Agenda
Public Policy Committee
June 8, 2022 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……James W. Heath, Chairperson

A. Reports

1. Approval of April 7, 2022 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2021-11: Proposed Amendment of MCR 9.116

The proposed amendment of MCR 9.116 would allow the Attorney Grievance Commission to initiate disciplinary proceedings against a former judge who, but for his or her departure from the bench, would have been removed from office based on misconduct that was the subject of judicial disciplinary proceedings.

Status:	07/01/22 Comment Period Expires.
Referrals:	03/14/22 Civil Procedure & Courts Committee; Judicial Ethics Committee; Professional Ethics Committee; Judicial Section.
Comments:	Civil Procedure & Courts Committee; Judicial Ethics Committee. Comments submitted to the Michigan Supreme Court are included in the materials.
Liaison:	Suzanne C. Larsen

2. ADM File No. 2021-40: Amendment of BLE 5

The amendment of Rule 5 of the Rules for the Board of Law Examiners specifically allows attorneys who are teaching in a clinical program to represent individual clients of that program.

Status:	07/01/22 Comment Period Expires.
Referrals:	04/01/22 Referred to Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Professional Ethics Committee; Unauthorized Practice of Law Committee.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Mark A. Wisniewski

C. Legislation

1. HB 5749 (Filler) Courts: district court; compensation for district court judges; increase. Amends sec. 8202 of 1961 PA 236 (MCL 600.8202).

Status:	05/10/22 Passed the House 96 to 8; Referred to the Senate Committee on Judiciary & Public Safety.
Referrals:	04/11/22 Civil Procedure & Courts Committee; Judicial Section.
Comments:	Civil Procedure & Courts Committee.
Liaison:	E. Thomas McCarthy, Jr.

2. Trial Court Funding

HB 5956 (Lightner) Criminal procedure: sentencing; sunset on certain costs that may be imposed upon criminal conviction; modify. Amends sec. 1k, ch. IX of 1927 PA 175 (MCL 769.1k).

HB 5957 (Lightner) Courts: funding; formula for local court operational needs based; allow the state court administrative office to create. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 2406.

Status: 03/24/22 Referred to House Committee on Appropriations.
Referrals: 03/30/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Thomas G. Sinas

3. HB 5975 (Pohutsky) Courts: guardian ad litem; trauma-informed training for lawyer-guardian ad litem; require. Amends sec. 17d, ch. XIIA of 1939 PA 288 (MCL 712A.17d).

Status: 05/26/22 Passed the House 98 to 9; Referred to the Senate Committee on Health Policy & Human Services.
Referrals: 03/28/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section; Probate & Estate Planning Section.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Liaison: Lori A. Buiteweg

4. HB 5987 (LaGrand) Crime victims: other; restorative justice practices enabling act; create. Creates new act.

Status: 04/12/22 Referred to House Committee on Judiciary.
Referrals: 04/18/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Judge Cynthia D. Stephens (Ret.)

5. SB 1015 (Bayer) Criminal procedure: evidence; admissibility of certain hearsay testimony in certain human trafficking and prostitution prosecutions; provide for. Amend sec. 27c, ch. VIII of 1927 PA 175 (MCL 768.27c).

Status: 04/21/22 Referred to Senate Committee on Judiciary & Public Safety.
Referrals: 05/09/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Takura N. Nyamfukudza

6. SB 1027 (MacDonald) Criminal procedure: other; prison diversion program for individuals in the possession of controlled substances; create. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 21b to ch. XVII.

Status: 05/05/22 Referred to Senate Committee on Judiciary & Public Safety.
Referrals: 05/09/22 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. Amicus Brief Authorization Request

1. *Spencer Woodman v Dep't of Corrections* (Docket No. #163382)

Comments: Justice Initiatives Committee; Access to Justice Policy Committee.
Liaison: Valerie R. Newman

E. Consent Agenda

To allow the Criminal Jurisprudence & Practice Committee and Criminal Law Section to submit their positions on each of the following items:

1. M Crim JI 11.25a
The Committee proposes a new instruction, M Crim JI 11.25a, for the crime of brandishing a firearm in violation of MCL 750.234e. This jury instruction is entirely new.

2. M Crim JI 19.1a
The Committee proposes a new instruction, M Crim JI 19.1a, for the crime of kidnapping a child in violation of MCL 750.350. This jury instruction is entirely new.

3. M Crim JI 19.6
The Committee proposes to amend jury instruction M Crim JI 19.6, the instruction for charges under the parental kidnapping statute, MCL 750.530a. The amendment entirely re-writes the instruction.

4. M Crim JI 19.9
The Committee proposes a new instruction, M Crim JI 19.9, for the crime of a prisoner taking a hostage in violation of MCL 750.349a. This jury instruction is entirely new.

5. M Crim JI 34.7 – 34.15
The Committee proposes instructions, M Crim JI 34.7, 34.7a, 34.8, 34.9, 3.10, 34.11, 34.12, 34.13, 34.14 and 34.15, for the Medicaid-related crimes found in MCL 400.603 to 400.611. These jury instructions are entirely new.

6. M Crim JI 41.1
The Committee proposes a new instruction, M Crim JI 41.1, for the crime of trespassing for eavesdropping or surveillance in violation of MCL 750.539b. This jury instruction is entirely new.

MINUTES
Public Policy Committee
April 7, 2022 – 12:00 p.m. to 1:30 p.m.

Committee Members: James W. Heath, Lori A. Buiteweg, Kim Warren Eddie, Suzanne C. Larsen, E. Thomas McCarthy, Jr., Takura N. Nyamfukudza, Brian D. Shekell, Judge Cynthia D. Stephens, Mark A. Wisniewski (9)
SBM Staff: Peter Cunningham, Nathan A. Triplett, Carrie Sharlow
GCSI Staff: Marcia Hune, Samantha Zandee

A. Reports

1. Approval of January 20, 2022 minutes
The minutes were unanimously approved.

2. Approval of March 3, 2022 minutes
The minutes were unanimously approved.

3. Public Policy Report
A verbal update was offered.

B. Legislation

1. HB 5512 (Calley) Medical marihuana: other; inconsistencies between the Michigan Medical Marihuana Act and certain parts of the revised judicature act of 1961 related to drug treatment courts; resolve in favor of the revised judicature act of 1961. Amends sec. 7 of 2008 IL 1 (MCL 333.26427).
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee agreed that this bill is *Keller* Permissible in improving the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (9) to support the legislation as drafted.

HB 5868 (Howell) Courts: drug court; eligibility criteria to drug treatment courts; modify. Amends sec. 1064 of 1961 PA 236 (MCL 600.1064).
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee agreed that this bill is *Keller* Permissible in improving the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (9) to support the legislation as drafted.

2. HB 5647 (Fink) Civil procedure: costs and fees; contingency fees in class action; require prior legislative approval for fees to be appropriated. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1467.
The committee reviewed recommendations from the following groups: Civil Procedure & Courts Committee.
The committee agreed unanimously to table consideration of HB 5647. SBM staff will monitor the legislation.

3. HB 5676 (LaFave) Occupations: attorneys; small claims judgment collection on behalf of an awardee; allow for certain attorneys. Amends sec. 8409 of 1961 PA 236 (MCL 600.8409).
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
The committee agreed that this bill is *Keller* Permissible in improving the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (9) to oppose HB 5676. The small claims court system is a special system and should stay the way it is.

4. HB 5680 (Borton) Civil procedure: other; certain public video recordings of court proceedings; allow the victims' faces to be blurred. Amends secs. 8, 38 & 68 of 1985 PA 87 (MCL 780.758 et seq.).
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.
The committee agreed 8 to 1 that this bill is *Keller* Permissible in improving the functioning of the courts and the availability of legal services to society.
The committee voted unanimously to table consideration of HB 5680.

5. HB 5681 (VanWoerkom) Crime victims: statements; victim impact statements; allow to be made remotely. Amends secs. 15, 43 & 75 of 1985 PA 87 (MCL 780.765 et seq.).
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee agreed that this bill is *Keller* Permissible in improving the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (9) to support HB 5681.

6. HB 5758 (Lightner) Probate: other; allowing electronic signing and witnessing of certain documents under certain conditions; eliminate sunset.
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Elder Law & Disability Rights Section; Family Law Section; Probate & Estate Planning Section.
The committee agreed that these bills are *Keller* Permissible in affecting the availability of legal services to society.
The committee voted unanimously (9) to support HB 5758.

HB 5759 (Lightner) Occupations: notaries public; use of communication technology to perform electronic notarizations and remote electronic notarizations; modify and expand.
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Elder Law & Disability Rights Section; Family Law Section; Probate & Estate Planning Section; Real Property Law Section.
The committee agreed that these bills are *Keller* Permissible in affecting the availability of legal services to society.
The committee voted unanimously (9) to support HB 5759.

7. HB 5889 (Glenn) Civil procedure: evidence; consultations with human trafficking victims; provide confidentiality. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 2157c.
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

The committee agreed 6 to 3 that this bill is *Keller* Permissible in improving the functioning of the courts and the availability of legal services to society.
The committee voted unanimously (9) to oppose the legislation.

8. HJR L (Rabhi) Criminal procedure: bail; cash bail payments; prohibit. Amends secs. 15 & 16, art. I of the state constitution.
The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Criminal Law Section.
The committee agreed that this bill is *Keller* Permissible in improving the functioning of the courts.
The committee voted 7 to 2 to support HJR L.

9. SB 869 (Horn) Courts: judges; personal information and physical safety protections for judges, their families, and household members; enhance. Creates new act.
The committee reviewed recommendations from the following groups: Civil Procedure & Courts Committee.
The committee agreed that this bill is *Keller* Permissible in improving the functioning of the courts.
The committee voted to table consideration of SB 869 pending comment from the Judicial Section Council.

C. <u>Consent Agenda</u>
To allow the Criminal Jurisprudence & Practice Committee to submit its positions on each of the following items:

1. M Crim JI 8.2
The Committee proposes a new instruction, M Crim JI 8.2, for aiding and abetting the crime of possession of a firearm at the time of committing a felony (aiding and abetting felony-firearm) because the primary aiding and abetting instruction, M Crim JI 8.1, is difficult to adapt in order to make it clear that simply aiding and abetting the underlying felony offense is insufficient to establish aiding and abetting the crime of felony-firearm. See *People v Moore*, 470 Mich 56 (2004). This instruction is entirely new.

2. M Crim JI 13.6a, 13.6b, 13.6c, and 13.6d
The Committee proposes to amend jury instructions M Crim JI 13.6a (first-degree fleeing and eluding), M Crim JI 13.6b (second-degree fleeing and eluding), M Crim JI 13.6c (third-degree fleeing and eluding), and M Crim JI 13.6d (fourth-degree fleeing and eluding) to comport with the wording of an amendment to MCL 750.479a. Further, requirements that the prosecutor prove prior offenses for second- and third-degree fleeing and eluding are proposed to be eliminated. See *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Deletions are in strike-through, and new language is underlined.
The Consent Agenda was approved.

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 2, 2022

Re: Public Policy Update

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

Legislation

SB 244 – Proof of Service

SB 244 was introduced on March 16, 2021. The bill was substantially similar to 2019 SB 231, which the Board of Commissioners reviewed at its July 26, 2019 meeting and voted unanimously to support. SBM supported SB 244 when it was taken up before the Senate Committee on Judiciary & Public Safety on September 9, 2021. Substitute S-1 was adopted and reported to the full Senate on September 30; the substitute amended the bill's language regarding the required verification to be made by the individual serving process. The bill passed the Senate unanimously on December 8, 2021. SBM supported the legislation when it was taken up by the House Committee on Judiciary on January 12, 2022. The bill passed the House unanimously on March 15 and was signed into law on March 24, as Public Act 36.

HB 5340 – Family Treatment Court

The Board of Commissioners reviewed HB 5340 at its January 21, 2022 meeting and voted to support the concept of family treatment courts but oppose the requirement that participants waive their right to counsel and the bill's categorical exclusion of violent offenders. The legislation was discussed at the May 10 meeting of the House Judiciary Committee. The bill's sponsor, Representative Whiteford, and Justice Beth Clement testified on HB 5340 and answered questions. SBM submitted a card noting its position.

HB 5482 – HB 5484 – Eligibility for Specialty Courts

The Board of Commissioners reviewed HB 5482 – HB 5484 at its January 21, 2022 meeting and voted unanimously to support the legislation with a recommended amendment to amend to MCL 600.1064(1) to align that provision's language related to drug treatment court eligibility requirements for violent offenders with the language proposed in HB 5482. On March 2, Representatives Howell and LaGrand introduced HB 5868, which does just that; the Board supported the legislation at its April 8, 2022 meeting.

HB 5512 – Drug Treatment Courts & Michigan Medical Marihuana Act

The Board of Commissioners reviewed HB 5512 at its April 8, 2022 meeting and voted unanimously to support the legislation. HB 5512 passed the House of Representatives on April 27 with a vote of 87 in favor, and 16 in opposition. SBM will continue monitoring the bill as it moves through the Senate.

HB 5541 – Uniform Bar Examination

The Board of Commissioners reviewed HB 5541 (H-1) at its January 21, 2022 meeting and voted unanimously to support the bill. The legislation passed the House unanimously on January 25. SBM supported HB 5541 when it was discussed by the Senate Committee on Judiciary & Public Safety on March 10. The bill passed the Senate 35 to 2 on March 23. HB 5541 was signed into law on March 24 as Public Act 59.

HJR Q – Increase the Constitutional Age Limitation for Judicial Office

HJR Q would amend the state constitution to increase the age limitation for judicial office from age 70 to age 80. SBM supports HJR Q based on a vote by the Representative Assembly on October 8. 2015. To take effect, HJR Q requires a two-thirds vote in support in both legislative chambers, after which it must be passed by a majority of voters at the next general election.

Court Rules

ADM File No. 2020-26: Amendments of MCR 1.109 and MCR 8.119 (Protection of Personal Identifying Information)

The Board of Commissioners reviewed ADM File No. 2020-26 at its January 22, 2021 meeting and voted to support the proposed amendments in concept but took no position on the specific language of the amendments. The amendments were adopted on June 9, 2021 with an effective date of July 1; however, the effective date was later extended to January 1, 2022 to "allow for additional programming changes and other changes required by trial courts and court users to implement the rule changes." On December 6, 2021, the effective date was extended to April 1, 2022.

ADM File No. 2020-06: Amendment of MCR 2.403, 2.404, and 2.405 (Case Evaluation)

The Board of Commissioners reviewed ADM File No. 2020-06 at its June 12, 2020 meeting and voted to support the proposed amendments to MCR 2.403, 2.404, and 2.405. The amendments were adopted on December 1, 2021 and were effective January 1, 2022.

ADM File No. 2021-47: Amendment of MCR 3.950 (Juvenile Offenders in the Adult Justice System)

The Board of Commissioners reviewed ADM File No. 2021-47 via electronic vote and voted to support the amendment. The amendment was reviewed at the May 18, 2022 Public Administrative Hearing and adopted as published effective immediately.

ADM File No. 2021-34: Amendment of MCR 5.125 (Community Mental Health Program and Assisted Outpatient Treatment)

The Board of Commissioners reviewed ADM File No. 2021-34 at its November 19, 2021 meeting and voted unanimously to support the proposed amendment. The amendment was reviewed at the

March 16, 2022 Public Administrative Hearing and adopted as drafted with an effective date of May 1, 2022.

ADM File No. 2021-41: Amendment of MCR 6.001, 6.003, 6.102, 6.103, 6.106, 6.445, 6.615, and 6.933 and Addition of MCR 6.105, 6.441, and 6.450 (Recommendations of the Michigan Joint Task Force on Jail & Pretrial Incarceration)

The Board of Commissioners reviewed ADM File No. 2021-41 at its January 21, 2022 meeting and voted unanimously to support the proposed amendments. The amendments were reviewed at the May 18, 2022 Public Administrative Hearing. The Court declined to adopt the proposed amendments of MCR 6.006. The adopted amendment of MCR 6.445 removes mention of "show cause" for probation violation and revocation. The rest of the amendments were adopted as drafted with an effective date of September 1, 2022.

ADM File No. 2021-45: Amendment of MCR 7.306 (Independent Citizens Redistrict Commission)

The Board of Commissioners reviewed ADM File No. 2021-45 at its January 21, 2022 and voted unanimously to support the amendment. The amendments were reviewed at the May 18, 2022 Public Administrative Hearing. The Court adopted the proposed amendment, with minor further amendments, on May 18, 2022, effective immediately.

ADM File No. 2018-25: Amendment of MCR 7.312 (Procedure for Cases Being Argued on Application)

The Board of Commissioners reviewed ADM File No. 2018-25 at its April 12, 2019 meeting. The Board voted unanimously to support the proposed amendment "with the modification that briefing schedules for mini oral arguments on the application (MOAAs) be the same as those cases in which the Court grants leave to appeal." The Court adopted the amendments on February 2, 2022, effective May 1, 2022.

ADM File No. 2021-31: Amendment of MCR 8.110 (Addition of Juneteenth to Court Holidays)

The Board of Commissioners reviewed ADM File No. 2021-31 at its January 21, 2022 meeting. The Board voted unanimously to support Option D to "add Juneteenth as a court holiday in Michigan without omitting another holiday presently recognized by the court rules." The Court adopted Option D on June 1, 2022, effective immediately.

