Agenda
Public Policy Committee
July 20, 2023 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……Daniel D. Quick, Chairperson

A. Reports

1. Approval of June 7, 2023 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2022-14: Proposed Amendment of MCR 2.311

The proposed amendment of MCR 2.311 would allow a mental examination to be recorded by video or audio under certain circumstances.

Status:	08/01/23 Comment Period Expires.
Referrals:	04/25/23 Civil Procedure & Courts Committee; Insurance Law Section; Negligence Law Section.
Comments:	None at this time.
Liaison:	Nicholas M. Ohanesian

2. ADM File No. 2022-11: Proposed Amendments of MCR 2.511 and 6.412

The proposed amendments of MCR 2.511(C) and 6.412(C) align with Fed Crim P 24 and Fed Civ R 47 and would require the court to allow the attorneys or parties to conduct voir dire in civil and criminal proceedings if the court examines the prospective jurors. The proposed requirement is subject to the court's determination that the parties' or attorneys' questions are proper.

Status:	08/01/23 Comment Period Expires.
Referrals:	04/25/23 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section; Negligence Law Section. Comments submitted to the Court are included in the materials.
Liaison:	Brian D. Shekell

3. ADM File No. 2023-05: Proposed Amendment of MCR 3.613

To avoid confusion, the proposed amendment of MCR 3.613 incorporates the amendment of MCR 3.613 (ADM File No. 2021-21), which takes effect July 1, 2023.

The proposed amendment of MCR 3.613 in this ADM file would add a new subrule (H) that is similar to MCR 2.002(I) and would require a court to pay the costs of publication in a name change proceeding if fees are waived under MCR 2.002, publication is required by law, and publication has not been waived under MCR 3.613.

Status:	09/01/23 Comment Period Expires.
Referrals:	05/31/23 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Children's Law Section. Comment submitted to the Court is included in the materials.
Liaison:	Judge Cynthia D. Stephens (Ret.)

4. ADM File No. 2022-26: Proposed Amendment of MCR 6.425

The proposed amendment of MCR 6.425(D)(1)(c) would require a trial court, on the record before sentencing, to personally address the defendant regarding his or her allocution rights and to address any victim who is present and allow the victim to be reasonably heard, similar to FR Crim P 32(i)(4).

Status: 08/01/23 Comment Period Expires.
Referrals: 04/25/23 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: Takura N. Nyamfukudza

5. ADM File No. 2023-08: Amendment of MCR 7.202

The amendment of MCR 7.202 includes in the definition of "final judgment" or "final order" postjudgment orders deciding a claim for remaining proceeds under MCL 211.78t.

Status: 08/01/23 Comment Period Expires.
Referrals: 04/25/23 Civil Procedure & Courts Committee; Appellate Practice Section.
Comments: None at this time.
Liaison: Aaron V. Burrell

C. Legislation

1. Tax Tribunal

HB 4563 (Hoadley) Property tax: tax tribunal; electronic hearings of the tax tribunal; provide for. Amends sec. 3a of 1976 PA 267 (MCL 15.263a).

HB 4564 (Outman) Property tax: tax tribunal; methods for tax tribunal to hold hearings; expand to include electronically. Amends secs. 26 & 34 of 1973 PA 186 (MCL 205.726 & 205.734).

Status: 05/16/23 Referred to House Committee on Tax Policy.
Referrals: 05/24/23 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Tax Section.
Comments: Access to Justice Policy Committee.
Liaison: David C. Anderson

2. HB 4657 (Pohutsky) Courts: state court administration; state pretrial services division; create. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 11 & 11a to ch. V.

Status: 05/24/23 Referred to Committee on Criminal Justice.
Referrals: 05/24/23 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Suzanne C. Larsen

3. HB 4738 (Breen) Criminal procedure: witnesses; confidentiality of certain information of a witness; require prosecuting attorney to maintain, and provide for disclosure in certain circumstances. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 40b to ch. VII.

HB 4739 (Mentzer) Crime victims: rights; practice of redacting victim's contact information; codify. Amends 1985 PA 87 (MCL 780.751 - 780.834) by adding sec. 8a.

Status: 06/21/23 Reported without Amendment from House Committee on Judiciary.
Referrals: 06/14/23 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison: Valerie R. Newman

4. HB 4850 (Glanville) Courts: juries; exemption from jury service for certain military personnel; allow.
Amends sec. 1307a of 1961 PA 236 (MCL 600.1307a).

