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July 25, 2016

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

RE: ADM File No. 2013-18 – Proposed Amendments of Rules 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 of the Michigan Court Rules

Dear Clerk Royster:

At its July 22 meeting, the Board of Commissioners of the State Bar of Michigan considered the above proposed amendments published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee, Criminal Jurisprudence & Practice Committee, Committee on Justice Initiatives, Domestic Violence Committee, Criminal Law Section, Family Law Section, and Young Lawyers Section.

The Board voted to take the following positions:

- Support the amendments to MCR 2.004, 3.705, 3.708(D)(7), 3.708(I), 3.804(B)(3), 4.101, 4.201, 4.202, 4.304, 4.401, 5.119(1) and (2), 5.140(A) and (B), MCR 5.404(B)(1).
- Support the proposed amendments to MCR 3.708(H)(2) with the removal of the last sentence that would allow either party to prevent the use of videoconferencing technology without having to articulate any reason.

In making this recommendation, the Board shared the concern expressed by the Domestic Policy Committee that there is a high likelihood of abuse by respondents who simply want to manipulate the process, because of the nature of power, control, and manipulation often used by respondents against petitioners in this context. In addition, giving the respondent unfettered power to determine who may testify remotely inhibits the court's role of protecting petitioners in a PPO matter. It is likely that petitioners would need to call experts and other witnesses by videoconference and giving respondents the right to veto this option without good cause is unfair and potentially unsafe for petitioners.

The PPO statute is civil in nature and should be treated similarly to other civil proceedings, recognizing that the court must balance the rights and protection of the petitioner. If the liberty of the respondent is at issue, the court can weigh that in balancing the need for the testimony.

- Support MCR 3.904(A) Alternative B, 3.904(A)(1) Alternative B, 3.904(A)(2) Alternative B, 3.904(A)(2) Alternative B.
This support is conditioned upon the juvenile having the exclusive right to object to the use of video conferencing proceedings at the initial post-adjudication dispositional hearing.
- Support MCR 3.904(B)(1)(2) Alternative B, 3.904(B)(2)(b) Alternative B, 3.904(B)(2)(b) Alternative B.
This support is conditioned on the understanding that only the respondents may make an objection to videoconferencing at the jurisdictional hearing and termination phase and any objection to videoconferencing post-jurisdictional and pre-termination must have a reason stated.
- Oppose the proposed amendments to MCR 5.738a.
Although the Board is not opposed to the expansion of videoconferencing technology in mental health proceedings, there was concern that the proposed rules do not adequately protect the rights of the subject.
- Oppose the proposed amendments to MCR 5.402(F).
The Board was concerned that the subject of a guardianship proceeding might not possess the competency required to consent to the use of videoconferencing technology.
- Support proposed Alternative A to MCR 6.006(C)(2) with an amendment changing “two-way interactive video technology” to “videoconferencing.”
The Board notes that both the Criminal Jurisprudence and Practice Committee and the Committee on Justice Initiatives supported Alternative A, and the Board recommends changing the language in Alternative A to “videoconferencing” to make the language consistent throughout the court rules.
- Oppose the proposed amendments to MCR 6.006(D).
This amendment would expand the use of videoconferencing to include felony sentencing. All three State Bar entities that submitted comments to the Board on this amendment (The Criminal Jurisprudence and Practice Committee, the Committee on Justice Initiatives, and the Criminal Law Section) vigorously opposed this amendment. Sentencing is a critical stage of a criminal proceeding and criminal defendants have a right to present at the sentencing hearing. Although the proposed amendment would require the consent of the defendant, there is too great a risk that defendants would face pressure to accept videoconferencing for convenience and efficiency, jeopardizing the fairness of the proceedings.

There was concern that the defendant’s attorney may not be advising the defendant on videoconferencing via the jail. The ability of the defendant/client and his or her attorney to communicate with confidentiality could be compromised, and the relay of information on the pre-sentence report could be hampered. Accountability is

essential to our criminal justice system, and there is a symbolic as well as historical importance to having a judge sentence someone in person, rather than sentence an image over a media outlet.

- Oppose the proposed amendments to MCR 6.901.
This amendment was opposed to be consistent with the position taken on the amendments proposed for MCR 6.006.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet Welch", written in a cursive style.

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Lori A. Buiteweg, President