his or her testimony?
- (e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?
- (f) Have there been any promises, threats, suggestions, or other influences that affect how the witness testifies?
- (g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?
- (h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

M Crim JI 2.7 Questions Not Evidence

The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is.

M Crim JI 2.8 Court's Questioning Not a Reflection of Opinion

I may ask some of the witnesses questions myself. These questions are not meant to reflect my opinion about the evidence. If I ask questions, my only reason would be to ask about things that may not have been fully explored.

M Crim JI 2.9 Questions by Jurors Allowed

- (1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.
- (2) You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Raise your hand, write the

question down, and pass it to the bailiff, who will give it to me. Do not show your question to other jurors.

(3) If your question is not asked, it is because I determined under the law that the question should not be asked. Do not speculate about why the question was not asked. In other words, you should draw no conclusions or inferences about the facts of the case, nor should you speculate about what the answer might have been. Also, in considering the evidence you should not give greater weight to testimony merely because it was given in answer to questions submitted by members of the jury.

(4) On the other hand, if you cannot hear what a witness or lawyer says, please raise your hand immediately and ask to have the question or answer repeated.

M Crim JI 2.10 Objections

During the trial the lawyers may object to certain questions or statements made by the other lawyers or witnesses. I will rule on these objections according to the law. My rulings for or against one side or the other are not meant to reflect my opinions about the facts of the case.

M Crim JI 2.11 Disregard Out-of-Presence Hearings

Sometimes the lawyers and I will have discussions out of your hearing. Also, while you are in the jury room I may have to take care of other matters that have nothing to do with this case. Pay no attention to these interruptions.

M Crim JI 2.12 Jurors Not To Discuss Case

You must not discuss the case with anyone, including your family or friends. You must not even discuss it with the other jurors until the time comes for you to decide the case. When it is time for you to decide the case, I will send you to the jury room for that purpose. Then you should discuss the case among

yourselves, but only in the jury room and only when all the jurors are there. When the trial is over, you may, if you wish, discuss the case with anyone.

M Crim JI 2.13 Recesses

(1) If I call for a recess during the trial, I will either send you back to the jury room or allow you to leave the courtroom on your own and go about your business. But you must not discuss the case with anyone or let anyone discuss it with you or in your presence. If someone tries to do that, tell him or her to stop, and explain that as a juror you are not allowed to discuss the case. If he or she continues, leave and report the incident to me as soon as you return to court.

(2) You must not talk to the defendant, the lawyers, or the witnesses about anything at all, even if it has nothing to do with the case.

(3) It is very important that you only get information about the case in court, when you are acting as the jury and when the defendant, the lawyers, and I are all here.

M Crim JI 2.14 Caution about Publicity in Cases of Public Interest

(1) During the trial, do not read, listen to, or watch any news reports about the case. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because news reports do not have to meet these standards, they could give you incorrect or misleading information that might unfairly favor one side. So, to be fair to both sides, you must follow this instruction.

[Give the instruction below when recessing:]

(2) Remember, for the reasons I explained to you earlier, you must not read, listen to, or watch any news reports about this case while you are serving on this jury.

M Crim JI 2.15**Sequestration of Jurors**

(1) Because this case has gotten so much public attention, I have reluctantly decided that you will not be allowed to go home at the end of the day. Instead, you will stay together. I know this will be difficult for all of you, and you should tell me if this causes you any special hardship.

(2) You may wonder why this is necessary. In fairness to both sides, it is necessary for you to stay together away from any outside information. Please do not communicate in any way with anyone except the other jurors without telling one of the bailiffs. Also, you must not read any newspapers or magazines except for the ones the bailiffs give you. I have told the bailiffs to remove all articles about the trial from the reading material.

(3) We will do everything we can to make you as comfortable as possible. The bailiff will help you with anything you need.