Status:	06/27/23 Referred to House Committee on Criminal Justice.
Referrals:	06/28/23 Civil Procedure & Courts Committee; Military Law Section.
Comments:	None at this time.
Liaison:	Danielle Walton

Agenda
Public Policy Committee
June 7, 2023 – 12:00 p.m. to 1:30 p.m.
MINUTES

Committee Members: David C. Anderson, Lori A. Buiteweg, Aaron V. Burrell, Suzanne C. Larsen, Valerie R. Newman, Takura N. Nyamfukudza, Nicholas M. Ohanesian, Daniel D. Quick, Judge Cynthia D. Stephens (Ret'd), Danielle Walton
SBM Staff: Peter Cunningham, Nathan Triplett, Carrie Sharlow
GCSI: Marcia Hune

A. Reports

1. Approval of April 27, 2023 minutes – The minutes were approved with one abstention.
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2019-33: Proposed Rescission of Administrative Order No. 2021-7 and Proposed Adoption of the Michigan Continuing Judicial Education Rules

Pursuant to Administrative Order No. 2021-7, the Mandatory Continuing Judicial Education (MCJE) Board proposed a set of rules that would govern the MCJE program, and the Court has published them for comment. Many of the rules directly correlate with a provision in AO 2021-7, though there are some additions and differences between the AO and the proposed rules. The MCJE program is set to take effect on January 1, 2024.

The following entities offered recommendations: Judicial Ethics Committee.

The Committee voted unanimously (9) to take no position, and authorize the Judicial Ethics Committee to submit its comments.

2. ADM File No. 2020-31: Proposed Amendment of MRPC 1.8

The proposed amendment of MRPC 1.8 would allow attorneys to provide certain assistance to indigent clients they are serving on a pro bono basis.

The following entities offered recommendations: Access to Justice Policy Committee; Justice Initiatives Committee; Professional Ethics Committee.

The Committee voted unanimously (9) to support the proposed amendment to MPRC 1.8 in concept, but not as currently drafted.

3. ADM File No. 2021-10: Proposed Amendment of the Michigan Rules of Evidence

The proposed amendments of the Michigan Rules of Evidence (MRE) reflect the work of the Michigan Rules of Evidence Committee established by Administrative Order No. 2021-8. The Committee was tasked with restyling the MREs in an effort to remain as consistent as possible with the 2011 restyling of the Federal Rules of Evidence. Major reorganization of the rules appears in MRE 803 and MRE 804 where the residual exceptions found in both rules are moved into a new MRE 807, and in MRE 804 where the exception regarding deposition testimony is moved up from subrule (b)(5) to proposed subrule (b)(2).

The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section.

The Committee voted unanimously (9) to support the amendments of the Michigan Rules of Evidence with a recommendation that the Court add language stating explicitly that the amendments are stylistic, not substantive, changes; and further recommend that the Court reestablish a Standing Committee on Rules of Evidence.

4. ADM File No. 2023-06: Amendments of MCR 6.001 and 8.119 and Addition of MCR 6.451 with concurrent comment period

The amendment of MCR 8.119 requires courts to restrict access to case records involving set aside convictions similar to how MCL 780.623 restricts access to records maintained by the Michigan State Police. The amendment further requires the court to redact information regarding any conviction that has been set aside before that record is made available. The addition of MCR 6.451 requires the court to provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution under MCL 780.621h(3) and to order the reinstatement on an SCAO-approved form. The amendment of MCR 6.001 clarifies that MCR 6.451 applies to cases cognizable in the district courts.

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

The Committee voted unanimously (9) to support ADM File No. 2023-06 as drafted and submit the Access to Justice Policy Committee comments to the Court for consideration.

5. ADM File No. 2023-06: Proposed Amendments of MCR 6.110 and 8.119

The proposed amendment of MCR 8.119 would require all case records maintained by the district court to become nonpublic immediately after bindover to the circuit court. This proposal would also amend MCR 6.110(G) to expand the types of documents that must be transmitted to the circuit court to ensure appropriate public access in the circuit court. The proposal would consolidate public access in the circuit court case file and would also uniformly ensure that information regarding set aside criminal offenses in the circuit court cannot be separately accessed in the district court case file.