ADM File No. 2019-34: Amendment of the October 13, 2021 Order Amending Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and Adopting Rule 3a and Rule 4a of the Rules for the Board of Law Examiners (Uniform Bar Examination in Michigan)

The Board of Commissioners reviewed ADM File No. 2019-34 at its July 23, 2021 meeting and voted to support the "proposed amendments, implementing the Uniform Bar Examination in Michigan." The original proposal was reviewed at the September 22, 2021 Public Administrative Hearing and adopted with an effective date of March 1, 2022 to be in use for the July 2022 Bar Examination. However, "that target date was predicated on two things: the enactment of accompanying legislation and implementation of a Michigan law component in the examination itself." Due to the delay, the effective date has been moved to August 1, 2022 for implementation at the February 2023 Bar Examination. The required accompanying legislation (HB 5541) was signed into law on March 24 as Public Act 59.

ADM File No. 2021-25: Amendment of Rule 19 of the Rules Concerning the State Bar of Michigan (Confidentiality of Information)

This proposal was presented to the Court by the State Bar of Michigan. The proposed amendment was reviewed at the March 16, 2022 Public Administrative Hearing and adopted as drafted with one amendment requiring the joint consent of both the applicant and the Governor's Office before disclosure. The original proposal required consent from the applicant **or** the Governor's Office **or** the by Order of the Supreme Court. The amendment is effective May 1, 2022.

ADM File No. 2021-33: Amendment of Administrative Order No. 1997-10 (Employment Information with the Judiciary)

The Board of Commissioners reviewed ADM File No. 2021-33 at its November 19, 2021 meeting and voted unanimously to support the proposed amendment, agreeing that it will "clarify the means by which information related to court employee compensation is made available to the public, while taking appropriate steps to protect employees from the disclosure of personal identifiable information." The proposed amendment was reviewed at the March 16, 2022 Public Administrative Hearing and adopted as drafted with an effective date of July 1, 2022.

Order

Michigan Supreme Court
Lansing, Michigan

March 9, 2022

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-11

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

Proposed Amendment of
Rule 9.116 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.116 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 9.116 Judges; Former Judges

(A) [Unchanged.]

(B) Former Judges. Except as otherwise provided in this subrule, the administrator or commission may not take action against a former judge for conduct where the Michigan Supreme Court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.223(A)(1)-(5). The administrator or commission may take action against a former judge:

(1) for conduct resulting in removal as a judge;~~, and~~

(2) if the former judge does not hold judicial office at the time the Court issues its decision under MCR 9.252(A), and the Court finds that the conduct would have resulted in removal as a judge had the former judge still held judicial office at that time; or

(3) for any conduct that~~which~~ was not the subject of a disposition by the Judicial Tenure Commission or by the Court.

~~The administrator or commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.223(A)(1)-(5).~~

(C) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.116 would allow the Attorney Grievance Commission to initiate disciplinary proceedings against a former judge who, but for his or her departure from the bench, would have been removed from office based on misconduct that was the subject of judicial disciplinary proceedings.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by July 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-11. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

March 9, 2022

Clerk

Public Policy Position
ADM File No. 2021-11

No Position

Explanation:
The Committee voted to take no position on ADM File No. 2021-11, as it did not believe it was appropriately situated to judge the merits of the proposal.

Position Vote:
Voted for position: 15
Voted against position: 1
Abstained from vote: 3
Did not vote (absence): 13

Contact Person:
Lori J. Frank lori@markofflaw.com

Public Policy Position
ADM File No. 2021-11: Proposed Amendment of MCR 9.116

Support

Explanation
The Judicial Ethics Committee agrees that the Attorney Grievance Commission (AGC) should be able to initiate disciplinary proceedings against a former judge who has voluntarily left the bench prior to the decision for removal through Judicial Tenure Commission proceedings. The Committee opined that if there is a concern with representing clients following departure from the bench, the judicial officer should be subject to an investigation and possible consequences through the AGC's process.

Position Vote:
Voted For position: 5
Voted against position: 1
Abstained from vote: 1
Did not vote: 3

Contact Person:
Judge Terry Clark d70-6@saginawcounty.com

Name: Don Passenger

Dear Members,

I am not in favor of this amendment. A judge who leaves office has already received a sanction. If there are additional reasons for something to occur, there are other vehicles. I believe this could be misused for political gain.

As a retired Michigan judge and former president of the Michigan District Judges Association, I am aware of a number of proceedings that terminated by forced or voluntary resignation and that was almost always a good outcome. We have people who have often sacrificed a career to become public servants, and while that does not create a free pass, it is worthy of consideration that they not be unfairly punished as would be the case if this amendment were misused.

Thank you for your consideration of my opinion. But, I believe the rule as written is appropriate. I encourage you to reject the amendment.

State of Michigan

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Judicial Tenure Commission

May 10, 2022

Via Email

Sarah Roth, Esq.
Administrative Counsel
Michigan Supreme Court
PO Box 300552
Lansing, MI 48909

RE: ADM File No. 2021-11 – Proposed Amendment of Rule 9.116 of the Michigan Court Rules

Dear Ms. Roth:

The Judicial Tenure Commission thanks the Supreme Court for the opportunity to submit comments concerning the proposed amendment to MCR 9.116, the court rule that governs the attorney discipline system's jurisdiction over former judges.

The proposed amendment partially closes a weakness in the existing division of authority between the judicial discipline system and the attorney discipline system. The weakness is that a judge may be sanctioned for serious misconduct – misconduct that calls into question not only the judge's fitness to sit in judgment of others, but also calls into question the judge's fitness to serve as a lawyer – but may face no actual sanction as either a judge or a lawyer.

For instance, the Judicial Tenure Commission recommended that the Court remove former judge Byron Konschuh for embezzlement he committed while he was a public official, and for false statements he made under oath during the investigation into his embezzlement. This was clearly misconduct that calls into question his fitness as a lawyer as well as a judge. Before the Court ruled, Mr. Konschuh was voted out of office. That made removing him from office moot, but to foreclose the possibility that Mr. Konschuh would seek to regain his seat in a future election, the Court suspended him for six years.

Current MCR 9.116 forbids the attorney discipline system to take action against a former judge if the Judicial Tenure Commission or Supreme Court have already taken action against the judge, unless that action was removal from the bench. As a result, Mr. Konschuh was free to resume the practice of law once his term ended, immune from any action by the attorney discipline process. The consequence – surely unintended by the drafters of the current rule – is that Mr. Konschuh avoided any meaningful sanction by either discipline system for his very serious misconduct.

The Court's proposed amendment to MCR 9.116 would ensure that a future judge whose misconduct is serious enough to warrant removal, and who leaves office before the order of removal can take effect, will nonetheless have their fitness reviewed by the attorney discipline system. While that is an improvement over the current rule, it still leaves open the potential that attorneys will avoid any sanction for serious misconduct committed while they were judges. There are two ways in which Rule 9.116 can be improved further.

The first is to broaden the category of former judges subject to potential attorney discipline. Under the current rule there is no bar to the following:

- A judge makes false statements. At the conclusion of the judicial discipline process, the Court opts for a sanction less than removal, such as a lengthy suspension. *See*, *e.g.*, *In re Simpson* [cite]. Unlike Judge Simpson, though, as soon as the sanction takes effect, the judge leaves the bench for the more lucrative practice of law rather than endure the suspension. The attorney discipline process is forbidden to take any action. As a consequence, the judge will face no sanction, and the public will not be protected from a potentially unfit attorney.

- A judge has a misconduct case pending before the Court. While that case is pending, other serious misconduct by that judge is brought to the attention of the Judicial Tenure Commission. *See*, *e.g.*, *In re Morrow*, [cite]. The misconduct is serious enough that, but for the pending case, it would be worthy of a public complaint. However, given the pending case, the Commission's most effective action is to investigate the new misconduct and merely admonish the judge, in order to be able to inform the Court of the additional misconduct in time for the Court to consider it, if it wishes, in connection with the pending case. The Court ultimately suspends the judge for their conduct in the pending case, and there is no indication that the sanction included the new misconduct. Again, the judge chooses to retire rather than to accept the suspension. Under the current rule, the Commission's admonition bars the attorney discipline system from addressing the judge's new misconduct, even though it was serious. Again, the public is not protected from a potentially unfit attorney.

The Judicial Tenure Commission believes that former judges who fall into *any* of these categories should be subject to evaluation by the attorney discipline system. The reason is that otherwise, by leaving the bench these former judges can go directly into the practice of law without any meaningful sanction for serious misconduct – misconduct that might result in a lengthy suspension, or disbarment, for a similarly situated lawyer who was never a judge.

One likely objection to the Commission's suggestion is that it would be a sort of "double jeopardy" – if the judicial discipline process has already acted against a judge, it is somehow unfair to let the attorney discipline process sanction the now-former judge for the same conduct. This objection rests on two misperceptions:

1) Unlike the penalty in criminal cases in which double jeopardy is a concern, professional discipline is not penal in nature. It is to protect the public. If circumstances frustrate one discipline system's effort to protect the public, that should not also frustrate the ability of the other system to do so.

2) Unlike the criminal justice system, which has a single goal, the goals of the two professional discipline systems are different. The judicial discipline system protects the public from unethical judges, while the attorney discipline system protects the public from unfit lawyers. Because the two discipline systems have different purposes, the appropriate sanction in one is not necessarily the appropriate sanction in the other. Inasmuch as judges are also lawyers, the two systems should not be seen as either/or, nor in competition.

> Rather, they should work together to accomplish the paramount goal, which is protecting the public. It is the attorney discipline system that is structured to protect against unfit lawyers, and its ability to do that should not be hampered by decisions made about judges that were made for a different purpose.

The Judicial Tenure Commission is not suggesting that every former judge who once faced judicial discipline should also be subject to sanction by the attorney discipline process. Rather, the Commission suggests a rule that would require the attorney discipline system to give credit to whatever sanction the judicial discipline system imposed, and that would also require the attorney discipline system to take into account the passage of time since the misconduct occurred, to prevent dredging up misconduct that was addressed by the judicial discipline system long prior to the judge becoming an attorney.

As drafted, the proposed amendment only permits the attorney discipline process to take action against a judge who has left office if the Court first certifies that but for the judge having left office, the Court would have removed the judge. That requirement rests on the premise that only judges who would have been removed should face the risk of sanctions from the attorney discipline system. Inasmuch as the Judicial Tenure Commission believes there are additional situations, as described above, in which the attorney discipline process has a role to play, the Commission recommends that requiring this finding by the Court is both excessive and unnecessary.

In light of the risks identified above, the Judicial Tenure Commission suggests amending MCR 9.116(B) along the following lines:

> (B) Former Judges. The administrator or commission may only take action against a former judge:
>
> (1) for conduct resulting in removal as a judge;
>
> (2) for any conduct that was not the subject of a disposition by the Judicial Tenure Commission or by the Court; or

(3) if, after considering a sanction imposed by the Court or an action by the Judicial Tenure Commission under MCR 9.223(A)(2)-(5), and after considering the passage of time since the sanction or action, it plainly appears that the sanction or action is not adequate to serve the administrator's and commission's need to protect the public in light of the nature of the conduct and its adverse reflection on the former judge's fitness as an attorney.

Very truly yours,

Jon H. Hulsing
Chairperson
For the Commission

JHH:cc

Order

Michigan Supreme Court
Lansing, Michigan

March 16, 2022

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-40

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

Amendment of Rule 5 of the Rules for the Board of Law Examiners

_____

On order of the Court, this is to advise that the amendment of Rule 5 of the Rules for the Board of Law Examiners is adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment period. 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 on the Public Administrative Hearings page.

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

Rule 5 Admission Without Examination

(A)-(C) [Unchanged.]

(D) An attorney

(1) [Unchanged.]

(2) practicing law in an institutional setting, e.g., counsel to a corporation or instructor in a law school, may apply to the Board for a special certificate of qualification to practice law. The applicant must satisfy Rule 5(A)(1)-(3), and comply with Rule 5(B). The Board may then issue the special certificate, which will entitle the attorney to continue current employment if the attorney becomes an active member of the State Bar. The special certificate permits attorneys teaching or supervising law students in a clinical program to represent the clients of that clinical program. If the attorney leaves the current employment, the special certificate automatically expires; if the attorney's new employment is also institutional, the attorney may reapply for another special certificate.

(E) [Unchanged.]

Staff Comment: The amendment of Rule 5 of the Rules for the Board of Law Examiners specifically allows attorneys who are teaching in a clinical program to represent individual clients of that program.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by July 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-40. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

March 16, 2022

Clerk

Public Policy Position
ADM File No. 2021-40: Amendment of Rule 5 of the Rules for the Board of Law Examiners

Support with Amendment

Explanation
The Committee voted to support ADM File No. 2021-40 with the recommendation that additional language, proposed by the Civil Procedure & Courts Committee, be added to require that an attorney practicing under the authority granted by a special certificate designate that fact on any filings made when representing clients pursuant to the proposed amendment.

Position Vote:
Voted For position: 14
Voted against position: 1
Abstained from vote: 0
Did not vote (absence): 12

Contact Persons:
Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
ADM File No. 2021-40: Amendment of Rule 5 of the Rules for the Board of Law Examiners

Support with Amendment

Explanation:
The Committee voted to support ADM File No. 2021-40 with additional language added to require an attorney practicing under the authority granted by a special certificate be required to designate that fact on any filings made when representing clients pursuant to the proposed amendment.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 11

Contact Person:
Lori J. Frank lori@markofflaw.com

Public Policy Position
ADM File No. 2021-40: Amendment of Rule 5 of the Rules for the Board of Law Examiners

Support

Explanation:
The Committee unanimously voted to support ADM File No. 2021-40 with the recommendation that additional language, proposed by the Civil Procedure & Courts Committee, be added to require that an attorney practicing under the authority granted by a special certificate designate that fact on any filings made when representing clients pursuant to the proposed amendment.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: HB 5749 – District Court Judge Compensation

Background

House Bill 5749 would amend the Revised Judicature Act, 1961 PA 236, to equalize compensation between district court judges and probate court judges beginning October 1, 2023. Currently, the statutory formula for calculating a district court judge's salary results in these judges making slightly less than their colleagues serving as probate court judges ($158,027 vs. $159,917 in FY 2021-22), despite comparable caseloads and workloads.

In 2011, the Report and Recommendations[1] of the State Bar of Michigan's Judicial Crossroads Task Force identified "haphazard compensation" of trial court judges in Michigan as a critical challenge and recommended eliminating disparities in compensation by making the base salary of all trial judges uniform. HB 5749 aligns with this recommendation.

Both the Michigan District Judges Association and the State Court Administrative Office have indicated support for the bill. The House Judiciary Committee reported HB 5749 by a vote of 10-1-0 on April 26, 2022. The bill was then approved by the full House on May 10, 2022 by a vote of 96-8-5. The bill has been referred to the Senate Judiciary and Public Safety Committee.

***Keller* Considerations**

How trial court judges are compensated and whether compensation structures are established to promote the efficient use of judicial resources impacts the functioning of courts. Equitable compensation promotes the retention of experienced judges and encourages talented lawyers to seek election/appointment to the bench; as such, the bill is reasonably related to improving functioning of the courts and is therefore *Keller*-permissible.

[1] State Bar of Michigan, *Judicial Crossroads Task Force Report and Recommendations: Delivering Justice in the Face of Diminishing Resources* (March 2011), p 10, available at < https://www.michbar.org/file/judicialcrossroads/JudicialCrossroadsReport.pdf> (accessed June 1, 2022).

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

House Bill 5749 is reasonably related to the improvement of the functioning of the courts and is therefore *Keller*-permissible. It may be considered on its merits.

HOUSE BILL NO. 5749

February 15, 2022, Introduced by Reps. Fink, Howell, Haadsma, Bolden, Yaroch, Calley, Cambensy and Filler and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 8202 (MCL 600.8202), as amended by 2016 PA 31.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 8202. (1) A district judge ~~shall~~ **must** receive an annual salary payable by this state as calculated under this section.

(2) In addition to the salary received from this state under subsection (1), a district judge may receive from a district funding unit in which the judge regularly holds court an additional salary as determined by the governing legislative body of the

district funding unit as provided in this section. Supplemental salaries paid by a district funding unit ~~shall~~ **must** be uniform as to all judges who regularly hold court in the district funding unit. However, the total annual additional salary paid to a district court judge by the district funding units in which the judge regularly holds court ~~shall~~ **must** not cause the district judge's total annual salary received from state and district funding unit funds to exceed the maximum total salary allowed under this section.

(3) ~~Each~~ **Until September 30, 2023, a** district judge ~~shall~~ **must** receive an annual salary calculated as follows:

(a) A minimum annual salary payable by the state that is equal to the difference between 84% of the salary of a justice of the supreme court as of December 31, 2015 and $45,724.00.

(b) In addition to the amount calculated under subdivision (a), a salary of $45,724.00 from the district funding unit or units as provided in subsection (2). If a district judge receives a total additional salary of $45,724.00 from the district funding unit or units and receives neither less than nor more than $45,724.00, including any cost-of-living allowance, the state shall reimburse the district funding unit or units the amount that the unit or units have paid to the judge.

(c) In addition to the amounts under subdivisions (a) and (b), an amount payable by the state that is equal to the amounts calculated under subdivisions (a) and (b) multiplied by the compounded aggregate percentage pay increases, excluding lump-sum payments, paid to civil service nonexclusively represented employees classified as executives and administrators on or after January 1, 2016. The additional salary under this subdivision takes

effect on the same date as the effective date of the pay increase paid to civil service nonexclusively represented employees classified as executives and administrators. The additional salary under this subdivision ~~shall~~ **must** not be based on a pay increase paid to civil service nonexclusively represented employees classified as executives and administrators if the effective date of the increase was before January 1, 2016.