M Crim JI 2.16**Jurors Not to Consider Information from Outside the Courtroom**

The restrictions I'm about to describe are meant to ensure that the parties get a fair trial. In our judicial system, it is crucial that jurors are not influenced by anything or anyone outside the courtroom. Now that many jurors have easy access to information through handheld devices and other technology, jurors may be tempted to use these devices to learn more about some aspect of the case. But if a juror were to do this, it would harm the parties. The parties' attorneys would have no way of knowing that a juror has gotten outside information and would have no chance to object if that information was false, untrustworthy, or irrelevant. Remember, no matter how careful and conscientious news reporters, family members, friends, and other people outside the courtroom may be, information about the case from television, radio, the Internet, and social media will inevitably be incomplete—and could be incorrect. Please bear these things in mind as I read the following instructions. These restrictions apply from this moment until I discharge you from jury service:

- (1) You must decide this case based solely on the evidence you see and hear in this courtroom. You must not consider information that comes from anywhere else.
- (2) This means that during the trial, you must not read, watch, or listen to news reports about the case, whether in newspapers, on television, on the radio, or on the Internet.
- (3) You also must not research any aspect of the case during the trial. This means research using a cellular phone, computer, or other electronic device to search the Internet, as well as research with traditional sources like dictionaries, reference manuals, newspapers, or magazines.
- (4) You must not investigate the case on your own or conduct any experiments concerning the case, including investigation or experiments using the Internet, computers, cellular phones, or other electronic devices.
- (5) You must not visit the scene of any event at issue in this trial. If it is necessary for you to view or visit the scene, court staff will take you there as a group, under court supervision. You must not consider as evidence any personal knowledge you have of the scene.
- (6) Before your deliberations, you must not discuss this case with anyone, even your fellow jurors. After you begin deliberations, you should discuss the case with your fellow jurors, but you still must not discuss the case with anyone else until I discharge you from jury service. Until I have discharged you from your jury service, you must not share any information about the case by any means, including cellular phones or social media.
- (7) If you discover that a juror has violated my instructions, report it to my bailiff.

M Crim JI 2.17 Notetaking Allowed

You may take notes during the trial if you wish, but of course you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide your verdict, you may use your notes to help you remember what

happened in the courtroom. If you take notes, do not let anyone except the other jurors see them during deliberations. [You must turn them over to the bailiff during recesses.] Your notes will not be examined by anyone, and when your jury service concludes, your notes will be collected and destroyed.

M Crim JI 2.18 Notetaking Not Allowed

I don't believe that it is desirable or helpful for you to take notes during this trial. If you take notes, you might not be able to give your full attention to the evidence. So please do not take any notes while you are in the courtroom.

M Crim JI 2.19 Multiple Defendants Consider Evidence and Law As It Applies to Each Defendant

- (1) There is more than one defendant in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.
- (2) You should consider each defendant separately. Each is entitled to have [his / her] case decided on the evidence and the law that applies to [him / her].
- [(3) If any evidence was limited to (one defendant / some defendants) you should not consider it as to any other defendants.]

M Crim JI 2.20 Defendant Represents Himself or Herself

In this case, the defendant, _____, is representing [himself / herself]. This fact should not affect your decision in any way. The defendant has the right to represent [himself / herself], and [he / she] has chosen to exercise that right. [A lawyer, _____, is present if the defendant wishes to consult (him / her).]

M Crim JI 2.21 Second Trial

This case has been tried before, and during this trial you may hear some references to the first trial. Sometimes a case must be retried before a new jury, and you should not pay any attention to the fact that this is the second trial. Your verdict must be based only on the evidence in this trial. You must decide the facts only from what you yourself hear and see.

M Crim JI 2.22 Number of Jurors

You can see that we have chosen a jury of [thirteen / fourteen]. After you have heard all of the evidence and my instructions, we will draw lots to decide which [one / two] of you will be dismissed in order to form a jury of twelve.

M Crim JI 2.23 Penalty

Possible penalty should not influence your decision. It is the duty of the judge to fix the penalty within the limits provided by law.

M Crim JI 2.24 Instructions to Be Taken As a Whole

I may give you more instructions during the trial, and at the end of the trial I will give you detailed instructions about the law in this case. You should consider all of my instructions as a connected series. Taken all together, they are the law you must follow.