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

The Committee voted unanimously (9) to support the proposed amendments to Rule 6.110 and oppose the proposed amendments to Rule 8.119. The Committee recommends that the amendment to Rule 8.119 should be rewritten more narrowly for the purpose of ensuring that the public cannot access case records held by district courts related to convictions that have been subsequently set aside, and not in a manner that encompasses all district court case records.

C. <u>Legislation</u>

1. HB 4421 (Young) 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 following entities offered recommendations: Access to Justice Policy Committee; Criminal Law Section.

The committee voted unanimously that this legislation is *Keller*-permissible because it is reasonably-related to the functioning of the courts, particularly remote court hearings and streaming of court proceedings.[i]

The Committee voted 9 to 1 to support HB 4421 with amendments to provide that a victim's image must be blurred, and that blurring does not apply to contemporaneous streaming.

2. SB 0248 (Lauwers) Courts: other; age requirement for the use of a courtroom support dog; modify. Amends sec. 2163a of 1961 PA 236 (MCL 600.2163a).

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

The committee voted unanimously that this legislation is *Keller*-permissible because it is reasonably-related to the functioning of the courts.

The committee voted 6 to 4 to support SB 0248.

3. SB 0257 (Runestad) Civil procedure: other; video recordings of court proceedings; provide for availability and review. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1429.

The following entities offered recommendations: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Children's Law Section; Criminal Law Section; Family Law Section.

The committee voted unanimously that this legislation is *Keller*-permissible because it is reasonably-related to the functioning of the courts.

The Committee voted 8 to 2 to support SB 0257 with the following amendments:

1. **Some courts have audio recordings but not video. Therefore, to be comprehensive, instead of referring to "video recordings," the bill should refer to recordings in general throughout.**

2. **Historically, juvenile court proceedings have not been subject to the common-law or First Amendment right of public access, and there are privacy concerns with allowing recordings of juvenile court proceedings to be public even if the courtroom happened to be open for the proceeding itself. Under MCL 712a.28, juvenile case records are not open to the general public. To align this restriction with SB 257, subsection (1) of SB 257 should be amended as follows: "If a court makes a video recording of a public court proceeding in a case in which records are open to the general public, the court shall make the recording available for public access as required by this section."**

3. **In subsection (3), the 60-day limit should be eliminated. As long as the video remains in the court's custody and control, it should be presumptively available to the public. There are many situations in which the public's interest in a recording would not surface within 60 days of the proceeding.**

4. **In subsection (4), the form of public access should not deny the ability of the public to obtain an actual copy of the recording. If they are allowed to view it but not actually have a copy that they can show others, that restriction would violate the First Amendment. See *Soderberg v Carrion*, 999 F3d 962, 964 (CA 4, 2021).**

5. **The bill should permit the blurring of both crime victims' and children's faces in a video recording.**

4. Resentencing Upon Petition

SB 0321 (Chang) Criminal procedure: sentencing; resentencing upon petition of certain prisoners; provide process for. Amends secs. 12 & 25, ch. IX of 1927 PA 175 (MCL 769.12 & 769.25) & adds secs. 27a, 27b, 27c, 27d, 27e, 27f, 27g & 27h to ch. IX.

HB 4556 (Hope) Criminal procedure: sentencing; resentencing upon petition of certain prisoners; provide process for. Amends secs. 12 & 25, ch. IX of 1927 PA 175 (MCL 769.12 & 769.25) & adds secs. 27a, 27b, 27c, 27d, 27e, 27f, 27g & 27h to ch. IX.

SB 0322 (Wojno) Corrections: prisoners; corrections code of 1953; amend to reflect requirement for department of corrections to provide certain notification to prisoners. Amends secs. 33e & 34 of 1953 PA 232 (MCL 791.233e & 791.234) & adds sec. 34e.

HB 4557 (Neeley) Corrections: prisoners; corrections code of 1953; amend to reflect requirement for department of corrections to provide certain notification to prisoners. Amends secs. 33e & 34 of 1953 PA 232 (MCL 791.233e & 791.234) & adds sec. 34e.

SB 0323 (Polehanki) Crime victims: notices; crime victim's rights act; amend to reference rights of crime victims in certain prisoner resentencing. Amends secs. 13 & 41 of 1985 PA 87 (MCL 780.763 & 780.791).