(4) Beginning October 1, 2023, a district judge must receive an annual salary that is equal to the annual salary of a probate judge calculated under section 821(2).

(5) ~~(4)~~ A district judge who holds court in a county other than the county of the judge's residence ~~shall~~ **must** be reimbursed for his or her actual and necessary expenses incurred in holding court upon certification and approval by the state court administrator. Upon certification of the judge's expenses, the sum ~~shall~~ **must** be paid out of the state treasury under the accounting laws of this state.

(6) ~~(5)~~ Salaries of a district court judge may be increased but ~~shall~~ **must** not be decreased during a term of office, except to the extent of a general salary reduction in all other branches of government.

(7) ~~(6)~~ A judge of the district court is eligible to be a member of the Michigan judges retirement system created under the judges retirement act of 1992, 1992 PA 234, MCL 38.2101 to 38.2670.

(8) ~~(7)~~ The district court in a district may hold evening and Saturday sessions.

Legislative Analysis

DISTRICT COURT JUDGE COMPENSATION

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

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

House Bill 5749 (H-1) as reported from committee
Sponsor: Rep. Andrew Fink
Committee: Judiciary
Complete to 5-5-22

BRIEF SUMMARY: House Bill 5749 would amend the Revised Judicature Act to increase the compensation of district court judges to equal that of probate judges, beginning October 1, 2022.

FISCAL IMPACT: House Bill 5749 would have a fiscal impact on the state and on local units of government. The fiscal impact would result from increasing the salary of a district court judge to equal the salary paid to a probate judge. The FY 2021-22 cost to the state for a probate court judge is $182,272. This amount includes the probate court judge's salary of $159,917 and $22,355 in estimated payroll taxes and retirement costs. The FY 2021-22 cost to the state for a district court judge is $180,226. This amount includes the district court judge's salary of $158,027 and $22,199 in estimated payroll taxes and retirement costs. Currently, there are 234.0 district court judges. The fiscal impact would be an additional cost of $478,879. State costs are funded roughly 98% with state GF/GP revenue. Local costs for judgeships vary from district to district.

THE APPARENT PROBLEM:

Currently, the salary of a probate or circuit court judge is $159,917, and the salary of a district court judge is $158,027. However, according to committee testimony, caseload studies have found that probate and district judges help one another, often blurring the lines between their designated tasks. Because these judges often have comparable workloads and caseloads, some believe that their pay should be the same.

THE CONTENT OF THE BILL:

District court judges are currently paid a salary that is equal to 84% of the salary of a justice of the Supreme Court as of December 31, 2015. Probate and circuit court judges are paid a salary that is equal to 85% of the salary of a Supreme Court justice as of that date. The statutory salaries of district, probate, and circuit court judges are also adjusted based on any wage increases approved by the Civil Service Commission for nonexclusively represented employees (state workers not eligible for union representation).

The bill would increase the salary of a district court judge to equal that of a probate judge, as calculated under the act, beginning October 1, 2022.

MCL 600.8202

ARGUMENTS:

For:

Supporters of the bill argue that the mere fact that associates' salaries at law firms can be higher than a judge's salary is a problem. Additionally, while district and probate judges may have different assigned duties, the reality of the court system is that these judges often work together to help each other's caseloads and workloads. The different assigned duties are comparable in workload, and an equitable salary should reflect the comparable workloads and caseloads.

Against:

Critics of the bill argue that the law is currently written in a way that is not understandable to the general public and that a judge's salary is already too high. These critics argue that the law should be entirely rewritten to be more easily understood by the public, and that money should be spent to make changes to courtrooms, such as providing to the public unedited recordings of proceedings on DVD for a nominal fee, before increasing any judgeship salary.

POSITIONS:

Representatives of the Michigan District Judges Association testified in support of the bill. (4-12-22)

The State Court Administrative Office indicated support for the bill. (4-12-22)

Legislative Analyst: Emily S. Smith
Fiscal Analyst: Robin Risko

Public Policy Position
HB 5749

No Position

Explanation:
The Committee voted unanimously to take no position on House Bill 5749, as the bill pertains to judicial compensation. Historically, the Committee has thought it most appropriate not to opine on such matters. The Committee believed that following that past practice was advisable in the case of HB 5749 as well.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 11

***Keller*-Permissibility Explanation:**
The Committee agreed unanimously that HB 5749 was *Keller*-permissible as questions of judicial compensation are reasonably related to the functioning of the courts. This is especially true when, as in the case of HB 5749, the legislation in question addresses the overall structure of judicial compensation and questions of equitable treatment between judicial officers performing similar functions.

Contact Person:
Lori J. Frank lori@markofflaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: HB 5956 and HB 5957 – Trial Court Funding/Imposition of Court Costs

Background

In *People v Cunningham*, the Michigan Supreme Court unanimously held that trial courts may only impose court costs on defendants when specifically authorized by statute.[1] With court-generated revenue accounting for one-third of trial court operational costs and over a quarter of total court expenditures in Michigan, the potential impact of *Cunningham* on the functioning of trial courts was significant. The Legislature responded to the Court's opinion by amending Sec. 1k of the Code of Criminal Procedure, 1927 PA 175, to authorize a court to impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case[.]"[2] This legislative authorization to impose court costs was to sunset in October 2017. In 2017, the Legislature extended the authorization to impose costs through October 2020.[3] At the same time, the Legislature created the Trial Court Funding Commission ("Commission") to "review and recommended changes to the trial court funding system in light of *People v Cunningham*[.]"[4] The Commission undertook this work in earnest and issued a final report in September 2019. Unfortunately, a confluence of circumstances resulted in little to no forward progress being made on implementing the Commission's recommendations: a complex policy issue, competing political pressures, and the disruption of the legislative calendar by the onset of the COVID-19 pandemic. Unable to implement a long-term funding fix, the Legislature once again extended the sunset on the authorization to impose costs through October 2022.[5]

With only four months remaining until the expiration of this most recent sunset, House Bill 5956 was introduced to further extend the sunset until October 1, 2025. As a practical matter, with only a few short months remaining in the 101st Legislature, the prospect of any serious movement on a broader trial court funding package is slight. An extension of the sunset would permit trial courts to continue imposing costs and thereby avoid the loss of a significant source of court operating revenue, while the 102nd Legislature is seated and given the opportunity to enact a long-term, sustainable trial court funding system consistent with the Commission's recommendations. As the Commission itself noted in its final report: "The Legislature should extend the statute allowing for fines and costs to be imposed

[1] 496 Mich 145; 852 NW2d 118 (2014).
[2] MCL 769.1k(1)(b)(iii); 2014 PA 352.
[3] 2017 PA 64.
[4] 2017 PA 65.
[5] 2020 PA 151.

in criminal cases until the state acts to replace this court-generated revenue with state general fund support."[6]

The Board of Commissioners has supported the initial legislation authorizing the imposition of costs in 2014, each of the bills extending the sunset, and the legislation creating the Trial Court Funding Commission. The Board of Commissioners also supported the recommendations of the Commission.

The circumstances surrounding trial court funding and the treatment of costs is further complicated by litigation presently pending before the Michigan Supreme Court which challenges the constitutionality of imposing general court operating costs on defendants via MCL 769.1k(1)(b)(iii).[7] House Bill 5957 was introduced in anticipation of an opinion in *People v Travis* prohibiting trial courts from imposing such costs. The bill provides that, within 60 days of such a ruling, the State Court Administrative Office ("SCAO") must provide a report, based on existing data, to the Legislature with an estimate of the amount of each trial court's operational funding needs and the amount of funding lost as a result of the Court's ruling. The bill then provides that, after current year appropriations are applied, if a trial court's estimated operational funding needs, as determined by SCAO, are not met, the state will pay the trial court's remaining operational funding needs up to the amount of estimated operational funding loss. Of course, as required by the Michigan Constitution, such funding would still be subject to the appropriations process, notwithstanding the provisions of HB 5957.

HB 5956 and 5957 are tie-barred to one another.

Keller Considerations

As noted above, the structure of trial court funding and the imposition of court costs have repeatedly been determined to be *Keller*-permissible by the Board of Commissioners, as the Board has been called upon to take public policy positions on several pieces of legislation in this issue space over the course of the last decade. Adequate, sustainable funding for the operation of trial courts is essential to the functioning of our courts. Such funding is also necessarily related to access to legal services, as underfunded courts are unable to meet a community's numerous legal needs. At the same time, the imposition of court costs on defendants may also impact the availability of legal services to society.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

[6] Michigan Trial Court Funding Commission, *Final Report* (September 6, 2019), p 28, available at <https://www.michigan.gov/-/media/Project/Websites/treasury/Reports/TCFC_Final_Report_962019_9-16-2019.pdf?rev=1fedbe221d224bf5978880216acbb06d> (accessed June 1, 2022).

[7] See *People v Travis*, ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 163073).

Staff Recommendation

The structure of trial court funding in Michigan and the question of what role, if any, the imposition of court costs plays in such structure is necessarily related to both the functioning of the courts and the availability of legal services to society. As such, House Bills 5956 and 5957 are *Keller*-permissible and may be considered on their respective merits.

HOUSE BILL NO. 5956

March 23, 2022, Introduced by Rep. Lightner and referred to the Committee on Appropriations.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

by amending section 1k of chapter IX (MCL 769.1k), as amended by 2020 PA 151.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER IX

Sec. 1k. (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is

deferred by statute or sentencing is delayed by statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(*i*) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

(*ii*) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

(*iii*) Until October 1, ~~2022,~~ **2025,** any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:

(A) Salaries and benefits for relevant court personnel.

(B) Goods and services necessary for the operation of the court.

(C) Necessary expenses for the operation and maintenance of court buildings and facilities.

(*iv*) The expenses of providing legal assistance to the defendant.

(*v*) Any assessment authorized by law.

(*vi*) Reimbursement under section 1f of this chapter.

(2) In addition to any fine, cost, or assessment imposed under subsection (1), the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance.

(3) Subsections (1) and (2) apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.

(4) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

(5) The court may provide for the amounts imposed under this section to be collected at any time.

(6) Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case.

(7) The court shall make available to a defendant information about any fine, cost, or assessment imposed under subsection (1), including information about any cost imposed under subsection (1)(b)(*iii*). However, the information is not required to include the calculation of the costs involved in a particular case.

(8) If the court imposes any cost under subsection (1)(b)(*iii*), no later than March 31 of each year the clerk of the court shall transmit a report to the state court administrative office in a manner prescribed by the state court administrative office that contains all of the following information for the previous calendar year:

(a) The name of the court.

(b) The total number of cases in which costs under subsection (1)(b)(*iii*) were imposed by that court.

(c) The total amount of costs that were imposed by that court under subsection (1)(b)(*iii*).

(d) The total amount of costs imposed under subsection (1)(b)(*iii*) that were collected by that court.

(9) No later than July 1 of each year, the state court

administrative office shall compile all data submitted under subsection (8) during the preceding calendar year and submit a written report to the governor, the secretary of the senate, and the clerk of the house of representatives. The report described in this subsection must be made available to the public by the secretary of the senate and the clerk of the house of representatives.

(10) A defendant must not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under this section unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No. 5957 (request no. 05857'22) of the 101st Legislature is enacted into law.

HOUSE BILL NO. 5957

March 23, 2022, Introduced by Rep. Lightner and referred to the Committee on Appropriations.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

(MCL 600.101 to 600.9947) by adding section 2406.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2406. (1) If the supreme court issues a ruling preventing trial courts from imposing or collecting court costs upon conviction under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, within 60 days of that ruling, the state court administrative office shall provide a report to the legislature with an estimate of the amount of each trial court's

operational funding needs and the amount of funding loss by each trial court as a result of the court ruling. The estimate under this subsection must be based on existing data.

(2) After the funding already appropriated for the current fiscal year by the trial court's funding unit and this state is applied, if a trial court's estimated operational funding needs under subsection (1) are not met, upon appropriation, the state shall pay the trial court's remaining operational funding needs up to the amount of the estimated operational funding loss.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No. 5956 (request no. 05378'22) of the 101st Legislature is enacted into law.

Public Policy Position
HB 5956 & HB 5957

HB 5956 - Oppose
HB 5957 – Support

Explanation

The Committee voted to oppose HB 5956. The Committee believes it is long past time for the Legislature to address the uncertainty regarding the future of trial court funding in Michigan created by the Michigan Supreme Court's opinion in *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014). Rather than continuing to approve temporary legislative fixes, the Committee believes the Legislature should work in earnest to implement the recommendations of the Trial Court Funding Commission ("TCFC"). While there is no doubt that the COVID-19 pandemic inhibited progress on implementing some of the recommendations of the TCFC, the fact remains that nearly a decade has elapsed since *Cunningham* with no sign of meaningful legislative action on a long-term, sustainable funding solution. Given that the assessment of additional costs on individual defendants to fund the day-to-day operations of our courts imposes a considerable financial burden on low-income criminal defendants, the Legislature should make trial court funding reform a priority. The Committee took note of the fact that this position is in accord with the views of both the Criminal Jurisprudence & Practice Committee and Criminal Law Section.

The Committee voted to support HB 5957. The Committee believes that this bill is a reasonable preemptive response to the possibility that the Michigan Supreme Court may hold that the collection of court costs under MCL 769.1k is unconstitutional in *People v Travis*, ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 163073). Ensuring the continuity of trial court funding ensures that people will remain able to access justice in their local courts.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

***Keller* Permissibility Explanation:**

The Committee believes that House Bills 5956 and 5957 are reasonably related to both the functioning of the courts and the availability of legal services to society. Continuity of trial court funding is essential to maintaining court operations and ensuring that litigants have access to justice.

Contact Persons:

Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
HB 5956 & HB 5957

Oppose

Explanation:
The Committee voted to oppose House Bill 5956. The Committee believes that the issue of trial court funding has remained in a state of uncertainty since the Michigan Supreme Court's holding in *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014). A comprehensive set of recommendations was made in the Trial Court Funding Commission's final report in 2019. Rather than act on these recommendations, the Legislature has simply extended the temporary fix provided in MCL 769.1k. House Bill 5956 would be the third such extension and a majority of the Committee believes that it is past time for the Legislature to resolve the underlying issue, rather than extending the sunset on a temporary fix.

Similarly, the Committee voted to oppose House Bill 5957. The legislation is a preemptive attempt to address the possibility that the Michigan Supreme Court will hold that the collection of court costs under MCL 769.1k is unconstitutional in *People v Travis*, ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 163073). A majority of the Committee believed that it was inappropriate for the Legislature to act in anticipation of a possible Court opinion, as opposed to responding legislatively once an opinion is issued. The Committee also felt that it would be preferable for the Legislature to address a long-term, sustainable solution to the trial court funding issue, not another temporary fix.

Position Vote on HB 5956:
Voted For position: 8
Voted against position: 7
Abstained from vote: 0
Did not vote (absence): 9

Position Vote on HB 5957:
Voted For position: 13
Voted against position: 2
Abstained from vote: 1
Did not vote (absence): 8

***Keller*-Permissible Explanation:**
The Committee believes that House Bills 5956 and 5957 are reasonably related to both the functioning of the courts and the availability of legal services to society. Given that Court-generated revenue funds encompass one-third of court operations costs and over a quarter of total court expenditures in Michigan, the question of whether such revenue collection will continue and whether an adequate, sustainable funding solution for trial courts will be found will have significant implications for how Michigan courts function and how many individuals they will be able to serve.

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
HB 5956 & HB 5957

Oppose

Explanation:
Council recommends legislature follow the recommendations of the Trial Court Funding Commission.

Position Vote:
Voted for position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 0

***Keller*-Permissibility Explanation:**
The improvement of the functioning of the courts.

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: HB 5975 – Trauma-informed Training for Lawyer-Guardians Ad Litem ("LGAL")

Background

House Bill 5975 is part of an eleven-bill package based on the recommendations of the Michigan House Adoption & Foster Care Task Force ("Task Force"). The Task Force concluded that:

> Despite the significance of their role, state law falls short of providing uniform trauma-informed training for LGALs and Parent Attorneys. This gap in training requirements has contributed to multiple incidents where LGALs and Parent Attorneys have unintentionally failed to provide trauma-sensitive services to the children they represent.[1]

In order to address this perceived gap, the Task Force recommended that "state law be revisited by requiring all LGALs and parent attorneys to receive trauma-informed training prior to accepting a court appointment in a child protective proceeding."[2] HB 5975 (H-1) attempts to effectuate this recommendation by amending Sec. 17d of the Probate Code, 1939 PA 288, which prescribes the powers and duties of a LGAL to require them "[t]o participate in trauma-informed training if provided by the State Court Administrative Office."

As introduced, the bill read that LGALs were "[t]o participate in trauma-informed training provided by the Supreme Court"; this language was modified in the H-1 substitute. At first glance, the change in language may seem insignificant; however, it is meant to take into account that the State Court Administrative Office ("SCAO") Child Welfare Services Division has already developed and implemented an online, self-paced training program for LGALs, including a trauma-informed training module, using grant funding. The "if provided" language of the H-1 substitute is intended to account for the possibility that SCAO's grant funding may not be available in perpetuity and that, absent some other funding source, the training would be discontinued. SCAO supported the H-1 substitute when it was heard in the House Families, Children, and Seniors Committee. The bill was subsequently reported unanimously by the Committee and passed the House on May 24, 2022 by a vote of 98-9. It has been referred to the Senate Health Policy and Human Services Committee.