M Crim JI 2.25 Deliberations and Verdict

After all of the evidence has been presented and the lawyers have given their arguments, I will give you detailed instructions about the rules of law that apply to this case. Then you will go to the jury room to decide on your verdict. A verdict must be unanimous. That means that every juror must agree on it, and it must reflect the individual decision of each juror.

M Crim JI 2.26**Maintaining an Open Mind**

It is important for you to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case.

You must not let bias, prejudice, or public opinion influence your decision. Each of us may have biases or perceptions about other people based on stereotypes. We may be aware of some of our biases, though we do not express them. We may not be fully aware of some of our other biases. Take the time you need to test what might be automatic or instinctive judgments and to reflect carefully about the evidence. I caution you again to avoid reaching conclusions that may have been unintentionally influenced by stereotypes. You must reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

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Proposed Chapter 2 procedural jury instructions on following pages

Proposed instructions:

M Crim JI 2.1 Juror Oath Following Selection

(1) Ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.

(2) I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict. If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly and reach a true verdict.

(3) Here is your oath: “Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.”

[NEW] M Crim JI 2.2 Written Copy of Instructions

You will have a written copy of the instructions I am going to read to you. You may refer to them during the trial. Since no one can predict the course of a trial, these instructions may change at the end of the trial. At the close of the trial, I will provide you with a copy of my final instructions for your use during deliberations.

M Crim JI 2.3 Legal Principles

Now I will explain some of the legal principles you will need to know and the procedure we will follow in this trial.

M Crim JI 2.4**Elements of the Charge**

Defendant is charged (in Count X)¹ with _____. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Read elements of the offense(s). Since the elements of the offense(s) may contain legal terms, definitions of those terms should also be given.]

Use Note

1. For use where the defendant is charged with multiple counts.

M Crim JI 2.5**Presumption of Innocence, Burden of Proof, and Reasonable Doubt**

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he / she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his / her] innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) 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.

M Crim JI 2.6

Trial Procedure

(1) A trial follows this procedure:

(2) First, the prosecutor makes an opening statement, where [he / she] gives [his / her] theories about the case. The defendant's lawyer does not have to make an opening statement, but [he / she] may make an opening statement after the prosecutor makes [his / hers], or [he / she] may wait until later. These statements are not evidence. They are only meant to help you understand how each side views the case.

(3) Next, the prosecutor presents [his / her] evidence. The prosecutor may call witnesses to testify and may show you exhibits like documents or objects. The defendant's lawyer has the right to cross-examine the prosecutor's witnesses.

(4) After the prosecutor has presented all [his / her] evidence, the defendant's attorney may also offer evidence, but does not have to. By law, the defendant does not have to prove [his / her] innocence or produce any evidence. If the defense does call any witnesses, the prosecutor has the right to cross-examine them. The prosecutor may also call witnesses to contradict the testimony of the defense witnesses.

(5) After all the evidence has been presented, the prosecutor and the defendant's lawyer will make their closing arguments. Like the opening statements, these are not evidence. They are only meant to help you understand the evidence and the way each side sees the case. You must base your verdict only on the evidence.

M Crim JI 2.7

Function of Court and Jury

(1) My responsibilities as the judge in this trial are to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case. As jurors, you are the ones who will decide this case.

(2) Your responsibility as jurors is to decide what the facts of the case are. This is your job, and no one else's. You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said.

(3) What you decide about any fact in this case is final.

M Crim JI 2.8

Judging Credibility and Weight of Evidence

(1) Part of your job in deciding what the facts of this case are is to decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness.

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Does the witness seem to have a good memory?

(c) How does the witness look and act while testifying? Does the witness seem to be making an honest effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age or maturity affect how you judge his or her testimony?

(e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?

(f) Have there been any promises, threats, suggestions, or other influences that affect how the witness testifies?

(g) In general, does the witness have any special reason to tell the truth or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

M Crim JI 2.9 Considering Only Evidence / What Evidence Is

When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence.

M Crim JI 2.10 Questions Not Evidence

The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is.

M Crim JI 2.11 Courts Questioning Not a Reflection of Opinion

I may ask some of the witnesses questions myself. These questions are not meant to reflect my opinion about the evidence. If I ask questions, my only reason would be to ask about things that may not have been fully explored.