HB 4558 (Wilson) Crime victims: notices; crime victim's rights act; amend to reference rights of crime victims in certain prisoner resentencing. Amends secs. 13 & 41 of 1985 PA 87 (MCL 780.763 & 780.791).

SB 0324 (Bayer) Criminal procedure: sentencing; penalties for certain crimes of imprisonment for life without parole eligibility; amend public health code to reflect potential resentencing. Amends sec. 17764 of 1978 PA 368 (MCL 333.17764).
HB 4559 (McKinney) Criminal procedure: sentencing; penalties for certain crimes of imprisonment for life without parole eligibility; amend public health code to reflect potential resentencing. Amends sec. 17764 of 1978 PA 368 (MCL 333.17764).
SB 0325 (Irwin) Crimes: penalties; penalties for certain crimes of imprisonment for life without parole eligibility; amend Michigan penal code to reflect potential resentencing. Amends secs. 16, 18, 200i, 204, 207, 209, 210, 211a, 227b, 316, 436, 520b & 543f of 1931 PA 328 (MCL 750.16 et seq.).
HB 4560 (Aiyash) Crimes: penalties; penalties for certain crimes of imprisonment for life without parole eligibility; amend Michigan penal code to reflect potential resentencing. Amends secs. 16, 18, 200i, 204, 207, 209, 210, 211a, 227b, 316, 436, 520b & 543f of 1931 PA 328 (MCL 750.16 et seq.).
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
The Committee voted 8 to 2 that only the court procedure components of the legislative package are *Keller*-permissible because they are reasonably-related to the functioning of the courts.
The Committee voted 8 to 1 to not support or oppose the legislative package, but believes that if the "Second Look" legislative package moves forward, significant amendments are necessary to address concerns regarding the particulars of the resentencing petition mechanism and the capacity and resource challenges that would results from implementation of the package.

D. <u>Consent Agenda</u>
To allow the Criminal Jurisprudence & Practice Committee and Criminal Law Section to submit their positions on each of the following items:

M Crim JI 37.1c
The Committee proposes a new jury instruction, M Crim JI 37.1c (Using False Documents to Deceive Principal or Employer), for the crime found at MCL 750.125(3). The instruction is entirely new.

M Crim JI 40.4
The Committee proposes a new jury instruction, M Crim JI 40.4 (Furnishing Alcohol to a Minor), for the crime found at MCL 436.1701. The instruction is entirely new.

---

[i] Judge Cynthia D. Stephens (Ret'd) arrived after this vote.

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

June 30, 2023

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

RE: ADM File No. 2020-31 – Proposed Amendment of Rule 1.8 of the Michigan Rules of Professional Conduct

Dear Clerk Royster:

At its June 9, 2023 meeting, the Board of Commissioners of the State Bar of Michigan ("SBM") voted unanimously to support the addition of a humanitarian exception to Rule 1.8 of the Michigan Rule of Professional Conduct ("MRPC"), but to oppose the form of the exception published for comment in ADM File No. 2020-31. Instead, the Board urges the Court to adopt the amendment to Rule 1.8 proposed by the Bar in April 2022 (Enclosed).

The Board believes that SBM's proposal preserves the fundamental nature of the attorney-client relationship, while permitting an attorney to assist a client with the expenses that all too often pose significant barriers to indigent individuals accessing our justice system. By contrast, the Board fears that the amendment proposed by ADM File No. 2020-31 would make the challenges faced by pro bono and public interest attorneys and their clients significantly worse than they are today under the existing rule.

ADM File No. 2020-31 enumerates only four types of permissible assistance. In doing so, the proposed amendment impliedly prohibits any other type of assistance that would facilitate a client's access to the justice system (e.g., transportation to appointments other than court proceedings or meals served during such appointments). The Board believes that the limitations imposed by the proposed amendment to Rule 1.8 as published for comment would significantly undermine the purpose and intent of a humanitarian exception. SBM's proposed amendment, by contrast, would allow flexibility in the exact nature of the assistance, while still providing illustrative examples in the proposed commentary and requiring that the assistance facilitate the client's access to the justice system.