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[1] Michigan House of Representatives, Michigan House Adoption & Foster Care Task Force Report (November 10, 2021), p 14, available at <https://dtj5wlj7ond0z.cloudfront.net/uploads/2021/11/Adoption_TaskForce_Report_11_09_21.pdf> (accessed June 1, 2022).

[2] *Id.*

Keller Considerations

By imposing a mandatory training requirement on attorney-guardians ad litem, House Bill 5975 directly regulates attorneys and the legal profession. In addition, by providing a means by which attorneys will be better equipped to serve the needs of the children they are called upon to represent as LGALs, the training requirement imposed by this legislation will arguably improve the functioning of the courts and expand access to legal services to the children who require a LGAL to represent their interests. As such, HB 5975 is necessarily related to the regulation of attorneys and reasonably related to both the functioning of the courts and the availability of legal services to society.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	✓ Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

House Bill 5975 is necessarily related to the regulation of attorneys and reasonably related to both the functioning of the courts and the availability of legal services to society. As such, the legislation is *Keller*-permissible and may be considered on its merits.

SUBSTITUTE FOR

HOUSE BILL NO. 5975

A bill to amend 1939 PA 288, entitled

"Probate code of 1939,"

by amending section 17d of chapter XIIA (MCL 712A.17d), as amended by 2012 PA 115.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER XIIA

Sec. 17d. (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

(a) The obligations of the attorney-client privilege.

(b) To serve as the independent representative for the child's best interests, and be entitled to ~~full and active participation~~ **fully and actively participate** in all aspects of the litigation and

access to all relevant information regarding the child.

(c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file ~~shall~~ **must** be reviewed before disposition and before the hearing for termination of parental rights. Updated ~~materials shall~~ **material must** be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress ~~relating~~ **that relates** to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.

(d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:

(*i*) Before the pretrial hearing.

(*ii*) Before the initial disposition, if held more than 91 days after the petition has been authorized.

(*iii*) Before a dispositional review hearing.

(*iv*) Before a permanency planning hearing.

(*v*) Before a post-termination review hearing.

(*vi*) At least once during the pendency of a supplemental petition.

(*vii*) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.

(e) The court may allow alternative means of contact with the child if good cause is shown on the record.

(f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(h) To attend all hearings and substitute representation for the child only with court approval.

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court ~~as to~~ **of** the child's wishes and preferences.

(j) To monitor the implementation of case plans and court orders ~~,~~ and **to** determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(k) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through

consultation with the child's parent, foster care provider, guardian, and caseworker.

(*l*) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(m) To participate in ~~training in~~ early childhood, child, and adolescent development **training.**

(n) To participate in trauma-informed training if provided by the state court administrative office.

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable.

Legislative Analysis

FOSTER CARE AND ADOPTION AMENDMENTS

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

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

House Bill 5974 (proposed substitute H-1)
House Bill 6073 (proposed substitute H-1)
House Bill 6074 as introduced
Sponsor: Rep. Mary Whiteford

House Bill 5975 (proposed substitute H-1)
Sponsor: Rep. Laurie Pohutsky

House Bill 5976 as introduced
Sponsor: Rep. Tyrone A. Carter

House Bill 5977 as introduced
Sponsor: Rep. Phil Green

House Bill 5978 as introduced
Sponsor: Rep. Rodney Wakeman

House Bill 6070 (proposed substitute H-1)
Sponsor: Rep. Jack O'Malley

House Bill 5980 as introduced
Sponsor: Rep. Stephanie A. Young

House Bill 5981 as introduced
Sponsor: Rep. Sarah Anthony

House Bill 6075 as introduced
Sponsor: Rep. Daire Rendon

Committee: Families, Children and Seniors
Complete to 5-10-22

SUMMARY:

Taken together, the bills would do the following:

- Define certain nonparent adults as relatives under the juvenile code, the child care licensing act, the Probate Code, and the Guardianship Assistance Act. (HBs 5974, 6073, 6074, and 6075)
- Provide a credit against the individual and corporate income tax for qualified taxpayers that provide paid adoption leave to their employees. (HB 6070)
- Provide that a qualified residential treatment program is a residential use of property under Michigan zoning law. (HB 5981)
- Require lawyer-guardians ad litem to have trauma-informed training if provided by the State Court Administrative Office (SCAO). (HB 5975)
- Require the Department of Health and Human Services (DHHS) to do all of the following:
    - Issue extended (three-year) foster family home and foster family group home licenses under certain conditions. (HB 5980)
    - Conduct a comprehensive needs assessment regarding the use of residential treatment. (HB 5977)
    - Implement requirements concerning family finding and engagement services. (HB 5978)
    - Submit a cost savings report to the legislature. (HB 5976)

House Bill 5974 would amend the juvenile code (Chapter XIIA of the Probate Code) to amend the definition of the term ***relative*** as used in specified sections of the code.[1]

Relative now generally means an individual who is at least 18 who by blood, marriage, or adoption has one of several listed relationships to a child. In addition, for the purpose of placement, ***relative*** includes a stepparent, ex-stepparent, parent who shares custody of a half-sibling, or parent of a man whom the court has found probable cause to believe is the putative father of the child if there is no man with legally established rights to the child.

Under the bill, ***relative*** would mean either of the following:

- An individual who is at least 18 years old who is related to a child within the fifth degree by blood, marriage, or adoption, including the following:
  - The spouse of an individual related to the child within the fifth degree, even after the marriage has ended by death or divorce.
  - The parent who shares custody of a half-sibling of the child.
  - The parent of a man whom the court has found probable cause to believe is the putative father of the child if there is no man with legally established rights to the child.
- An individual who is at least 18 years old who is not related to a child within the fifth degree by blood, marriage, or adoption but who has a strong emotional tie or role in the child's life (or in the child's parent's life, if the child is an infant), as determined by DHHS or, if the child is an ***Indian child***, as determined solely by the ***Indian child's tribe***.

  Indian child would mean an unmarried person who is under the age of 18 and either is a member of an ***Indian tribe*** or is eligible for membership in an Indian tribe as determined by that Indian tribe.

  Indian tribe would mean any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska native village as defined in the federal Alaska Native Claims Settlement Act.

  Indian child's tribe would mean the Indian tribe an Indian child is a member of or eligible for membership in or, if the child is a member of or eligible for membership in more than one tribe, the tribe with which the child has the most significant contacts.

MCL 712A.13a

House Bill 5975 would amend the juvenile code to require a lawyer-guardian ad litem to participate in trauma-informed training if provided by SCAO.

MCL 712A.17d

House Bill 5976 would amend the Foster Care and Adoption Services Act to require DHHS to submit to the legislature and the House and Senate appropriations committees an annual report that identifies cost savings due to reductions in foster youth in foster care programs compared

[1] Of the applicable sections, the term ***relative*** is used in sections 13b (change in foster care placement), 18f (preparation and review of case service plan), 19 (court review hearings), and 19a (permanency planning hearings).

to the cost when the highest number of foster youth were in the foster care system in the immediately preceding 10 years. The report would have to include details of DHHS's efforts to reinvest the costs savings identified in the report, including information about reinvestment in prevention services, permanency services, adoption services, safety assessments, adoptive and foster family recruitment, training, caseworker bonuses, and wage increases. The report would be due each January 1 beginning January 1, 2023.

Proposed MCL 722.953a

House Bill 5977 would amend 1973 PA 116, the child care licensing act, to require DHHS to annually conduct a comprehensive needs assessment regarding using residential treatment and the needs of youth who are referred to this type of treatment. The assessment would have to identify the types of beds currently being used and the types of beds needed and the age group, gender, and geographic region of youth receiving those treatment services and those in need of the treatment services. DHHS would have to work with community partners to assist providers in meeting the needs of foster youth identified through the assessment. The assessment would have to be conducted every January 1 beginning January 1, 2023.

Proposed MCL 722.116a

House Bill 5978 would amend the Foster Care and Adoption Services Act to provide that, upon appropriation and by no later than October 1, 2022, DHHS must work in conjunction with entities that perform family finding and engagement services to help foster youth who are separated from their family to connect to family and friends who may assist in the foster youth's care. In addition, by December 31, 2022, DHHS would have to make efforts in family finding and engagement services on behalf of all foster youth currently in the foster care program. DHHS also would have to incorporate family finding and engagement services in all current and future child abuse and child neglect investigations.

Proposed MCL 722.953b

House Bill 5980 would amend the child care licensing act to require DHHS to issue an extended license to a foster family home or foster family group home that has been licensed for at least one year and is in good standing with DHHS. An extended license would be effective for three years after its date of issuance unless revoked, refused renewal, or modified to a provisional license under the act. An extended license would have to be renewed every three years upon application and approval. (A regular license under the act is currently effective for two years after the date of issuance unless revoked, refused renewal, or modified to a provisional license.)

MCL 722.118

House Bill 5981 would amend the Michigan Zoning Enabling Act to provide that a ***qualified residential treatment program*** is a residential use of property for the purposes of zoning, is a permitted use in all residential zones, and is not subject to a different special or conditional use permit or procedure than that required for other dwellings of similar density in the same zone.

Qualified residential treatment program would mean a program in a child caring institution to which all of the following apply:[2]

- The program has a trauma-informed treatment model, evidenced by the inclusion of trauma awareness, knowledge, and skills into the program's culture, practices, and policies.
- The program has registered or licensed nursing and other licensed clinical staff on-site or available 24 hours a day, seven days a week, who provide care in the scope of their practice as provided in Part 170 (Medicine), Part 172 (Nursing), Part 181 (Counseling), Part 182 (Psychology), Part 182A (Applied Behavior Analysis), and Part 185 (Social Work) of the Public Health Code.
- The program integrates families into treatment, including maintaining sibling connections.
- The program provides aftercare services for at least six months post discharge.
- The program is accredited by an independent not-for-profit organization as described in 42 USC 672(k)(4)(G).[3]
- The program does not include a detention facility, forestry camp, training school, or other facility operated primarily for detaining minor children who are determined to be delinquent.

House Bill 6070 would amend Parts 1 and 2 (individual and corporate income tax) of the Income Tax Act to provide that, for tax years beginning on and after January 1, 2023, a ***qualified taxpayer*** that voluntarily provides paid ***adoption leave*** to its employees may claim a credit against the tax in an amount equal to 50% of the amount of wages[4] paid during the tax year to each qualifying employee during any period the employee is on adoption leave or $4,000 per qualified employee, whichever is less.

Qualified taxpayer would mean a taxpayer that is an employer that has written policy offering adoption leave that satisfies the following:

- The policy provides at least two weeks of paid adoption leave for each full-time qualifying employee and a proportionate amount of adoption leave for each part-time qualifying employee.
- The rate of payment for adoption leave is at least 50% of the wage normally paid to that same employee for services performed for the employer.

Adoption leave would mean a period of absence related to an adoption of a child by the employee to provide time for bonding and adjustments immediately after placement of that child with the employee.

Qualified employee would mean an individual who has been employed by the employer for at least one year and who for the preceding year had compensation that does not exceed 60% of the amount applicable for highly compensated employees under the Internal Revenue Code for that same year.[5]

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[2] Also see https://dhhs.michigan.gov/OLMWEB/EX/FO/Public/FOM/912-1.pdf

[3] See https://www.law.cornell.edu/uscode/text/42/672

[4] As defined in section 3306(b) of the Internal Revenue Code: https://www.law.cornell.edu/uscode/text/26/3306

[5] If the preceding year were 2021, the applicable amount would be $130,000. Sixty percent of that amount is $78,000. See section 414(q)(1)(B) https://www.law.cornell.edu/uscode/text/26/414. The adjusted amounts are available here: https://www.irs.gov/retirement-plans/plan-participant-employee/definitions

However, the maximum amount of leave with respect to any qualifying employee for which a credit may be claimed under the bill could not exceed 12 weeks. The credit could not exceed the employee's normal hourly wage rate multiplied by the number of hours of leave taken. The wages of an employee not paid an hourly wage would have to be prorated to an hourly wage rate as prescribed by the Department of Treasury. Any adoption leave paid by the state or a political subdivision of the state or required to be paid by law could not be included in determining the amount of the credit under the bill.

The amendments to the individual income tax would provide that a qualified taxpayer who is a member of a flow-through entity that voluntarily provides paid adoption leave to its employees could claim credit against the member's tax liability based on the member's distributive share of business income reported from that flow-through entity or an alternative method approved by the department.

If the amount of credit allowed for a tax year and any unused carryforward exceeded the qualified taxpayer's tax liability for the tax year, the portion that exceeds the tax liability would not be refunded but could be carried forward to offset tax lability in subsequent tax years for up to five years.

MCL 206.678

MCL 125.3102 and 125.3206

House Bills 6073, 6074, and 6075 would respectively amend provisions of the child care licensing act, the Probate Code and juvenile code, and the Guardianship Assistance Act to provide that the term "related" or "relative," as applicable, has the meaning given to "relative" as defined by House Bill 5974, above.

MCL 722.111 (HB 6073)
MCL 710.22 and 712A.18 (HB 6074)
MCL 722.872 (HB 6075)

FISCAL IMPACT:

House Bill 5974 would not have a significant fiscal impact on state expenditures to DHHS or on local units of government.

House Bill 5975 would have an indeterminate fiscal impact on the state. The bill would require lawyer-guardians ad litem (LGALs) to take trauma-informed training if provided by SCAO. The fiscal impact would depend on whether training is provided and, if so, the form of that training. According to SCAO, training options are likely to result in the following costs:

- A 60- to 90-minute training webinar would cost approximately $500.
- A six-hour training webinar would cost approximately $1,600, utilizing three to four speakers.
- Adding a module to the current five-module LGAL online training on the SCAO Learning Management System (LMS) would cost roughly $6,000. Costs would include development of written content, adding content to the LMS, testing on the LMS, etc.

- A full-day in person training for up to 100 LGALs would cost approximately $10,000 ($4,200 for the venue, $4,700 for the speakers, $400 for travel, and $500 for printing).

House Bill 5976 would have no fiscal impact on the state and local units of government, except for any negligible DHHS costs for providing an annual report to the legislature. It should be noted, however, that section 367b of the Management and Budget Act requires the May Revenue Estimating Conference to forecast Medicaid and human services (including foster care) expenditure and caseload projections for the entitlement lines for the current and next two ensuing fiscal years. These expenditure and caseload projections, in practice, automatically increase or decrease the Medicaid and human services entitlement line items, which makes any efforts to "reinvest" savings difficult. Conversely, if a Medicaid and human services entitlement line item is forecast to have a shortfall, that entitlement line is not then required, for example, to reduce reimbursement rates, eligibility limits, or utilization limits.

House Bill 5977 would increase state and local units of government costs by a minimal amount. The legislature has appropriated anywhere from $250,000 to $500,000 for similar needs assessments performed by DHHS. The counties may also experience a minimal cost, as they may need to work with and respond to any information requests from DHHS to determine how counties utilize their licensed child caring institution beds, by need, age, and gender.

House Bill 5978 would have no fiscal impact on the state or local units of government unless there is a separate legislative action to appropriate funds for DHHS for family finding and engagement services.

House Bill 5980 would likely increase state expenditures to DHHS by an indeterminate amount and would not have a significant impact on local units of government. Under the bill, the department may see decreased costs related to the administration of foster family homes and foster family group homes license renewal every three years rather than every two years. The amount of any savings gained is indeterminate and would depend on the number of extended licenses that are issued by the department.

House Bill 5981 would not have a significant fiscal impact on state expenditures to DHHS or on local units of government.

House Bill 6073 would not have a fiscal impact on any unit of state or local government.

House Bills 6074 and 6075 would not have a significant fiscal impact on state expenditures to the Department of Health and Human Services (DHHS) or local units of government.

A fiscal analysis of **House Bill 6070** is in progress.

Legislative Analyst: E. Best
Fiscal Analysts: Sydney Brown
Kevin Koorstra
Robin Risko
Jim Stansell

Public Policy Position
HB 5975

Support

Explanation:
The Committee voted unanimously to support HB 5975. The Committee believes that requiring trauma-informed training, as long as SCAO is able to provide such training, will help ensure that individuals appointed to serve as lawyer-guardians ad litem (LGAL) are equipped to perform this important duty and to competently represent a child's best interests.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

***Keller* Permissibility Explanation:**
HB 5975 is *Keller*-permissible as it necessarily relates to the regulation of the legal profession by statutorily requiring specific training for attorneys who serve as LGALs.

Contact Persons:
Katherine L. Marcuz kmarcuz@sado.org
Lore A. Rogers rogersl4@michigan.gov

Public Policy Position
HB 5975

Support in Concept

Explanation:
The Committee voted to unanimously to support the concept of lawyers-guardian ad litem receiving trauma-informed training but was concerned about certain aspects of the approach to the issue used in the language of House Bill 5975. Specifically, the Committee expressed concern about whether a more holistic approach that included training in other relevant subject matters would be more useful and appropriate. The Committee also questioned the rationale for requiring such training of lawyers-guardian ad litem only and not non-lawyers serving as guardian ad litem.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 11

***Keller*-Permissibility Explanation:**
The Committee agreed unanimously that HB 5975 was *Keller*-permissible and the competence of attorneys to practice, especially in fields requiring specialized knowledge, is essential to the functioning of the courts. In addition, because trauma-informed training is mandatory for lawyers-guardian ad litem under the language of HB 5975, this bill is also reasonable related to the regulation of attorneys.