M Crim JI 2.12**Questions by Jurors Allowed**

(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.

(2) You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Raise your hand, write the question down, and pass it to court staff, who will give it to me. Do not show your question to other jurors.

(3) If your question is not asked, it is because I determined under the law that the question should not be asked. Do not speculate about why the question was not asked. In other words, you should draw no conclusions or inferences about the facts of the case, nor should you speculate about what the answer might have been. Also, in considering the evidence you should not give greater weight to testimony merely because it was given in answer to questions submitted by members of the jury.

[NEW] M Crim JI 2.13**Notifying Court of Inability to Hear or See Witness or Evidence**

If you cannot hear something that is said or presented, or if you cannot see a witness or evidence, please raise your hand immediately.

M Crim JI 2.14**Objections**

During the trial the lawyers may object to certain questions or statements made by the other lawyers or witnesses. I will rule on these objections according to the law. My rulings for or against one side or the other are not meant to reflect my opinions about the facts of the case.

M Crim JI 2.15**Disregard Out-of-Presence Hearings**

Sometimes the lawyers and I will have discussions out of your hearing. Also, while you are in the jury room I may have to take care of other matters that have nothing to do with this case. Pay no attention to these interruptions.

M Crim JI 2.16**Jurors Not To Discuss Case**

You must not discuss the case with anyone, including your family or friends. You must not even discuss it with the other jurors until the time comes for you to decide the case. When it is time for you to decide the case, I will send you to the jury room for that purpose. Then you should discuss the case among yourselves, but only in the jury room and only when all the jurors are there.

You must not talk to the defendant, the lawyers, the witnesses, or anyone who may be connected to this case. This means that you may not speak to these individuals, even if it has nothing to do with this case. You should be very cautious about speaking to people because you may inadvertently speak to someone connected to this case. This restriction is necessary to avoid even the appearance of any improper conduct on any person's part.

If anyone tries to discuss the case with you or in your presence, tell them to stop. Explain that you are a juror and you are not allowed to discuss the case. If they continue, leave. Report the incident to court staff as soon as you return to court.

When the trial is over, these restrictions no longer apply. When the trial is over, you may, if you wish, discuss the case with anyone.

M Crim JI 2.17**Caution About Publicity in Cases of Public Interest**

(1) During the trial, do not read, listen to, or watch any news reports about the case. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because news reports do not have to meet these

standards, they could give you incorrect or misleading information that might unfairly favor one side. So, to be fair to both sides, you must follow this instruction.

[Give the instruction below when recessing:]

(2) Remember, for the reasons I explained to you earlier, you must not read, listen to, or watch any news reports about this case while you are serving on this jury.

M Crim JI 2.18 Sequestration of Jurors

(1) Because this case has gotten so much public attention, I have reluctantly decided that you will not be allowed to go home at the end of the day. Instead, you will stay together. I know this will be difficult for all of you, and you should tell me if this causes you any special hardship.

(2) You may wonder why this is necessary. In fairness to both sides, it is necessary for you to stay together and away from any outside information. Please do not communicate in any way with anyone except the other jurors without telling one of the court staff. Also, you must not read any newspapers or magazines except for the ones the bailiffs give you. I have told the bailiffs to remove all articles about the trial from the reading material.

(3) We will do everything we can to make you as comfortable as possible. The bailiff will help you with anything you need.

M Crim JI 2.19 Jurors Not to Consider Information from Outside the Courtroom

The restrictions I'm about to describe are meant to ensure that the parties get a fair trial. In our judicial system, it is crucial that jurors are not influenced by anything or anyone outside the courtroom. Under the law, the evidence you consider must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because information obtained outside the courtroom does not have these safeguards, it could give you incorrect or misleading information that might unfairly favor

one side. These restrictions start now and continue until I discharge you from jury service:

(1) It is your duty as a juror to decide this case based solely on the evidence you see and hear in this courtroom. You must not consider information that comes from anywhere else.

(2) This means that during the trial, you must not read, watch, or listen to news reports about the case, whether in newspapers, on television, on the radio, or on the Internet.