The Board also has serious concerns about the provision in ADM File No. 2020-31 that would appear to require a lawyer employed by a legal services or public interest organization to use their personal, out-of-pocket funds for humanitarian assistance to their client by prohibiting these attorneys from using their employer's funds to do so, even if their employer was willing to pay for such assistance. This restriction is unfair to the client, the lawyer, and the organization. The Board believes it would also threaten to render the humanitarian exception largely a nullity. SBM's alternative does not include such a restriction. The Board believes that, so long as the assistance facilitates the client's access to the justice system, it should not matter whether the assistance is financed by the attorney personally or by a nonprofit organization that employs the attorney and finances the representation.

When SBM first proposed a humanitarian exception to Rule 1.8 in October 2020, the Court declined to publish the proposal and requested that the Bar consider "a more nuanced, limited proposal." At

that time, the Court identified several specific concerns and invited the Bar to submit a revision to the Court for consideration. Our April 2022 alternative was the result. It was crafted by a workgroup from the Bar's Diversity & Inclusion Advisory Committee, Justice Initiatives Committee, and Professional Ethics Committee, and was overwhelmingly supported by the SBM Representative Assembly. The Board believes that SBM's alternative preserves the attorney-client relationship, addresses concerns about appropriately limiting the scope of permissible humanitarian assistance, and avoids the unintended consequences that would result from the adoption of ADM File No. 2020-31. The Bar is not alone in this conclusion. Both the Legal Services Association of Michigan and the Michigan State Planning Body—organizations composed of experienced lawyer-members who are most likely to be impacted by the adoption of a humanitarian exception—also support SBM's alternative.

The State Bar appreciates the Court's willingness to consider the Bar's request that Rule 1.8 be amended to provide a humanitarian exception and to advance this important discussion by publishing ADM File No. 2020-31 for comment. For the reasons stated here, the State Bar of Michigan requests that the Court not adopt the current proposal and, instead, adopt SBM's April 2022 alternative.

Thank you for the opportunity to comment on the proposed amendment.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
James W. Heath, President

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

April 20, 2022

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

RE: Proposed Amendment of Rule 1.8 of the Michigan Rules of Professional Conduct to Provide a Humanitarian Exception

Dear Clerk Royster:

The State Bar of Michigan ("SBM") recommends amending Rule 1.8 of the Michigan Rules of Professional Conduct ("MRPC") to provide a focused, humanitarian exception to the Rule's general prohibition of an attorney providing financial assistance to a client in connection with pending or contemplated litigation. This revised proposal, fully set forth in Attachment A, would permit a lawyer representing an indigent client to provide financial assistance to the client that "facilitates the client's access to the justice system." As noted in our proposed commentary for the amended Rule, such a humanitarian exception would preserve the fundamental nature of the attorney-client relationship, while also permitting an attorney to assist a client with transportation, lodging, meals, and clothing—necessary expenses that often pose a significant barrier to indigent individuals accessing the justice system.

In October 2020, SBM proposed a similar amendment to Rule 1.8. At that time, the Court declined to publish the proposal for comment and requested that the Bar consider "a more nuanced, limited proposal." The Court identified several specific concerns about the initial proposal and invited the Bar to submit a revision to the Court for consideration. The revised proposal presented in Attachment A is provided in response to the Court's invitation and identified concerns. It is the product of a workgroup convened by the Bar and comprised of stakeholders from the Diversity & Inclusion Advisory Committee, Justice Initiatives Committee, and Professional Ethics Committee. Ultimately, each of these committees voted to support the revised proposal, which was approved overwhelmingly by the Representative Assembly at its April 9, 2022 meeting.

By permitting lawyers to assist their indigent clients in this manner, the proposed amendment and commentary will allow such clients to more effectively engage in legal proceedings and strengthen access to justice in Michigan, while also guarding against improper financial entanglements between lawyers and their clients.

We appreciate your consideration of this revised proposal. It is our hope that it will address the Court's thoughtful concerns about the previous iteration and that the Court will publish the proposed amendment to the Michigan Rules of Professional Conduct, as revised, for comment and ultimate adoption.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Nicholas M. Ohanesian, Representative Assembly Chair

Attachment A

Proposed Amendments to MPRC 1.8(e)

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client and may provide assistance to the client that facilitates the client's access to the justice system.

Comment:

Humanitarian Exception.