Contact Person:
Lori J. Frank lori@markofflaw.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: HB 5987 – Restorative Justice Practices Enabling Act

Background

House Bill 5987 would create a new Restorative Justice Practices Enabling Act ("Act"), which would prescribe certain minimum standards for restorative justice facilitation in Michigan. *Restorative justice facilitation* is defined in the bill as a "voluntary program of classes or facilitated meetings conducted by a mediator or facilitator to reach a repair plan agreement with an offender, the victim of [an] offense, if any, and other interested individuals." Under HB 5987, restorative justice facilitation in a criminal case, a juvenile justice case, or during release on parole is voluntary. The proposed facilitation must take place through a *center*, which is defined as a community-based dispute resolution center as further described in the Community Dispute Resolution Act, 1988 PA 260. Both the offender and any victim electing to participate in restorative justice facilitation must provide consent to participate to a center.

The legislation envisions both mediators and facilitators performing certain restorative justice facilitation program functions. These are distinct roles under the provisions of the bill. A *mediator* is defined as "an individual who conducts mediations at a center and who has not less than 30 hours of mediation training in conflict resolution techniques, neutrality, agreement, writing, and ethics." A *facilitator*, in addition to meeting the requirements imposed on a mediator, must also have conducted at least three mediation sessions in a setting that is not a restorative justice facilitation and have completed additional training on restorative justice basic concepts, trauma informed practices, juvenile-developmental characteristics, and crime victimization. HB 5987 prohibits a mediator from providing restorative justice facilitation unless the mediator is supervised by a facilitator. Additionally, a mediator is prohibited from providing restorative justice facilitation if the offense involved a victim. For the purposes of this bill, *victim* is defined as "an individual who or a member of a community that is harmed by the commission of an offense." An *offense* is any violation of a penal law of the State of Michigan.

In the event that restorative justice facilitation is terminated, that termination must not be used against a participant in any manner. Participants in restorative justice facilitation must be advised to obtain a legal review of any agreement reached as a result of facilitation. With certain exceptions noted in HB 5987, and as otherwise provided by law, communication made in connection with or in a restorative justice facilitation is confidential and an admission, representation, or statement made that is not otherwise discoverable or obtainable is not admissible as evidence or subject to discovery.

The legislation immunizes a mediator or facilitator from civil damages for an act or omission in the scope of their employment or function as a mediator or facilitator, unless they acted in bad faith, with a malicious purpose, or in a manner exhibiting wanton or willful disregard of the rights, safety, or property of another.

If a restorative justice facilitation results in a repair plan agreement, the agreement must be in writing and signed by the participants and include the time periods in which the plan must be accomplished. If such an agreement occurs in conjunction with a specific criminal or juvenile justice case, not less than five business days before sentencing or disposition, the mediator or facilitator is required to provide the court with the agreed upon repair plan. The mediator or facilitator may also testify to the repair plan agreement and the court may consider the repair plan agreement during sentencing or disposition. HB 5987 defines a *repair plan agreement* as an agreement following a restorative justice facilitation that "describes the consequences to repair the harm from an offense, including, but not limited to, the offender providing an apology, reparation, restitution, or restoration, performing community services, or receiving counseling."

Keller Considerations

The proposed Restorative Justice Practices Enabling Act and, in particular, the repair plan agreements that it proposes are intended to be used to inform sentencing decisions in a criminal case or the disposition of a juvenile justice matter. The Act would also render admissions, representations, or statements made in the course of facilitation inadmissible as evidence and not subject to discovery. Considering HB 5987's definitions of "victim" and "offense," the scope of the cases in which facilitation may come into play is very broad. It is unclear how this bill would impact existing restorative justice programs being employed in Michigan; HB 5987 only requires restorative justice facilitations to comply with its requirements. Having said that, if existing programs fall within the bill's definitions, but do not presently comply with the new requirements, those programs will either need to change their practices or discontinue operation. Taken together, the provisions of HB 5987 have the potential to have a significant impact on how any number of matters are presented to the courts and how the courts then process matters where restorative justice facilitation has been utlized. Such impacts are reasonably related to the functioning of the courts and therefore the legislation is *Keller*-permissible.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

The provisions of the proposed Restorative Justice Practices Enabling Act are reasonably related to the functioning of the courts. As such, HB 5987 is *Keller*-permissible and may be considered on its merits.

HOUSE BILL NO. 5987

April 12, 2022, Introduced by Reps. LaGrand, Stone, Kuppa, Anthony, Rogers, Hope, Brabec, Sowerby, Brann, Brenda Carter, Haadsma, Hood, Weiss and Yancey and referred to the Committee on Judiciary.

A bill to provide for restorative justice facilitation; and to establish criteria for certain mediators and restorative justice facilitators.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act may be cited as the "restorative justice practices enabling act".

Sec. 2. As used in this act:

(a) "Center" means that term as defined in section 2 of the community dispute resolution act, 1988 PA 260, MCL 691.1552.

(b) "Facilitator" means a mediator who meets all of the following requirements:

(*i*) Has conducted at least 3 mediation sessions in a setting that is not a restorative justice facilitation.

(*ii*) Has completed additional training on restorative justice basic concepts, trauma informed practices, juvenile-developmental characteristics, and crime victimization.

(c) "Mediator" means an individual who conducts mediations at a center and who has not less than 30 hours of mediation training in conflict resolution techniques, neutrality, agreement, writing, and ethics.

(d) "Offender" means the defendant in a criminal case or the respondent in a juvenile justice case who committed or allegedly committed the offense, or an individual sentenced and committed to the department of corrections for an offense.

(e) "Offense" means a violation of a penal law of this state.

(f) "Repair plan agreement" means the agreement following a restorative justice facilitation that describes the consequences to repair the harm from an offense, including, but not limited to, the offender providing an apology, reparation, restitution, or restoration, performing community service, or receiving counseling.

(g) "Restorative justice facilitation" means a voluntary program of classes or facilitated meetings conducted by a mediator or facilitator to reach a repair plan agreement with an offender, the victim of the offense, if any, and other interested individuals.

(h) "Victim" means an individual who or a member of a community that is harmed by the commission of an offense.

Sec. 3. (1) Restorative justice facilitation practices in this

state must comply with this act.

(2) Participation in restorative justice facilitation in a criminal case, in a juvenile justice case, or during release on parole is voluntary and must comply with this act.

Sec. 4. (1) Restorative justice facilitation must take place through a center. The offender and any victim who elects to participate in restorative justice facilitation must first provide consent to participate to a center.

(2) Except as provided in subsection (3), a mediator shall not provide restorative justice facilitation unless the mediator is supervised by a facilitator.

(3) A mediator shall not provide restorative justice facilitation if the offense involved a victim.

Sec. 5. (1) The mediator or facilitator of a restorative justice facilitation shall provide an opportunity for the participants to achieve a mutually acceptable resolution to the harm, in joint or separate sessions, as appropriate, utilizing dialogue and negotiation.

(2) A mediator or facilitator of a restorative justice facilitation shall be impartial, neutral, and unbiased, and shall not make a decision for a participant in the facilitation.

(3) If a participant in a restorative justice facilitation is unable to agree, or, if the mediator or facilitator determines an agreement would be unconscionable due to duress or other factors, the mediator or facilitator shall terminate the restorative justice facilitation. If restorative justice facilitation is terminated, the fact that the facilitation is terminated must not be used against a participant in any manner.

(4) A mediator or facilitator shall not make or impose a

sanction or penalty on a participant in a restorative justice facilitation.

(5) A mediator or facilitator may recommend resources to a participant, if appropriate.

(6) A participant in a restorative justice facilitation must be advised to obtain a legal review of any agreement.

Sec. 6. (1) Except as otherwise provided by law or if any of the following situations apply, a verbal, written, or electronic communication made in or in connection with a restorative justice facilitation and any repair plan agreement resulting from that facilitation, whether made to the mediator, facilitator, participant, or other individual attending the mediation session, are confidential:

(a) Each participant in the facilitation consents to waiving confidentiality and disclosing a specific communication.

(b) A subsequent action against the mediator or facilitator is initiated by a participant in the facilitation for damages arising out of the facilitation process.

(c) The communication was made to further another crime or fraud.

(d) The mediator or facilitator believes disclosure is required to report a threat to an individual's safety.

(2) Except as otherwise provided by law, an admission, representation, or statement made in a restorative justice facilitation that is not otherwise discoverable or obtainable is not admissible as evidence or subject to discovery.

(3) Except as otherwise provided by law and section 9 or unless each participant to a restorative justice facilitation consents in writing, the mediator or facilitator of the restorative

justice facilitation is not subject to the process requiring the disclosure of any matter discussed during the facilitation.

Sec. 7. A mediator or facilitator who conducts a restorative justice facilitation is not liable for civil damages for an act or omission in the scope of the mediator's or facilitator's employment or function as a mediator or facilitator, unless he or she acted in bad faith, with a malicious purpose, or in a manner exhibiting wanton or willful disregard of the rights, safety, or property of another.

Sec. 9. (1) If a restorative justice facilitation results in a repair plan agreement, the agreement must be in writing and signed by the participants and must include the time periods in which the plan must be accomplished.

(2) If a restorative justice facilitation occurs in conjunction with a specific criminal or juvenile justice case and results in a repair plan agreement not less than 5 business days before a sentencing or disposition hearing, the mediator or facilitator shall provide the court with the repair plan agreement described in subsection (1) before the court sentences or enters an order of disposition for the offender. The mediator or facilitator may also testify to the repair plan agreement, or provide additional reports of the repair plan agreement, to the court, a probation officer, a parole officer, or another supervising authority.

(3) The court may consider the repair plan agreement in the order of sentencing or disposition.

Public Policy Position
HB 5987

Support the Concept of Providing Expanded Opportunities for Restorative Justice across the Michigan

Explanation

The Committee voted 16 to 1 to support the concept of providing expanded opportunities for restorative justice across Michigan, while also ensuring meaningful inclusion of victims and thoughtful consideration of victims' unique concerns in any such programming. The Committee noted that HB 5987 as drafted raises several questions and concerns, including:

- Clarification of language outlining distinctions between mediation and facilitation, as proposed by the legislation, and how each relates to and involves victims.
- What qualifications, if any, facilitators and mediators would be required to provide proof of before being approved to act in these respective roles.
- Whether the bill, though well-intentioned, could inadvertently make restorative justice practices less available or more inaccessible in the future. For instance, how will the legislation impact programs available today that do not meet the new criteria outlined in the bill? If such programs were no longer permissible, would that effectively force a court to opt for punitive alternatives?
- How the proposed restorative justice programming would be funded if a defendant is indigent. Mediation can be costly, and the Committee does not support a two-tier system in which wealthy defendants can participate in restorative justice programs, but indigent defendants must endure a punitive sentence because they cannot afford to pay for a restorative justice alternative.

Position Vote:

Voted For position: 16
Voted against position: 1
Abstained from vote: 0
Did not vote (absence): 10

***Keller* Permissibility Explanation:**

The Committee agreed that the bill is *Keller*-permissible because it is reasonably related to the availability of legal services to society, and the improvement of the functioning of the courts. The bill would create the "Restorative Justice Practices Enabling Act" and would create qualifications, requirements, and protections for restorative justice practices. If a restorative justice facilitation in connection with a criminal case is successful and results in an agreement, the court may consider the agreement in resolving the case. Each of these elements could have significant impacts on court functioning and in what manner individuals are able to access justice.

Contact Persons:

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Public Policy Position
HB 5987

Oppose

Explanation:
The Committee voted to oppose House Bill 5987. While the Committee believes that restorative justice practices are often beneficial, there were concerns about the legislation as drafted (e.g., how the new statute would align with the Crime Victim's Rights Act, how such a program would impact vulnerable victims, and whether such a program would lead to unnecessary delay in the legal process). In addition, the Committee believes that there are already restorative justice programs being implemented in Michigan today and that legislative intervention at this time is both unnecessary and potentially counterproductive for those programs.

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 9

***Keller*-Permissible Explanation:**
The Committee believes that the introduction of restorative justice programs, as proposed in House Bill 5987, will have a potentially significant impact on which cases proceed through the traditional process and which are subject to restorative justice facilitation. This will inevitably impact court dockets and the allocation of scarce resources. The bill is therefore reasonably related to the functioning of the courts and *Keller*-permissible.

Contact Persons:
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Public Policy Position
HB 5987

Support

Explanation:
The council supports creating a statewide restorative justice program.

Position Vote:
Voted for position: 12
Voted against position: 3
Abstained from vote: 3
Did not vote: 0

***Keller*-Permissibility Explanation:**
The improvement of the functioning of the courts.

Contact Person: Sofia V. Nelson
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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: SB 1015 – Admissibility of Hearsay Testimony in Human Trafficking Prosecutions

Background
Senate Bill 1015 would amend Sec. 27c of the Code of Criminal Procedure, 1927 PA 175, to permit the admission of certain hearsay testimony in prosecutions involving human trafficking or commercial sexual activity. Sec. 27c currently provides that evidence of a statement by a declarant is admissible if four conditions are met:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant;
(b) The action in which the evidence is offered is an offense involving domestic violence;
(c) The statement was made at or near the time of the infliction or threat of physical injury. The statute prohibits the admission of statements made more than five years before the filing of the instant action;
(d) The statement was made under circumstances that would indicate the statement's trustworthiness; and
(e) The statement was made to a law enforcement officer.

SB 1015 would expand the offenses under which this rule of evidence could be used from solely domestic violence to include both human trafficking and commercial sexual activity. The bill would define commercial sexual activity as that term is used in MCL 750.462a.[1] The bill would define human trafficking as a violation of Chapter LXVIIA of the Michigan Penal Code, 1931 PA 328, MCL 750.462a to 750.762h. The bill would also define the term "infliction or threat of physical injury" to include both:

> (i) Threatening to harm or physically restrain any individual or the creation of any scheme, plan, or pattern intended to cause an individual to believe that failure to perform an act would result in psychological, reputational, or financial harm to, or physical restraint of, any individual.

[1] "Commercial sexual activity" means 1 or more of the following for which anything of value is given or received by any person:
(i) An act of sexual penetration or sexual contact as those terms are defined in section 520a.
(ii) Any conduct prohibited under section 145c.
(iii) Any sexually explicit performance as that term is defined in section 3 of 1978 PA 33, MCL 722.673.

(ii) Facilitating or controlling an individual's access to a controlled substance other than for a legitimate medical purpose.

Finally, SB 1015 is tie-barred to HB 4112, which would make numerous amendments to Chapter LXVII of the Code of Criminal Procedure, 1931 PA 328, to strike references to the offense of prostitution and replace that offense with the offense of commercial sexual activity.

Keller Considerations

The sections and committees reviewing this legislation were split on the question of whether the issues it presents are *Keller*-permissible. The Criminal Law Section and Criminal Jurisprudence & Practice Committee both concluded that SB 1015 was *Keller*-permissible, because the legislation would result in significant changes to how hearsay evidence is treated in certain prosecutions and in doing so impact the functioning of the courts. The Criminal Law Section also concluded that SB 1015 was reasonably related to the regulation of the legal profession, as it prescribes a rule of evidence that will be used in criminal proceedings.

By contrast, the Access to Justice Policy Committee, on a split vote, concluded that SB 1015 was not *Keller*-permissible. In the Committee majority's view, SB 1015 was not reasonably related to either the regulation of the legal profession or the quality of legal services, but rather presented substantive policy questions about the proper treatment of a particular criminal offense, which are better left to the Legislature and fall outside the scope of the Bar's permissible interests.

In particular, the fact that this issue comes before the Bar as legislation, as opposed to an amendment to the Rules of Evidence, further complicated how the committees construed the application of *Keller*. As the Bar approaches amendments to rules, such as the Rules of Evidence, as presumptively *Keller*-permissible, it is distinctly possible that an amendment to the Rules might have been regarded differently. Having said that, the "guiding standard" of *Keller*, according to the U.S. Supreme Court, is that the matter in question be "necessarily or reasonably" related to "regulating the legal profession or improving the quality of legal service[s]."[2] Alterations to the Rules of Evidence governing a criminal proceeding, especially a rule as fundamental as the admissibility of hearsay, would no doubt impact how such matters proceeded through the courts and impact their functioning. As such, it would be fair to conclude that such legislation clears the "reasonably related" hurdle established by *Keller*.

Procedurally, concluding that a piece of legislation is *Keller*-permissible does not obligate the Board to take a position on the merits of a bill. In the Board's discretion, there may be cases where it is more appropriate to decline to take a position on *Keller*-permissible legislation either because the Bar is divided on the policy question in a manner that would make it difficult for the Bar to advance a clear and coherent position or when there are other stakeholders better positioned than the Bar to offer the Legislature commentary on a particular question.

[2] *Keller v State Bar of California*, 496 US 1, 14, 110 S Ct 2228, 2236, 110 L Ed 2d 1 (1990).

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

Legislation that effectively amends the rules of evidence applicable in criminal proceedings, as SB 1015 does, is reasonably related to the functioning of the courts and therefore *Keller*-permissible. The legislation may be considered on its merits.

SENATE BILL NO. 1015

April 21, 2022, Introduced by Senators BAYER, BULLOCK, GEISS, POLEHANKI, MOSS, MCMORROW, BRINKS, CHANG, ALEXANDER and HOLLIER and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

by amending section 27c of chapter VIII (MCL 768.27c), as added by 2006 PA 79.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER VIII

Sec. 27c. (1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain

the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence, **commercial sexual activity, or human trafficking.**

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

(2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

(3) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(4) Nothing in this section shall be construed to abrogate any privilege conferred by law.

(5) As used in this section:

(a) "Commercial sexual activity" means that term as defined in section 462a of the Michigan penal code, 1931 PA 328, MCL 750.462a.

(b) ~~(a)~~ "Declarant" means a person who makes a statement.

(c) ~~(b)~~ "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(*i*) Causing or attempting to cause physical or mental harm to a family or household member.