(3) You also must not research any aspect of the case during the trial. This means research using a cellular phone, computer, or other electronic device to search the Internet, as well as research with traditional sources like dictionaries, reference manuals, newspapers, or magazines.

(4) You must not investigate the case on your own or conduct any experiments concerning the case, including investigation or experiments using the Internet, computers, cellular phones, or other electronic devices.

(5) You must not visit the scene of any event at issue in this trial. If it is necessary for you to view or visit the scene, court staff will take you there as a group, under court supervision. You must not consider as evidence any personal knowledge you have of the scene.

(6) You must not share any information about the case by any means, including cellular phones or social media. This means that even if you are not discussing the case with someone else, you may not post any information about the case on social media websites or in any other manner.

(7) If you discover that a juror has violated my instructions, report it to court staff.

M Crim JI 2.20

Notetaking Allowed

You may take notes during the trial if you wish, but of course you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide your verdict, you may use your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone except the other jurors see them

during deliberations. [*Describe the process the court will use to secure notes each day.*] Your notes will not be examined by anyone, and when your jury service concludes, your notes will be collected and destroyed.

M Crim JI 2.21 Notetaking Not Allowed

I don't believe that it is desirable or helpful for you to take notes during this trial. If you take notes, you might not be able to give your full attention to the evidence. So please do not take any notes while you are in the courtroom.

M Crim JI 2.22 Multiple Defendants Consider Evidence and Law As It Applies to Each Defendant

(1) There is more than one defendant in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.

(2) You should consider each defendant separately. Each is entitled to have [his / her] case decided on the evidence and the law that applies to [him / her].

[(3) If any evidence was limited to (one defendant / some defendants) you should not consider it as to any other defendants.]

M Crim JI 2.23 Defendant Represents Himself or Herself

In this case, the defendant, _____, is representing [himself / herself]. This fact should not affect your decision in any way. The defendant has the right to represent [himself / herself], and [he / she] has chosen to exercise that right. [A lawyer, _____, is present if the defendant wishes to consult (him / her).]

M Crim JI 2.24 Second Trial

This case has been tried before, and during this trial you may hear some references to the first trial. Sometimes a case must be retried before a new jury, and you should not pay any attention to the fact that this is the second trial. Your verdict must be based only on the evidence in this trial. You must decide the facts only from the evidence that you yourself hear and see in this trial.

M Crim JI 2.25 Number of Jurors

You can see that we have chosen a jury of [thirteen / fourteen]. After you have heard all of the evidence and my instructions, we will draw lots to decide which [one / two] of you will be dismissed to form a jury of twelve.

M Crim JI 2.26 Penalty

Possible penalty should not influence your decision. It is the duty of the judge to fix the penalty within the limits provided by law.

M Crim JI 2.27 Instructions to Be Taken As a Whole

I may give you more instructions during the trial. After all the evidence has been presented, you will hear the lawyers' closing arguments. Following the closing arguments, I will give you additional instructions about the rules of law that apply to this case. You should consider all of my instructions as a connected series. Taken all together, they are the law you must follow.

It is important for you to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case.

You must not let bias, prejudice, or public opinion influence your decision. Each of us may have biases or perceptions about other people based on stereotypes. We may be aware of some of our biases, though we do not express them. We may not be fully aware of some of our other biases. Take the time you need to test what might be automatic or instinctive judgments and to reflect carefully about the evidence. I caution you again to avoid reaching conclusions that may have been unintentionally influenced by stereotypes. You must reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

**Public Policy Position
M Crim JI Chapter 2**

Support as Drafted

Explanation:

The committee voted 16 in favor with 1 in opposition to support the Model Criminal Jury Instructions on Chapter 2 (Procedural Instructions) as drafted. The committee appreciated the extensive work that went into the proposed jury instructions.

Position Vote:

Voted For position: 16

Voted against position: 1

Abstained from vote: 0

Did not vote (absence): 6

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org

**Public Policy Position
M Crim JI Chapter 2 Revisions**

Support

Explanation

The Criminal Law Section of the State Bar of Michigan supports the proposed revisions to Chapter 2 of the Michigan Criminal Jury Instructions as written by the Committee on Model Criminal Jury Instructions.