Paragraph (e)(2) serves as a humanitarian exception. The lawyer can assist the client with needs that frustrate the client's access to the justice system, such as providing transportation to and from court sessions (including inexpensive lodging if that is lesscostly than transportation to and from for multiple days), meals needed during long court sessions, and clothing appropriate to appear in a court proceeding, while still preserving the nature of the attorney-client relationship. For purposes of this rule, indigent is defined as people who are unable, without substantial financial hardship to themselves and their dependents, to obtain competent, qualified legal representation on their own.

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

June 30, 2023

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

RE: ADM File No. 2021-10 – Proposed Amendments of the Michigan Rules of Evidence

Dear Clerk Royster:

At its June 9, 2023 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-10. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee and Criminal Jurisprudence & Practice Committee. The Board voted unanimously to support the proposed amendments with a recommendation that the Court add language stating explicitly in the text of the rules themselves that the amendments are stylistic, not substantive, changes to the Michigan Rules of Evidence (MRE). If the intent of the amendments is limited to ensuring that the MRE remain as consistent as possible with the Federal Rules of Evidence, this additional language would remove any ambiguity and give clear direction to both the Bench and Bar.

Additionally, the Board recommends that the Court reestablish a Standing Committee on Rules of Evidence. There have been several efforts undertaken recently (e.g, the MRE Committee established by Administrative Order No. 2021-8 and the State Bar of Michigan's MRE 702/703 Workgroup) to evaluate and make recommendations regarding the Rules of Evidence. The need for periodic review and evaluation in this field is certain to continue. Rather than addressing it in an ad hoc fashion, the Board believes that an ongoing committee would be better situated and equipped to advise the Court.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
James W. Heath, President

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

June 30, 2023

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

RE: ADM File No. 2023-06 – Amendments of Rules 6.001 and 8.119 and Addition of Rule 6.451 of the Michigan Court Rules

Dear Clerk Royster:

At its June 9, 2023 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2023-06. In its review, the Board considered recommendations from the Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee. The Board voted unanimously to support the proposed amendments of Rules 6.001 and 8.119, as well as the addition of Rule 6.451.

As Michigan continues to move forward with full implementation of the 2020 "Clean Slate" legislation, the Board believes that the amendments to the Michigan Court Rules proposed in ADM File No. 2023-06 will provide needed clarity to both the courts and the public about the treatment of court records related to set aside convictions and the procedures for reinstating a set aside conviction.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
James W. Heath, President

SBM STATE BAR OF MICHIGAN

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

June 30, 2023

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

RE: ADM File No. 2023-06 – Proposed Amendments of Rules 6.110 and 8.119 of the Michigan Court Rules

Dear Clerk Royster:

At its June 9, 2023 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2023-06. In its review, the Board considered recommendations from the Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee. The Board voted unanimously to support the proposed amendment of Rule 6.110, but to oppose the proposed amendment of Rule 8.119.

As to Rule 6.110, the Board believes that it would be beneficial to require that motions, responses, and orders entered by the district court be included among the records transmitted to the circuit court after bindover. Including these additional documents as a matter of course will ensure that a more complete record of the lower court proceedings is readily available.

As to Rule 8.119, the Board understands and shares the desire to ensure that certain records (e.g., those related to set aside convictions) are not publicly available but believes that the proposed amendment is overinclusive and a more narrowly tailored approach is required. The Board noted that both prosecutors and defense attorneys must regularly access information in district court case records, even following bindover, for a variety of reasons related to their respective practices. Strictly in terms of the population of individuals impacted by such a broad approach, the unintended, negative consequences of this proposed amendment far outweigh the benefits it would provide.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
James W. Heath, President

Order

Michigan Supreme Court
Lansing, Michigan

April 20, 2023

Elizabeth T. Clement,
Chief Justice

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

ADM File No. 2022-14

Proposed Amendment of
Rule 2.311 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.311 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 2.311 Physical and Mental Examination of Persons

(A) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.~~,~~ Upon request of a party, the order~~and~~ may also provide that

(1) the attorney for the person to be examined may be present at the examination, or~~.~~

(2) a mental examination be recorded by video or audio.

(B) If the court orders that a mental examination be recorded, the recording must

(1) be unobtrusive,

(2) capture the examinee's and the examiner's conduct throughout the examination, and

(3) be filed under seal.

(B) [Relettered (C) but otherwise unchanged.]