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(d) ~~(c)~~ "Family or household member" means any of the following:

(*i*) A spouse or former spouse.

(*ii*) An individual with whom the person resides or has resided.

(*iii*) An individual with whom the person has or has had a child in common.

(*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(e) "Human trafficking" means a violation of chapter LXVIIA of

the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.762h.

(f) "Infliction or threat of physical injury" includes both of the following:

(*i*) Threatening to harm or physically restrain any individual or the creation of any scheme, plan, or pattern intended to cause an individual to believe that failure to perform an act would result in psychological, reputational, or financial harm to, or physical restraint of, any individual.

(*ii*) Facilitating or controlling an individual's access to a controlled substance, as that term is defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104, other than for a legitimate medical purpose.

(6) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.

Enacting section 1. This amendatory act does not take effect unless House Bill No. 4112 of the 101st Legislature is enacted into law.

Public Policy Position
SB 1015

Oppose

Explanation:
The Committee voted to oppose Senate Bill 1015. The Committee was not persuaded either that there is a need for the proposed legislation or that human trafficking prosecutions are sufficiently analogous to other contexts in which such hearsay testimony is presently permitted to warrant the extension of this practice. In addition, the Committee noted that hearsay testimony is inherently unreliable, and its use should therefore be sparing. Finally, the Committee believed that such evidence would often result in a constitutional issue under *Crawford v Washington,* 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

***Keller*-Permissible Explanation:**
Because the legislation would result in significant changes in how hearsay evidence is treated in certain prosecutions, Senate Bill 1015 is reasonably related to the functioning of the courts and therefore *Keller*-permissible.

Contact Persons:
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Public Policy Position
SB 1015

Oppose

Explanation:
Hearsay is unreliable evidence.

Position Vote:
Voted for position: 10
Voted against position: 3
Abstained from vote: 2
Did not vote: 0

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

Contact Person: Sofia V. Nelson
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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: SB 1027 – Diversion Program for Possession of Controlled Substances

Background
Senate Bill 1027 would amend the Code of Criminal Procedure, 1927 PA 175, to add a new Sec. 21b to Chapter XVI – Miscellaneous Provisions. The new section would permit a prosecutor's office, law enforcement agency, and social welfare agency to work in concert "to establish a supervision program that diverts individuals who are suspected of committing a drug-related criminal offense away from criminal prosecution and into the supervision program before the filing of criminal charges[.]" The bill would require such a diversion program to include appropriate substance use disorder treatment and to utilize a case management system that "maintains a record of each case that is diverted under the program from inception to disposition." In the event that a prosecutor's office and the social welfare agency agree that an individual has successfully completed the terms of supervision, the individual must not be prosecuted for the drug-related offense.

The bill defines "drug-related criminal offense" as a misdemeanor or felony violation of the laws of this state, other than an assaultive crime, that is committed by an individual because of that individual's substance use disorder.

A "social welfare agency" is defined as a community-based organization offering assistance to individuals in need.

***Keller* Considerations**
The sections and committees that reviewed SB 1027 reached different conclusions as to the bill's *Keller*-permissibility. The Criminal Law Section and Criminal Jurisprudence & Practice Committee both concluded that pretrial diversion necessarily impacts caseloads as well as which cases reach the court system and at what time. As a result, they believed SB 1027 to be reasonably related to the functioning of the courts and therefore *Keller*-permissible.

By contrast, the Access to Justice (ATJ) Policy Committee concluded that SB 1027 was not *Keller*-permissible because the proposed diversion would take place prior to any criminal charges being filed. In fact, the Committee noted that since the legislation only requires that an individual be "suspected of committing a drug-related criminal offense," with no further definition as to what that phrase is intended to mean, it is impossible to know whether the individuals in the proposed program would have even been arrested or merely subject to law enforcement suspicion. As such, the ATJ Policy Committee concluded that the connection to caseloads and the functioning of the courts was too

attenuated to meet the *Keller* requirement of having a reasonable relationship to the functioning of the courts.

In order to protect the associational rights of Bar members that animate *Keller*, the Bar must be cautious not to adopt a definition of what it means to be "reasonably related" to the functioning of the courts so capacious that it encompasses virtually everything arguably impacting caseloads or court budgets. While the Bar has historically been a strong supporter of diversion programs—notably problem-solving courts—the common thread in those programs is their direct connection to an initiated and ongoing legal proceeding. That thread is not present in SB 1027. While a pre-charge diversion program may have its own merits, as the ATJ Policy Committee suggested, its connection to the functioning of the courts is too attenuated to qualify as "reasonably related" to court functioning.

***Keller* Quick Guide**

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	• Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

The pre-charge diversion program proposed in SB 1027 is too attenuated from the functioning of the courts to satisfy *Keller*'s guiding standard of being reasonably related to the functioning of the courts. As such, the bill is not *Keller*-permissible.

SENATE BILL NO. 1027

May 05, 2022, Introduced by Senator MACDONALD and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding section 21b to chapter XVI.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER XVI

Sec. 21b. (1) A prosecutor's office, a law enforcement agency, and a social welfare agency may work in concert to establish a supervision program that diverts individuals who are suspected of committing a drug-related criminal offense away from criminal prosecution and into the supervision program before the filing of

criminal charges under this section. A program established under this section must include appropriate substance use disorder treatment. A program established under this section must utilize a case management system that maintains a record of each case that is diverted under the program from inception to disposition. If the prosecutor's office and the social welfare agency agree that an individual has successfully completed the terms of his or her supervision, he or she must not be prosecuted for the drug-related criminal offense.

(2) As used in this section:

(a) "Assaultive crime" includes any of the following:

(*i*) A violation described in section 9a of chapter X.

(*ii*) A violation of chapter XI of the Michigan penal code, 1931 PA 328, MCL 750.81 to 750.90h, not otherwise included in subparagraph (*i*).

(*iii*) A violation of section 110a, 136b, 234a, 234b, 234c, 349b, or 411h(2)(a) of the Michigan penal code, 1931 PA 328, MCL 750.110a, 750.136b, 750.234a, 750.234b, 750.234c, 750.349b, or 750.411h, or any other violent felony.

(b) "Drug-related criminal offense" means a misdemeanor or felony violation of the laws of this state, other than an assaultive crime, that is committed by an individual because of that individual's substance use disorder.

(c) "Social welfare agency" means a community-based organization offering assistance to individuals in need.

(d) "Violent felony" means that term as defined in section 36 of the corrections code of 1953, 1953 PA 232, MCL 791.236.

Public Policy Position
SB 1027

Oppose

Explanation:
The Committee voted to oppose Senate Bill 1027. The Committee believes that the legislation unnecessarily complicates pretrial diversion programs, which are already widely utilized in Michigan. In addition, as the provisions proposed in the legislation are discretionary, not mandatory, it was unclear to the Committee what improvement the legislation would offer over the status quo.

Position Vote:
Voted For position: 12
Voted against position: 3
Abstained from vote: 0
Did not vote (absence): 9

***Keller*-Permissible Explanation:**
Pretrial diversion necessarily impacts caseloads as well as which cases reach the court system at what time. As a result, Senate Bill 1027 is reasonable related to the functioning of the courts and therefore *Keller*-permissible.

Contact Persons:
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Public Policy Position
SB 1027

Support

Explanation:
The council supports drug diversion.

Position Vote:
Voted for position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

***Keller*-Permissibility Explanation:**
The improvement of the functioning of the courts.

Contact Person: Sofia V. Nelson
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SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: June 1, 2022

Re: Proposed Amicus Brief in *Woodman v Dep't of Corrections* (Docket No. #163382) Regarding Reasonable Attorneys' Fees in Pro Bono/Legal Aid Representations

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Issue for Board Determination

Whether to authorize the State Bar of Michigan, upon the request of the Standing Committee on Justice Initiatives and the Access to Justice Policy Committee, to join an amicus brief, alongside the Michigan State Planning Body and the Legal Services Association of Michigan, in *Woodman v Dep't of Corrections,* ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 163382).

Explanation of Facts and Procedural History

The underlying case was brought under the Michigan Freedom of Information Act ("FOIA"), 1976 PA 442, by a journalist seeking video footage of an altercation that took place in a Michigan Department of Corrections ("MDOC") facility which resulted in the death of a prisoner under suspicious circumstances. The plaintiff prevailed in the Court of Claims and sought attorney fees and costs under a provision of FOIA, which provides in pertinent part that:

> If person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record *prevails* in an action commenced under this section, the court shall award *reasonable attorneys' fees*, costs, and disbursements. If the person or public body *prevails in part*, the court may, in its discretion, award all or an appropriate portion of *reasonable attorneys' fees*, costs, and disbursements. MCL 15.240(6) (emphasis added)

The Court of Claims held that the plaintiff had prevailed completely in his FOIA action and was therefore statutorily entitled to reasonable attorneys' fees. However, the court, after finding that the requested attorneys' fees were reasonable, reduced the fees awarded by 90% based solely on the fact that the representation had been undertaken pro bono.

Cross-appeals then followed on both the issue of whether the plaintiff had prevailed completely or partially and the trial court's fee reduction. The Michigan Court of Appeals, reversing the Court of Claims, held that the plaintiff had only prevailed partially, because the plaintiff had requested unredacted video from the MDOC, but the MDOC had been permitted to make limited redactions to the video. For the Board's purposes, the distinction between prevailing completely and prevailing partially is relevant, because awarding attorneys' fees is mandatory under MCL 15.240(6) when a plaintiff prevails completely, but such an award is left to the court's discretion when a plaintiff prevails

only partially. The Court of Appeals also held that "[i]f the trial court determines that plaintiffs are entitled to attorney fees in this case, the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees." *Woodman v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket Nos. 353164 and 353165), p 5.

An application for leave to appeal the judgment of the Court of Appeals was filed with the Michigan Supreme Court and, on April 22, the Court directed argument on the application for leave to appeal and briefing on three questions.

Questions Presented and Proposed Amici Answers

The issues presented in this case have potentially far-reaching implications for access to legal services in Michigan, especially those provided by pro bono counsel and legal aid organizations. The Michigan Supreme Court has presented three questions in *Woodman*, two of which are relevant for to Board's consideration of the request to join an amicus brief:

(1) Whether the plaintiff-appellant prevailed in full and is thus statutorily entitled to attorney fees under MCL 15.240(6).

Amici Answer: When assessing whether or not a party has prevailed in an action for the purpose of determining whether an award of attorneys' fees is mandatory or discretionary, a court should apply a "prevailed substantially," as opposed to a "prevailed completely," standard.

(2) Whether the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to the plaintiff-appellants based solely on the pro bono nature of the representation, notwithstanding the Court of Claims' factual findings that the hourly rates and the number of hours worked were reasonable.

Amici Answer: It is inappropriate for a court to reduce the attorneys' fees awarded based solely on the pro bono nature of the representation and such reductions will have a significant, deleterious effect on access to justice by hampering representation by pro bono counsel and legal aid programs.

The SBM Standing Committee on Justice Initiatives voted unanimously (with two abstentions) to recommend that the Bar join an amicus brief articulating the aforementioned answers to the Court alongside the State Planning Body and the Legal Services Association of Michigan. The Access to Justice Policy Committee subsequently reviewed the matter and voted unanimously to support the request made by the Standing Committee on Justice Initiatives.

***Keller* Analysis and SBM Amicus Brief Policy Compliance**

The Board of Commissioners may authorize the filing of an amicus brief only when the brief complies with the Board's Amicus Brief Policy[1] and concerns *Keller*-permissible questions of public policy. Per the Policy, an appropriate brief must "constitute a significant contribution to the determination of the

[1] The Amicus Brief Policy, adopted by the Board of Commissioners on May 12, 1998, is appended to this memorandum for ease of access.

. . . issues involved" and advance a position that is, *inter alia,* "a matter of compelling public interest" or "of specific significance to lawyers or the legal profession." The amici position proposed by the Standing Committee on Justice Initiatives and the Access to Justice Policy Committee in *Woodman* is both.

The import of the questions presented in this matter might seem narrow at first. However, while this particular case arises in the FOIA context, it is quite likely that its resolution will reach into any number of other areas of law where the Legislature has provided for the award of reasonable attorneys' fees. In many cases, what constitutes a "reasonable fee" is governed by the *Smith* framework, a list of eight considerations derived from a combination of factors outlined in *Smith v Khouri*, 481 Mich 519, 751 NW2d 472 (2008), and MRPC 1.5(a). This framework or its precursors have been utilized by Michigan courts in the context of attorneys' fees awarded in case evaluation sanctions[2] and worker's compensation,[3] automobile no fault,[4] and FOIA[5] litigation. In fact, the Michigan Supreme Court has indicated that the *Smith* framework should apply whenever the reasonableness of a fee award is at issue. See *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 279, 884 NW2d 257, 263 (2016) ("The operative language triggering the *Smith* analysis is the Legislature's instruction that an attorney is entitled to a reasonable fee."). The proper construction of the *Smith* framework and its implications for access to legal services are the central issues that would be briefed by SBM in the proposed amicus brief.

The Legal Services Corporation's recently released 2022 Justice Gap Study found that 74% of low-income households (those with incomes below 125% of the federal poverty threshold) experienced one or more legal problems in the last year, including consumer issues, health care, housing, domestic violence, and income maintenance challenges. At the same time, low-income households reported that they do not receive any or enough legal help for 92% of their substantial civil legal problems. Pro bono counsel and legal aid organizations are essential to closing this justice gap and ensuring that individuals and families, especially those who are low-income or otherwise disadvantaged, have access to legal counsel and services.

Because funding for legal aid organizations is inadequate to meet the overwhelming need, and because rising costs and competing needs place growing pressure on attorneys and law firms engaged in pro bono work, the ability to secure reasonable attorneys' fees is critical to the viability of these programs and services. Reducing or eliminating all or most attorneys' fees awarded for pro bono engagements will make it far more difficult for these attorneys to provide legal services to their clients. More clients will be left unrepresented as a result. In addition, if the Court permits trial courts to reduce attorneys' fees based solely on the pro bono nature of the representation, it will place attorneys doing pro bono work at a unique disadvantage by preventing them from accessing fees that would be available to any other attorney litigating a similar matter. All this taken together, the potential ramifications of the Court's resolution of the questions presented in *Woodman* are clearly both a "matter of compelling public interest" and "of specific significance to lawyers or the legal profession."

[2] *Smith v Khouri*, 481 Mich 519, 529, 751 NW2d 472, 479 (2008).
[3] *Crawley v Schick*, 48 Mich App 728, 737, 211 NW2d 217, 222 (1973).
[4] *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588, 321 NW2d 653, 661 (1982).
[5] *Prins v Michigan State Police*, 299 Mich App 634, 642, 831 NW2d 867, 873 (2013).

Similarly, when analyzing the request to join the proposed amicus brief from the perspective of *Keller*-permissibility, the question of whether or not legal aid organizations and pro bono attorneys are able to receive a reasonable fee will have potentially significant implications for the availability of legal services to society. Additionally, when compared to self-representation, representation by an attorney serves to ensure that matters move through the legal system in an expeditious, professional manner. Competent legal representation reduces unnecessary proceedings and helps to conserve scarce judicial resources. Promoting representation by attorneys by providing access to reasonable fees results in improvement in the functioning of the courts. As the issues presented in *Woodman* are both reasonably—perhaps necessarily—related to both access to legal services and the functioning of the courts, the proposed amicus brief is *Keller*-permissible and may be considered on its merits.

Were the questions presented in *Woodman* strictly limited to the FOIA context, it would be more challenging to determine if an amicus brief by the Bar satisfied the requirements of *Keller* and the Amicus Brief Policy. Such a narrow question, it could be argued, is not "necessarily or reasonably" related to "regulating the legal profession or improving the quality of legal service[s]"—the "guiding standard" of *Keller*.[6] But that is not the case here. As explained in the above, the *Smith* framework at issue in *Woodman* reaches far beyond the FOIA context to potentially any situation in which the Legislature has provided for a reasonable fee award. Likewise, FOIA-specific questions would be unlikely to satisfy the Board's Amicus Brief Policy requirement that a brief only be authorized "to advance arguments with respect to legal issues and not factual questions" or that the brief advance a position that is either "a matter of compelling public interest" or "if specific significance to lawyers or the legal profession." Moreover, because of the Bar's unique insight, perspective, and interest in the resolution of the questions presented, the views expressed by the Bar in an amicus brief in *Woodman* will provide the Court with "a significant contribution to the determination of the . . . issues involved," as required by the Amicus Brief Policy.

Similarly, the question of whether a plaintiff prevails completely or partially controls whether awarding attorneys' fees is mandatory or discretionary under MCL 15.240(6). By adopting a "completely prevails" standard, as opposed to "substantially prevails," the Court, as can be seen from the facts in *Woodman* itself, would make it much more difficult for attorneys to recover a reasonable fee. Such a rule, not unlike the issues surrounding the *Smith* framework, erects barriers that are especially challenging for pro bono counsel and legal aid organizations, which result in fewer attorneys undertaking these engagements and therefore a reduced availability of legal services to society. This also results in the same challenges to the functioning of the courts noted above when more litigants are left unrepresented. Here again, while the underlying case in *Woodman* was FOIA litigation, the Court's decision in this case will be, at a minimum, persuasive authority governing other contexts where whether to award attorneys' fees or the amount of the fee turns on whether a party prevails and under what standard.