Position Vote:

Voted for position: 16

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 10

Contact Person: Kahla Crino

Email: krino@ingham.org



**FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS**

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2021. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes new instructions, M Crim JI 37.12 [Jury Tampering: MCL 750.120a(1)], M Crim JI 37.13 [Jury Tampering Through Intimidation: MCL 750.120a(2)], and M Crim JI 37.14 [Retaliating Against a Juror: MCL 750.120a(4)] for the crimes found in the Bribery and Corruption chapter of the Penal Code.

[NEW] M Crim JI 37.12 Jury Tampering

(1) The defendant is charged with willfully influencing or attempting to influence jurors outside of courtroom proceedings. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Select the option that applies:]¹

(2) First, that *[identify juror or jurors]* *[was a member / were members]* of the group of potential jurors that could decide the case of *[state name of case]* in the *[identify court]*.

[Or]

(2) First, that *[identify juror or jurors]* *[was a member / were members]* of the jury that could decide the case of *[state name of case]* in the *[identify court]*.

(3) Second, that the defendant willfully and intentionally made an argument or used persuasion with *[that juror / those jurors]* other than as part of the proceedings being held in open court.

(4) Third, that when the defendant made an argument or used persuasion with [*identify juror or jurors*], [he / she] was attempting to influence [his / her / their] decision in the case where [he was / she was / they were] sitting as [a juror / jurors].

Use Note

1. The operative statute, MCL 740.120a(1), may include persons on either the jury venire or the petit jury that ultimately decides the case. *See People v Wood*, 506 Mich 116; 954 NW2d 494 (2020). Use the first option where the juror or jurors were on the jury venire but were not seated on the petit jury, and use the second option where the juror or jurors were on the petit jury.

[NEW] M Crim JI 37.13 Jury Tampering Through Intimidation

(1) The defendant is charged with willfully influencing or attempting to influence jurors outside of courtroom proceedings by using intimidation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

*[Select the option that applies:]*¹

(2) First, that *[identify juror or jurors]* [was a member / were members] of the group of potential jurors that could decide the case of *[state name of case]* in the *[identify court]*.

[Or]

(2) First, that *[identify juror or jurors]* [was a member / were members] of the jury that could decide the case of *[state name of case]* in the *[identify court]*.

(3) Second, that the defendant willfully and intentionally communicated with *[that juror / those jurors]* other than as part of the proceedings being held in open court. To “communicate” means to interact by spoken or written words or by any conduct or behavior that would lead a reasonable person to believe that a message was being conveyed or expressed.

(4) Third, that when the defendant communicated with *[identify juror or jurors]*, *[he / she]* was attempting to influence *[his / her / their]* decision in the case where *[he was / she was / they were]* sitting as *[a juror / jurors]*.

(5) Fourth, that the defendant attempted to influence the decision of the *[juror / jurors]* by using intimidation. Using intimidation means that the defendant’s conduct would lead a reasonable person to be placed in fear.

[Use the following paragraphs where the prosecutor has charged the applicable aggravating element]

(6) Fifth, that the defendant attempted to influence the decision of the *[juror / jurors]* by using intimidation in a case involving the crime of *[state alleged crime in case]*².

(6) Fifth, that when the defendant attempted to influence the decision of the *[juror / jurors]* by using intimidation, the defendant *[committed or attempted to commit the*

crime of (*state other offense*) as I have previously described to you / threatened to kill or injure someone or to cause damage to property]³.

Use Note

1. The operative statute, MCL 750.120a, may include persons on either the jury venire or the petit jury that ultimately decides the case. *See People v Wood*, 506 Mich 116; 954 NW2d 494 (2020). Use the first option where the juror or jurors were on the jury venire but were not seated on the petit jury, and use the second option where the juror or jurors were on the petit jury.

2. MCL 750.120a(2)(b) provides that a person who uses intimidation to influence jurors in the trial of a criminal case where the maximum penalty is 10 years or more or life faces an enhanced penalty. Whether the charged offense at the trial had a penalty of 10 years or more or life is a matter of law, and the court should identify the crime itself for the jury to determine whether the defendant's conduct occurred during the trial for that charge.