To illustrate the *Keller*-permissibility and Amicus Brief Policy compliance of briefing the two *Woodman* questions as amici, it is useful to draw a comparison with the third question at issue in the case, heretofore unremarked upon, posed by the Court: Whether the Court of Claims clearly erred in denying the plaintiff-appellants punitive damages. While the two issues discussed above both involve questions of law that reach far beyond the FOIA context and the facts of this case, this third question is much narrower and concerns only the application of a remedy established by the Legislature for

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

arbitrary and capricious FOIA denials on the facts and parties involved in *Woodman*. On its face, such a question falls far short of the "guiding standard" required by *Keller*, which is why it was omitted from the request for amicus briefing by the Standing Committee on Justices Initiatives, while the others were included. This third question also falls short of the Amicus Brief Policy requirement that an appropriate brief "advance arguments with respect to legal issues and not factual questions." An appropriate "case should not depend on specific facts that are unlikely to apply in most other situations."

Summary

The amicus brief requested by Standing Committee on Justice Initiatives and the Access to Justice Policy Committee is both *Keller*-permissible and compliant with the requirements of the Board's Amicus Brief Policy. The questions presented are reasonably—perhaps even necessarily—related to both the availability of legal services to society and improvement in the functioning of the courts. The proposed brief also "constitute[s] a significant contribution to the determination of the . . . issues involved" and would advance a position that is both "a matter of compelling public interest" and "of specific significance to lawyers or the legal profession."

AMICUS BRIEF POLICY

The Board of Commissioners may authorize the filing of an amicus curiae brief in appropriate cases. Briefs shall be authorized only:

1. When a brief would constitute a significant contribution to the determination of the issue or issues involved and only when the position thought to be advanced is:

(a) consistent with previously adopted State Bar policy; or
(b) a matter of compelling public interest which the Board then adopts as policy, or
(c) of specific significance to lawyers or the legal profession; and
(d) is consistent with Administrative Order 93-5 [Note: This is the Keller order, since replaced by Administrative Order 2004-1]

2. At the appellate level and generally only in the highest court where the issue is likely to be determined.

3. To advance arguments with respect to legal issues and not factual questions. The case should not depend on specific facts that are unlikely to apply in most other situations.

A request to participate in the case must be filed with the Executive Director of the State Bar and come to the attention of the Board of Commissioners with adequate leave time. The request should include an explanation of the facts, law, and proposed argument sufficient to allow the Board to make an informed decision. The proponent should consult with any other State Bar entity likely to be directly affected, and report the results of the consultation to the Board when making the request.

Preparation of an amicus brief must not post an undue financial burden for the State Bar.

If the brief is authorized, it shall be prepared on behalf of the State Bar of Michigan. If the brief is not authorized but otherwise complies with this policy, it may be prepared by the proponent on behalf of the proposing entity. See Bylaws, Article IX. A copy of any amicus brief shall be forwarded to the Executive Director of the State Bar contemporaneously with its filing in court.

Adopted May 12, 1998

Public Policy Position
Amicus Brief in *Woodman v Dep't of Corrections* (Docket No. #163382)

Support

Explanation:
The Committee voted unanimously to request that the Board of Commissioners authorize the State Bar of Michigan to join a joint amicus brief, alongside the Michigan State Planning Body and the Legal Services Association of Michigan, in *Woodman v Dep't of Corrections,* ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 163382). In *Woodman*, the Court is considering:

(1) Whether the plaintiff-appellant prevailed in full and is thus statutorily entitled to attorney fees under MCL 15.240(6); and

(2) Whether the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to the plaintiff-appellants based solely on the pro bono nature of the representation, notwithstanding the Court of Claims' factual findings that the hourly rates and the number of hours worked were reasonable.

The Court's resolution of these question will have a significant impact on both pro bono counsel and legal aid organizations, and by extension access to civil justice in Michigan. The Committee believes that the Bar is uniquely situated to argue, consistent with the requirements of *Keller*, that it is inappropriate for a court to reduce the attorneys' fees awarded based solely on the pro bono nature of the representation and that the Court should move from a "prevailed completely" to a "prevailed substantially" standard.

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 2
Did not vote (absence): 4

***Keller* Permissibility Explanation:**
The questions presented in *Woodman* will have a significant impact on, and thus are necessarily related to, both the availability of legal services to society and the functioning of the courts in Michigan.

Contact Person:
Ashley E. Lowe alowe@lakeshorelegalaid.org

Public Policy Position
Amicus Brief in *Woodman v Dep't of Corrections* (Docket No. #163382)

Support

Explanation:
The Committee voted unanimously to support the request from the Standing Committee on Justice Initiatives that the State Bar of Michigan join a joint amicus brief, alongside the Michigan State Planning Body and the Legal Services Association of Michigan, in *Woodman v Dep't of Corrections,* ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 163382). The resolution of the questions at stake in this litigation will have a profound impact on pro bono counsel and legal aid organizations, both of which are essential to ensuring access to justice and closing our gaping civil justice gap. The Bar has a unique and important perspective on, and interest in, the questions presented in *Woodman* that make it, and the other amici participating in the proposed brief, ideally situated to meaningfully inform the Court's deliberations in this matter.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 10

***Keller* Permissibility Explanation:**
The questions presented in *Woodman* will have a significant impact on, and thus are necessarily related to, both the availability of legal services to society and the functioning of the courts in Michigan.

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Order

Michigan Supreme Court
Lansing, Michigan

April 22, 2022

163382-3

SPENCER WOODMAN,
Plaintiff-Appellant,

v

SC: 163382
COA: 353164
Ct of Claims: 17-000082-MZ

DEPARTMENT OF CORRECTIONS,
Defendant-Appellee.
_____/

GEORGE JOSEPH,
Plaintiff-Appellant,

v

SC: 163383
COA: 353165
Ct of Claims: 17-000230-MZ

DEPARTMENT OF CORRECTIONS,
Defendant-Appellee.
_____/

On order of the Court, the application for leave to appeal the June 24, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) they prevailed in full, and are thus statutorily entitled to attorney fees under MCL 15.240(6); (2) the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to the appellants based solely on the pro bono nature of Honigman LLP's representation, notwithstanding the Court of Claims' factual findings that Honigman's hourly rates and the number of hours worked were reasonable; and (3) the Court of Claims clearly erred in denying the appellants punitive damages under MCL 15.240(7). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

April 22, 2022

Clerk

a0419

STATE OF MICHIGAN

COURT OF APPEALS

SPENCER WOODMAN,

Plaintiff-Appellant/Cross-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 24, 2021

No. 353164
Court of Claims
LC No. 17-000082-MZ

GEORGE JOSEPH,

Plaintiff-Appellant/Cross-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee/Cross-Appellant.

No. 353165
Court of Claims
LC No. 17-000230-MZ

Before: GADOLA, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

In these consolidated cases brought under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiffs, Spencer Woodman and George Joseph, appeal as of right the order of the trial court granting in part and denying in part their motion for attorney fees, costs, and punitive damages. Defendant, the Michigan Department of Corrections (MDOC), cross-appeals from the same order. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

On September 27, 2016, MDOC inmate Dustin Szot died after a physical altercation with another prisoner at defendant's Ionia Bellamy Creek Correctional Facility. The parties do not

dispute that corrections officers discharged Tasers on the inmates to stop the fight, and that it was determined that Szot died from blunt-force trauma.

Plaintiffs are journalists who separately submitted requests under Michigan's FOIA seeking video and audio recordings of the altercation from defendant. Woodman requested "a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot . . . . [including] footage from any and all available cameras that captured this incident as well as any available accompanying audio records." Defendant denied Woodman's request, asserting that the records were exempt from disclosure under MCL 15.243(1)(c).[1] Cheryl Groves, defendant's FOIA Coordinator, asserted that disclosure "could threaten the security of [the correctional facility] by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners." Woodman appealed the denial to defendant, which denied the appeal on the basis that disclosing the videos "would reveal the recording and security capabilities of [the correctional facility's] video monitoring system."

Joseph submitted a request to defendant under FOIA for "a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot . . . . [including] footage from any and all available cameras that captured any parts of the confrontation, including but not limited to cameras installed on tasers deployed . . . . [and] any audio records that accompany footage found to be responsive to this request." Defendant denied Joseph's request, stating that "[t]o the extent these records are [available], they are exempt from disclosure under [MCL 15.243(1)(c)]."

Plaintiffs each filed complaints, arguing that defendant wrongfully denied their requests under the FOIA. Plaintiffs asserted that the video recordings were not exempt from disclosure, and requested that the trial court order defendant to provide "a complete, unredacted copy of the Video and any accompanying audio recordings[.]" The parties thereafter agreed to the consolidation of the two cases.

During her deposition, Groves explained that whenever defendant received a FOIA request, the Assistant FOIA Coordinator would review the request, determine what information was exempt, redact information that was not going to be released, and provide Groves with the request and the proposed response. Groves testified that she would review the information and approve the response. Groves further testified that defendant never released video footage, however, denying any such request under the "custody and safety security exemption." Groves testified that no one from defendant's FOIA office reviewed the videos in this case before denying plaintiffs'

[1] MCL 15.243(1)(c) provides that "[a] public body may exempt from disclosure as a public record under this act . . . [a] public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure."

FOIA requests for the recordings, but instead complied with the agency policy of not releasing internal video from a correctional facility.

Plaintiffs moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact and plaintiffs were entitled to judgment as a matter of law because defendant had violated the FOIA by denying their requests for information. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10) on the basis that the videos were exempt from disclosure under MCL 15.243(1)(a), (c), and (u), and supported the motion with an affidavit from the correctional facility inspector, who averred that the exemptions applied.

The trial court denied defendant's motion for summary disposition under MCR 2.116(C)(8) on the basis that the motion relied on documents outside the pleadings. The trial court also concluded that regardless of whether the exemptions applied, defendant's response to plaintiffs' requests violated FOIA because defendant merely issued blanket denials without reviewing the videos requested. The trial court ordered defendant to produce the videos for an *in camera* review, and held in abeyance the parties' motions for summary disposition pending the review. The trial court permitted defendant to submit the video in a format that obscured the faces of the employees and prisoners in the videos to protect those individuals. Defendant provided the unredacted videos for *in camera* review, explaining that it did not have time to obscure the images of the individuals in the videos and requested that it be allowed to complete this task before disclosure of the videos.

The trial court determined that the videos did not reveal the placement of security cameras, but nonetheless appointed a Special Master to review the videos and report whether the recordings contained any security concerns. The Special Master reported that the videos did not reveal any security concerns except to the extent the videos made it possible to identify staff members and inmates. The trial court ordered that defendant disclose the videos to plaintiffs, but permitted defendant to redact the videos before disclosing them by obscuring the images of individuals in the videos. The trial court denied defendant's motion for reconsideration of its order.

Plaintiffs thereafter moved for attorney fees and costs in the amount of $211,780.75, and $2,000 in punitive damages. Plaintiffs asserted that as the prevailing party, they were entitled to reasonable attorneys' fees and costs under the FOIA, and that they were entitled to punitive damages because defendant's decision to deny their FOIA requests was arbitrary and capricious. Defendant argued that plaintiff had prevailed only in part because the trial court allowed defendant to redact the videos, and therefore under the FOIA the award of attorney fees was discretionary with the trial court.

The trial court held that plaintiffs had prevailed in full and accordingly were statutorily entitled to reasonable attorney fees and costs under the FOIA. The trial court found that the attorney fees requested were billed at a reasonable hourly rate and that the number of hours worked was not unreasonable. The trial court observed, however, that plaintiffs had been represented jointly by the law firm of Honigman LLP in a pro bono capacity and the American Civil Liberties Union Fund of Michigan (ACLU). The trial court awarded the ACLU its requested attorney fees of $14,200, but awarded Honigman only ten percent of its requested attorney fees in the amount of $19,218.63. The trial court reasoned that it was awarding partial fees because "in this case, dollars have not been necessarily spent except for those dollars that are attributable to counsel for

the ACLU. Instead those were pro bono dollars." The trial court denied plaintiffs' request for punitive damages.

Plaintiffs appeal from the trial court's order, challenging the trial court's award of the reduced amount of attorney fees and the trial court's denial of punitive damages. Defendant cross-appeals from the same order, challenging the trial court's determination that plaintiffs prevailed in full and thus are entitled to attorney fees and costs under the FOIA.

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a trial court's interpretation and application of the FOIA. *Mich Open Carry, Inc v Mich State Police*, 330 Mich App 614, 621; 950 NW2d 484 (2019). We review for clear error the trial court's factual determinations in a FOIA action. *King v Mich State Police Dep't*, 303 Mich App 162, 174; 841 NW2d 914 (2013). Whether a defendant acted arbitrarily and capriciously within the meaning of the FOIA is a factual finding that we review for clear error. See *Meredith Corp v Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003). A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake was made. *Nash Estate v Grand Haven*, 321 Mich App 587, 605; 909 NW2d 862 (2017). We review a trial court's award of attorney fees under the FOIA for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.*

B. ATTORNEY FEES UNDER FOIA

Defendant contends that the trial court erred by concluding that plaintiffs prevailed in full on their FOIA claims and therefore are statutorily entitled to attorney fees and costs under the act. Defendant argues that because it was permitted to respond to plaintiffs' FOIA requests by providing redacted videos, plaintiffs prevailed only in part in their FOIA claims, and as a result the statute does not mandate the award of attorney fees. By contrast, plaintiffs contend that the trial court correctly determined that they prevailed in full, but abused its discretion by limiting the amount of attorney fees awarded due to the pro bono fee arrangement.

Under Michigan's FOIA, "all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2); see also *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014). Michigan's FOIA therefore generally mandates the full disclosure of public records in the possession of a public body, *Ellison v Dep't of State*, 320 Mich App 169, 176; 906 NW2d 221 (2017), and is described as a pro-disclosure statute. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2003). When a request for records is made under the FOIA, a public body has a duty to provide access to the records, or to copies of the requested records, unless those records are exempt from disclosure. *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 380; 872 NW2d 223 (2015).

If a public body denies all or part of a request for records, the requesting person may commence a civil action in circuit court. MCL 15.240(1)(b). If the requesting person thereafter

"prevails" in that action, MCL 15.240(6) provides for the award of attorney fees, costs, and disbursements as follows:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

Thus, if a plaintiff prevails completely in a FOIA action, the award of attorney fees by the trial court is mandatory; if a party prevails partially in the FOIA action, the decision to award attorney fees is discretionary with the trial court. *Nash Estate*, 321 Mich App at 606. One "prevails" under MCL 15.240(6) if "the action was reasonably necessary to compel the disclosure [of public records], and . . . the action had a substantial causative effect on the delivery of the information to the plaintiff." *Amberg*, 497 Mich at 34. "[A]ttorney fees and costs *must* be awarded under the first sentence of MCL 15.240(6) only when a party prevails *completely*." *Local Area Watch v Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004).

In this case, plaintiffs prevailed because their actions were reasonably necessary to obtain the requested videos from defendant. However, plaintiffs demanded in their complaints the production of "a complete, unredacted copy of the Video . . . ." Defendant was permitted to redact certain information from the videos, and thus plaintiffs were determined to be entitled to only a portion of the records requested. We therefore conclude that under MCL 15.240(6), plaintiffs prevailed in part. Because plaintiffs prevailed in part in their FOIA claims, whether to award plaintiffs all or an appropriate portion of reasonable attorney fees, costs, and disbursements is discretionary with the trial court. See *Nash Estate*, 321 Mich App at 606; see also *Local Area Watch*, 262 Mich App at 150-151. We therefore vacate the trial court's award of attorney fees and costs to plaintiffs and remand this matter to the trial court for determination whether, in the trial court's discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements.

If the trial court determines in its discretion that plaintiffs are entitled to an award of attorney fees in this case, we observe that "[t]he touchstone in determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is *reasonableness*," *Prins v Mich State Police*, 299 Mich App 634, 642; 831 NW2d 867 (2013), and thus the amount of any attorney fees awarded under FOIA must be *reasonable* fees, regardless of the *actual* fees. See *Smith v Khouri*, 481 Mich 519, 528 n 12; 751 NW2d 472 (2008). That is, the question is one of the reasonableness of the attorney fees sought, not the price actually agreed to or paid by the party to his or her attorney, or, in this case, the actual hourly rates and total amounts billed by the law firm to the party. If the trial court determines that plaintiffs are entitled to attorney fees in this case, the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees.

When determining the reasonableness of an attorney fee, the court should first determine the fee customarily charged in the locality for similar legal services, which can be established "by

testimony or empirical data found in surveys and other reliable reports." *Id*. at 530-532. "This number should be multiplied by the reasonable number of hours expended in the case . . . ." *Id*. at 531. The trial court should then consider the following nonexhaustive factors:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,
>
> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
>
> (7) the time limitations imposed by the client or by the circumstances, and
>
> (8) whether the fee is fixed or contingent. [*Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 282; 884 NW2d 257 (2016).]

Building on the Court's decision in *Smith*, our Supreme Court in *Pirgu* combined the six factors cited in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and the eight factors listed in listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct.[2] See *Pirgu*, 499 Mich at 281. To facilitate appellate review, the trial court "should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors." *Id*. at 282.

C. PUNITIVE DAMAGES

Plaintiffs also contend that the trial court erred by declining to award plaintiffs punitive damages. We disagree. MCL 15.240(7) provides, in pertinent part:

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or

[2] In *Prins*, 299 Mich App at 645, this Court stated, "although *Smith* is not a FOIA case, it controls for purposes of determining reasonable attorney fees in FOIA cases . . . ." We conclude that *Pirgu*, which was released after *Prins*, is also applicable in FOIA cases.

compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. . . .

A plaintiff is entitled to punitive damages under MCL 15.240(7) only if the defendant arbitrarily and capriciously refused to provide the requested information, and the court ordered disclosure of an improperly withheld document. *Local Area Watch*, 262 Mich App at 153. Here, only the first element, being whether defendant's refusal was arbitrary and capricious, is in dispute. The term "arbitrary and capricious" is not defined by the FOIA. *Prins*, 299 Mich App at 647. In *Laracey v Fin Institutions Bureau*, 163 Mich App 437, 440; 414 NW2d 909 (1987), this Court stated:

> Although the terms "arbitrarily" and "capriciously" are not defined in the [FOIA] statute, they have generally accepted meanings. As noted in *Bundo v City of Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976), citing *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946), the United States Supreme Court has defined these terms as follows:
>
> > Arbitrary is: " '[W]ithout adequate determining principle . . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' "
> >
> > Capricious is: " '[A]pt to change suddenly; freakish; whimsical; humorsome.' "

This Court has held that even when a defendant's refusal to disclose records violated the FOIA, the defendant's actions were not necessarily arbitrary or capricious if the defendant's decision was based on "consideration of principles or circumstances and was reasonable, rather than whimsical." *Meredith Corp*, 256 Mich App at 717 (quotation marks and citations omitted). This Court also has found that a denial by the MDOC of a FOIA request based upon the desire to protect employee-witnesses from potential retribution and upon a reasoned belief that internal memoranda were exempt from disclosure under the FOIA was not arbitrary or capricious. *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 185-186; 501 NW2d 207 (1993).

In denying plaintiffs' request for punitive damages in this case, the trial court noted that defendant's response to plaintiffs' FOIA requests was based on legitimate security concerns, and was insufficient not because the security concerns were not legitimate but because defendant had a policy of denying all requests for video footage regardless of the content of the video. MCL 15.243(1) provides, in relevant part:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by

> persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
>
> * * *
>
> (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

In this case, defendant's inspector averred that disclosure of the requested videos would present an increased danger to the unnamed prisoner in the video and to the facility, particularly in light of recent threats against the facility, would reveal the layout of the premises and prisoner movement plans, and reveal the technical capabilities, equipment, and the tactics and procedures defendant's officers use in responding to confrontations. Defendant's denials of plaintiffs' FOIA requests thus were not arbitrary because they were not arrived at "[w]ithout adequate determining principle" or "without consideration or adjustment with reference to principles, circumstances, or significance . . . ." *Laracey*, 163 Mich App at 440 (quotation marks and citations omitted). Further, defendant's denials of plaintiffs' FOIA requests were not capricious. Although the record indicates that defendant's routine denial of requests for video footage was an inadequate response under the FOIA, the denials of plaintiffs' FOIA requests were uniform and consistent, and not subject to sudden change. See *id*. Accordingly, the trial court did not err by declining to award punitive damages. See *Local Area Watch*, 262 Mich App at 153.

The trial court's order denying plaintiffs punitive damages is affirmed. The trial court's order determining that plaintiffs prevailed in full and therefore are statutorily entitled to attorney fees, costs, and disbursements under the FOIA is reversed, and this matter is remanded to the trial court for determination within the trial court's discretion whether plaintiffs, having partially prevailed, are awarded any, all, or a portion of reasonable attorney fees, costs, and disbursements. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ David H. Sawyer
/s/ Michael J. Riordan

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by July 1, 2022. 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 a new instruction, M Crim JI 11.25a, for the crime of brandishing a firearm in violation of MCL 750.234e. This jury instruction is entirely new.

[NEW] M Crim JI 11.25a Brandishing a Firearm

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

(2) First, that the defendant possessed a firearm or had control of a firearm. A firearm is a weapon that will shoot out a projectile by explosive action, is designed to shoot out a projectile by explosive action, or can readily be converted to shoot out a projectile by explosive action.[1]

(3) Second, that while possessing or controlling the firearm, the defendant was in a public place.

(4) Third, that while possessing or controlling the firearm in a public place, the defendant pointed it, waved it about, or displayed it in a threatening manner.

(5) Fourth, that the defendant deliberately pointed, waved about, or displayed the firearm in a threatening manner.

(6) Fifth, that when the defendant pointed, waved about, or displayed the firearm, [he / she] did so intending to cause another person or other persons to be fearful.[2]

Use Note

1. The court need not read this sentence where it is undisputed that the weapon alleged to have been brandished was a firearm.

2. This is a specific intent crime.

Public Policy Position
M Crim JI 11.25a

Support

Explanation:
The Committee voted to support the Model Criminal Jury Instruction 11.25a regarding the crime of brandishing a firearm in violation of MCL 750.234e.

Position Vote:
Voted For position: 18
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 11.25a

Oppose

Explanation:
The fourth and fifth paragraphs go beyond scope of statute.

Position Vote:
Voted for position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote: 0

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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==========

PROPOSED

The Committee proposes a new instruction, M Crim JI 19.1a, for the crime of kidnapping a child in violation of MCL 750.350. This jury instruction is entirely new.

[NEW] M Crim JI 19.1a Taking a Child by Force or Enticement

(1) The defendant is charged with unlawfully taking a child by force or enticement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used force or trickery to take, carry, lure, or lead away [*state name of child*].

(3) Second, that when the defendant took, carried, lured, or led [him / her] away, [*state name of child*] was less than fourteen years old.

(4) Third, that the defendant intended to keep or conceal [*state name of child*] from

[*Choose from the following:*]

(a) the parent or legal guardian who had legal [custody / visitation rights] at the time.

(b) [his / her] adoptive parent.

(c) the person who had lawful charge of [*state name of child*] at the time.[1]

(5) Fourth, that the defendant was not the adoptive or natural parent of [*state name of child*].[2]

Use Note

1. This is a specific intent crime.

2. Read this paragraph only where the defendant offers evidence of adoptive or natural parenthood.

Public Policy Position
M Crim JI 19.1a

Support

Explanation:
The Committee voted to support Model Criminal Jury Instruction 19.1a regarding the crime of kidnapping a child in violation of MCL 750.350.

Position Vote:
Voted For position: 18
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 19.1a

Support

Position Vote:
Voted for position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 0

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

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==========

PROPOSED

The Committee proposes to amend jury instruction M Crim JI 19.6, the instruction for charges under the parental kidnapping statute, MCL 750.530a. The amendment entirely re-writes the instruction.

[AMENDED] M Crim JI 19.6 Parental Taking or Retaining a Child

(1) The defendant is charged with unlawfully taking or retaining a child. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that on [*date and time alleged*], [*name complainant*]:

[*Choose one of the following:*]

(a) was the [parent / legal guardian] of [*name of child*] who had [custody of (*name of child*) / parenting time rights with (*name of child*)] under a court order.

(b) was the adoptive parent of [*name child*].

(c) had lawful charge of [*name child*].

(3) Second, that on [*date and time alleged*], the defendant [took (*name of child*) / kept (*name of child*) for more than 24 hours].

(4) Third, that when the defendant [took (*name of child*) / kept (*name of child*) for more than 24 hours], [he / she] intended to keep or conceal [*name child*] from [*name complainant*].[1]

Use Note

This instruction applies only where parental kidnapping is charged under MCL 750.350a. The Committee of Model Criminal Jury Instructions takes the view that whether a defendant is a "parent" under the statute is a legal question for the court, not a factual question for the jury.

1. This is a specific intent crime. Neither MCL 750.350a nor the House Legislative Analysis accompanying it directly addresses the question as to whether apparent consent or a reasonable belief that lawful authority to take or keep the child exists, may be a defense to this crime, or otherwise negates an essential element of the crime.

Public Policy Position
M Crim JI 19.6

Support

Explanation:
The Committee voted to support Model Criminal Jury Instruction 19.6 regarding the instruction for charges under the parental kidnapping statute, MCL 750.530a.

Position Vote:
Voted For position: 18
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 19.6

Support

Position Vote:
Voted for position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 0

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

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==========

PROPOSED

The Committee proposes a new instruction, M Crim JI 19.9, for the crime of a prisoner taking a hostage in violation of MCL 750.349a. This jury instruction is entirely new.

[NEW] M Crim JI 19.9 Prisoner Taking a Person Hostage

(1) The defendant is charged with being a prisoner and taking a person hostage. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was a prisoner at [*identify facility where the defendant was incarcerated*].

(3) Second, that while still subject to incarceration at [*identify facility where the defendant was incarcerated*], the defendant used threats, intimidation, or physical force to take, lure away, hold, or hide [*name complainant*].

(4) Third, that the defendant took, lured away, held, or hid [*name complainant*] as a hostage.

> To hold a person hostage means that the defendant intended to use the person as a shield or to use the person as security to force someone else to [do something / perform some act] or [not do something / to refrain from performing some act / hold off on performing some act].[1]

(5) Fourth, the defendant intended to hold [*name complainant*] as a hostage and knew [he / she] did not have the authority to do so.

Use Note

1. The court may read all of the options in this paragraph or only those that apply to according to the charges or evidence.

Public Policy Position
M Crim JI 19.9

Support

Explanation:
The Committee voted to support Model Criminal Jury Instruction 19.9 regarding the crime of a prisoner taking a hostage in violation of MCL 750.349a.

Position Vote:
Voted For position: 18
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 19.9

Support

Position Vote:
Voted for position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 0

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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==========

PROPOSED

The Committee proposes instructions, M Crim JI 34.7, 34.7a, 34.8, 34.9, 3.10, 34.11, 34.12, 34.13, 34.14 and 34.15, for the Medicaid-related crimes found in MCL 400.603 to 400.611. These jury instructions are entirely new.

[NEW] M Crim JI 34.7 Medicaid Fraud – False Statement

(1) The defendant is charged with making a false statement or representation to obtain Medicaid benefits. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was [making an application for Medicaid benefits / having rights to a Medicaid benefit determined].

(3) Second, that when defendant was [making an application for Medicaid benefits / having rights to a Medicaid benefit determined] [he / she] made a false statement or false representation.

(4) Third, that the defendant knew the statement or representation was false.

(5) Fourth, that the false statement or false representation would matter or make a difference to a decision about benefits or the rights to benefits.

[NEW] M Crim JI 34.7a Medicaid Fraud – Concealing Events

(1) The defendant is charged with the crime of concealing or failing to disclose an event affecting the right to Medicaid benefits. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [was initially applying for Medicaid / was receiving a Medicaid benefit / was initially applying for Medicaid on another person's behalf / had applied on another person's behalf for Medicaid benefits and the other person was receiving Medicaid benefits].

(3) Second, that an event occurred that affected [the defendant's initial right to receive a Medicaid benefit / the defendant's continuing right to receive a Medicaid benefit / the other person's initial right to receive a Medicaid benefit / the other person's continuing right to receive a Medicaid benefit].

In this case, the event that is alleged to have occurred was [*describe event that affected right to benefits*].

(4) Third, that the defendant had knowledge of the occurrence of the event.

(5) Fourth, that the defendant concealed or failed to disclose the event.

(6) Fifth, that at the time the defendant concealed or failed to disclose the event that affected [defendant's right to receive a Medicaid benefit / the other person's right to receive a Medicaid benefit], [he / she] did so with an intent to obtain a benefit to which [the defendant / the other person] was not entitled or a benefit in an amount greater than [the defendant / the other person] was entitled.

[NEW] M Crim JI 34.8 Public Welfare Program – Kickback, Bribe, Payment, or Rebate

(1) The defendant is charged with the crime of making or receiving a kickback, bribe, payment, or rebate in connection with public welfare program goods or services. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [solicited, offered, or received a kickback or bribe / made or received a payment in connection with a kickback or bribe / received a rebate of a fee or charge for referring an individual to another person for the furnishing of goods and services].

(3) Second, that the [kickback or bribe / payment made or received in connection with a kickback or bribe / rebate of a fee or charge for referring an individual to another person] was intended to secure the furnishing of goods or services for which payment was or could have been made in whole or in part under the Social Welfare Act.

[NEW] M Crim JI 34.9 Medicaid Facilities – False Statement

(1) The defendant is charged with the crime of making or inducing a false statement or representation about an institution or facility. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly and willfully [made / induced the making of / tried to cause someone to make] a false statement or false representation.

(3) Second, that the false statement or false representation was about the conditions in or operation of an institution or facility.

(4) Third, that the defendant knew at the time [he / she] [made / induced the making of / tried to cause someone to make] the statement or representation that it was false.

(5) Fourth, that when the defendant [made / induced the making of / tried to cause someone to make] the false statement or representation, [he / she] intended that it would be used for initial certification or recertification to qualify the institution or facility as a hospital, skilled nursing facility, intermediate care facility, or home health agency.

(6) Fifth, that the false statement or representation would have mattered or made a difference in the initial certification or recertification decision.

[NEW] M Crim JI 34.10 Making a False Claim for Goods or Services Under the Social Welfare Act

(1) The defendant is charged with the crime of making a false claim under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, presented, or caused to be made or presented a claim to a state employee or officer.

(3) Second, that the claim that the defendant made, presented, or caused to be made or presented was to obtain goods or services under the Social Welfare Act.

(4) Third, that the claim was false.

(5) Fourth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his / her / their] conduct and aware that what [he / she / they] said or did could cause the payment of a Medicaid benefit. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.11 Making a False Claim That Goods or Services Were Medically Necessary Under the Social Welfare Act

(1) The defendant is charged with the crime of making a false statement that goods or services were medically necessary under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, presented, or caused to be made or presented a claim for goods or services under the Social Welfare Act, [*describe goods or services claimed*].

(3) Second, that the defendant claimed that [*describe goods or services claimed*] [was / were] medically necessary according to professionally accepted standards.

(4) Third, that the claim that the [*describe goods or services claimed*] [was / were] medically necessary was false.

(5) Fourth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his / her / their] conduct and aware that what [he / she / they] said or did could cause the payment of a Medicaid benefit for goods or services that were not medically necessary. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.12 Making a False Statement or Record to Avoid or Decrease a Payment to the State Under the Social Welfare Act

(1) The defendant is charged with the crime of making or using a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the state under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, used, or caused to be made or used a record or statement to a state employee or an officer. The [record / statement] was [*describe record or statement alleged*].

(3) Second, that the record or statement related to a claim made under the Social Welfare Act.

(4) Third, that the record or statement concealed, avoided, or decreased an obligation to pay or send money or property to the state of Michigan, or could have concealed, avoided, or decreased such an obligation.

(5) Fourth, that the record or statement was false.

(6) Fifth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his / her / their] conduct and aware that what [he / she / they] said or did could avoid or decrease a payment or transfer of money or property to the state of Michigan. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.13 Medicaid False Claims -- Knowledge

It is not necessary that the prosecutor show that the defendant had knowledge of similar acts having been performed in the past by a person acting on the defendant's behalf, nor to show that the defendant had actual notice that the acts by the persons acting on the defendant's behalf occurred to establish the fact that a false statement or representation was knowingly made.

Use Note

This instruction is used in cases where someone other than the defendant made a false claim that caused a benefit to be paid or provided to the defendant.

[NEW] M Crim JI 34.14 Medicaid Claims – Rebuttable Presumption

(1) You may, but you do not have to, infer that a claim for a Medicaid benefit was knowingly made [if the defendant's actual, facsimile, stamped, typewritten, or similar signature was used on the form required for the making of a claim / if the claim was submitted by computer billing tapes or other electronic means and the defendant had previously notified the Michigan Department of Social Services that claims will be submitted by computer billing tapes or other electronic means].

(2) The prosecutor still bears the burden of proving all of the elements beyond a reasonable doubt.

[NEW] M Crim JI 34.15 Medicaid False Claims – Venue

The prosecutor must also prove beyond a reasonable doubt that the crime[s] occurred on or about [*state date alleged*] within [*identify county*] County.

Use Note

The language describing the county should be omitted if the Attorney General has chosen Ingham County as the venue under MCL 400.611.

Public Policy Position
M Crim JI 34.7 – 34.15

Support

Explanation:
The Committee voted to support Model Criminal Jury Instructions 34.7 – 34.15 regarding the Medicaid-related crimes found in MCL 400.603 to 400.611.

Position Vote:
Voted For position: 18
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 34.7 – 34.15

Support

Position Vote:
Voted for position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 0

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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==========

PROPOSED

The Committee proposes a new instruction, M Crim JI 41.1, for the crime of trespassing for eavesdropping or surveillance in violation of MCL 750.539b. This jury instruction is entirely new.

[NEW] M Crim JI 41.1 Trespassing For Eavesdropping or Surveillance

(1) The defendant is charged with the crime of trespassing to engage in eavesdropping or surveillance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was on property owned or possessed by [*name owner(s)* or *possessor(s)*] without [*his / her / their*] permission or without [*his / her / their*] knowledge.

(3) Second, that the defendant went on [*identify complainant(s)*]'s property to [listen to, record, amplify, or transmit any part of a private conversation, discussion, or discourse / secretly observe the activities of another person or other persons].

(4) Third, that the defendant intended to [listen to, record, amplify, or transmit the private conversation of (*identify complainant(s)*) without the permission of all participants in the conversation / spy on and invade the privacy of the person or persons (he / she) was observing].

Public Policy Position
M Crim JI 41.1

Support

Explanation:
The Committee voted to support Model Criminal Jury Instruction 41.1 regarding the crime of trespassing for eavesdropping or surveillance in violation of MCL 750.539b.

Position Vote:
Voted For position: 18
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 41.1

Support

Position Vote:
Voted for position: 13
Voted against position: 1
Abstained from vote: 0
Did not vote: 0

Contact Person: Sofia V. Nelson
Email: sofia.nelson@gmail.com