3. MCL 750.120a(2)(c).

[NEW] M Crim JI 37.14 Retaliating Against a Juror

(1) The defendant is charged with retaliating against a juror for performing his or her duty. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify juror*] was a member of the jury that heard evidence to decide the case¹ of [*state name of case*] in the [*identify court*].

(3) Second that the defendant retaliated, attempted to retaliate, or threatened to retaliate against that juror for performing [his / her] duty as a juror.

Retaliate means that, because of the juror’s performance of [his / her] duty as a juror, the defendant:

[*Choose one or more according to the charges and evidence:*]

- (a) threatened to kill any person or threatened to cause property damage.
- (b) committed or attempted to commit the crime of [*identify other crime(s) alleged*], or a lesser offense, on which I have previously instructed you in Count [*identify appropriate count in the Information*].² It is not necessary, however, that the defendant be convicted of that crime.

Use Notes

1. If a juror who was a sworn member of the panel but did not sit on the petit jury that heard the evidence at trial is retaliated against for some act in performance of his or her duty as a juror, this language may be modified to provide “was a member of the of the group of potential jurors from which the jury in [*state name of case*] in the [*identify court*] was selected.” See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020).

2. If the crime committed or attempted as retaliation is not charged in a separate count, its elements and included offenses should be instructed on here.

**Public Policy Position
M Crim JI 37.12, 37.13, and 37.14**

Support as Drafted

Explanation:

The committee voted unanimously (17) to support the Model Criminal Jury Instructions 37.12, 37.13, and 37.14 (Jury Tampering) as drafted.

Position Vote:

Voted For position: 17

Voted against position: 0

Abstained from vote: 0

Did not vote (absence): 6

Contact Persons:

Mark A. Holsomback mahols@kalcounty.com

Sofia V. Nelson snelson@sado.org

Public Policy Position
M Crim JI 37.12, 37.13, 37.14
M Crim JI 38.2, 38.3, and 38.3a

Support

Explanation

The Criminal Law Section of the State Bar of Michigan supports the following jury instructions as written by the Committee on Model Criminal Jury Instructions: M Crim JI 37.12, 37.13, 37.14, 38.2, 38.3, and 38.3a.

Position Vote:

Voted for position: 16

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 10

Contact Person: Kahla Crino

Email: krino@ingham.org



**FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS**

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2021. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes new instructions, M Crim JI 38.2 [Hindering Prosecution of Terrorism (MCL 750.543h)], M Crim JI 38.3 [Soliciting Material Support for an Act of Terrorism (MCL 750.543k)], and M Crim JI 38.3a [Providing Material Support for an Act of Terrorism (MCL 750.543k)] for crimes found in the Michigan Anti-Terrorism Act.

[NEW] M Crim JI 38.2 Hindering Prosecution of Terrorism

(1) The defendant is charged with the crime of hindering the prosecution of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Select the option that applies:]

(2) First, that *[identify other person]* committed the crime of *[state felony]*. For the crime of *[state felony]*, the prosecutor must prove each of the following elements beyond a reasonable doubt: *[state elements of felony]*. It does not matter whether *[identify other person]* was convicted of the crime.

[Or]

(2) First, that *[identify other person alleged to have been a material witness]* was wanted as a material witness in connection with an act of terrorism.

An act of terrorism is a violent felony¹ that is dangerous to human life and that is intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion. *[Identify violent felony crime]* is a violent felony. You must decide

whether committing the crime was dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

(3) Second, that the defendant knew or had reason to know that [*identify other person*] [committed the crime of (*identify criminal conduct under Anti-Terrorism Act*) / was wanted as a material witness in connection with an act of terrorism].

(4) Third, that the defendant [harbored or concealed (*identify other person*) / warned (*identify other person*) that (he / she) was about to be discovered or apprehended / provided (*identify other person*) with money, transportation, a weapon, a disguise, false identification, or any other means of avoiding discovery or apprehension / by force, intimidation, or deception prevented or obstructed anyone from performing an act that might aid in the discovery, apprehension, or prosecution of (*identify other person*) / concealed, altered, or destroyed any physical evidence that might aid in the discovery, apprehension, or prosecution of (*identify other person*) / participated or aided in jury bribing, jury tampering, or witness intimidation in a trial of (*identify other person*) / participated or aided in an escape of (*identify other person*) from jail or prison].

(5) Fourth, that when the defendant [harbored or concealed (*identify other person*) / warned (*identify other person*) that (he / she) was about to be discovered or apprehended / provided (*identify other person*) with money, transportation, a weapon, a disguise, false identification, or any other means of avoiding discovery or apprehension / by force, intimidation, or deception prevented or obstructed anyone from performing an act that might aid in the discovery, apprehension, or prosecution of (*identify other person*) / concealed, altered, or destroyed any physical evidence that might aid in the discovery, apprehension, or prosecution of (*identify other person*) / participated or aided in jury bribing, jury tampering, or witness intimidation in a trial of (*identify other person*) / participated or aided in an escape of (*identify other person*) from jail or prison], [he / she] intended to avoid, prevent, hinder, or delay the discovery, apprehension, prosecution, trial, or sentencing of [*identify other person*].

Use Note

1. Under MCL 750.543b(a)(i), an act of terrorism requires that a person must have committed a “violent felony.” The definitional statute, MCL 750.543b(h), provides that a “violent felony” is one that has an element of the use, attempted use, or threatened use of physical force against an individual, or of the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device,

a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device. Whether the crime is a “violent felony” appears to be a question of law for the court to decide.

[NEW] M Crim JI 38.3 Soliciting Material Support for an Act of Terrorism

(1) The defendant is charged with the crime of soliciting material support for an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally raised, solicited, or collected material support or resources in the form of currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance¹.

(3) Second, that when the defendant raised, solicited, or collected the material support or resources, [he / she] knew that the material support or resources would be used by a person or organization that engaged in or was about to engage in an act that would be a violent felony,² which was or would be dangerous to human life and was intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [*Identify violent felony crime*] is a violent felony. You must decide whether the crime [was / would have been] dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

Use Note

1. The forms of material support listed here are found in MCL 750.543b(d). The court may select from those according the evidence or may add other forms of material support according to the charges and the evidence.

2. The definition of a *violent felony* is found in MCL 750.543b(h).

[NEW] M Crim JI 38.3a Providing Material Support for an Act of Terrorism

(1) The defendant is charged with the crime of providing material support for an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant provided material support in the form of currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance¹ to [(*identify person*) / another person].

(3) Second, that when the defendant provided material support to [(*identify person*) / another person], [he / she] knew that [(*identify person*) / the other person] would use that support or those resources at least in part to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism against the United States or its citizens, Michigan or its citizens, a political subdivision or agency of Michigan, or a local unit of government.

An act of terrorism is committing or attempting to commit the violent felony of [*identify crime*]² that was or would be dangerous to human life and was intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.³ [*Identify violent felony crime*] is a violent felony. You must decide whether the crime [was / would have been] dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

Use Note

1. The forms of material support listed here are found in MCL 750.543b(d). The court may select from those according the evidence or may add other forms of material support according to the charges and the evidence.

2. The definition of a *violent felony* is found in MCL 750.543b(h).

3. MCL 750.543b(a) defines *act of terrorism*.

**Public Policy Position
M Crim JI 38.2, 38.3, and 38.3a**

Support as Drafted

Explanation:

The committee voted unanimously (17) to support the Model Criminal Jury Instructions 38.2, 38.3, and 38.3a as drafted.

Position Vote:

Voted For position: 17

Voted against position: 0

Abstained from vote: 0

Did not vote (absence): 6

Contact Persons:

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Public Policy Position
M Crim JI 37.12, 37.13, 37.14
M Crim JI 38.2, 38.3, and 38.3a

Support

Explanation

The Criminal Law Section of the State Bar of Michigan supports the following jury instructions as written by the Committee on Model Criminal Jury Instructions: M Crim JI 37.12, 37.13, 37.14, 38.2, 38.3, and 38.3a.

Position Vote:

Voted for position: 16

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 10

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