Staff Comment (ADM File No. 2022-14): The proposed amendment of MCR 2.311 would allow a mental examination to be recorded by video or audio under certain circumstances.

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 August 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-14. 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.

April 20, 2023

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

April 20, 2023

Elizabeth T. Clement,
Chief Justice

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

ADM File No. 2022-11

Proposed Amendments of
Rules 2.511 and 6.412 of
the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.511 and 6.412 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 2.511 Impaneling the Jury

(A)-(B) [Unchanged.]

(C) Examination of Jurors~~; Discharge of Unqualified Juror~~. The court may ~~conduct the~~ examine~~ation of~~ prospective jurors or ~~may~~ permit the attorneys for the parties to do so. If the court examines the prospective jurors, it must permit the attorneys for the parties to:

(1) ask further questions that the court considers proper; or

(2) submit further questions that the court may ask if it considers them proper.

(D) Discharge of Unqualified Juror. When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror.

(D)-(H) [Relettered (E)-(I) but otherwise unchanged.]

Rule 6.412 Selection of the Jury

(A)-(B) [Unchanged.]

(C) Voir Dire of Prospective Jurors.

(1) [Unchanged.]

(2) Conduct of the Examination. The court may ~~conduct the~~ examin~~ation of~~ prospective jurors or permit the attorneys for the parties~~lawyers~~ to do so. If the court ~~conducts the~~ examines~~ation~~ the prospective jurors, it must~~may~~ permit the attorneys for the parties~~lawyers~~ to:~~ supplement the examination by direct questioning or by submitting questions for the court to ask.~~

(a) ask further questions that the court considers proper; or

(b) submit further questions that the court may ask if it considers them proper.

On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

(D)-(F) [Unchanged.]

Staff Comment (ADM File No. 2022-11): The proposed amendments of MCR 2.511(C) and 6.412(C) align with Fed Crim P 24 and Fed Civ R 47 and would require the court to allow the attorneys or parties to conduct voir dire in civil and criminal proceedings if the court examines the prospective jurors. The proposed requirement is subject to the court's determination that the parties' or attorneys' questions are proper.

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 August 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When

submitting a comment, please refer to ADM File No. 2022-11. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J., would decline to publish for comment.

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 20, 2023

Clerk

Public Policy Position
ADM File No. 2022-11: Proposed Amendments of MCR 2.511 and 6.412

Support

Explanation:
The Committee voted unanimously (17) to support the proposed amendments of MCR 2.511 and 6.412. The Committee believes that attorney-conducted voir dire is of critical importance. The proposed amendments would ensure that attorney-conducted voir dire is available in those courts that are limiting the practice today and provide a measure of uniformity in the treatment of this procedure across courts.

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

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

Public Policy Position
ADM File No. 2022-11: Proposed Amendments of MCR 2.511 and 6.412

Support with Amendments

Explanation:
The Committee voted unanimously (17) to support ADM File No. 2022-11 with amendments removing both proposed MCR 2.511(C)(2) and MCR 6.412(C)(2)(b). The Committee believes that attorney-conducted voir dire is vitally important and that the Rules should, if the court examines prospective jurors, require the court to permit attorneys for the parties to ask further questions. Submitting further questions to the court is an inadequate alternative to examination by attorneys.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 9

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2022-11: Proposed Amendments of MCR 2.511 and 6.412

Support

Explanation
Children's Law Section supports ADM File No 2022-11 because we believe it is important that attorneys be able to personally conduct voir dire rather than relying on the court to do so.

Position Vote:
Voted for position: 10
Voted against position: 0
Abstained from vote: 0
Did not vote: 9

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

Public Policy Position
ADM File No. 2022-11: Proposed Amendments of MCR 2.511 and 6.412

Support

Position Vote:
Voted for position: 12
Voted against position: 1
Abstained from vote: 0
Did not vote: 3

Contact Person: Takura N. Nyamfukudza
Email: takura@cndefenders.com

Public Policy Position
ADM File No. 2022-11: Proposed Amendments of MCR 2.511 and 6.412

Support with Recommended Amendments

Explanation
Motion to Approve Public Policy Position on Atty Conducted Voir Dire, submission of letter to MSC, and approve testimony at public hearing summarized as:
The proposed rule revision is a step in the right direction, but could be improved upon. The best change would be if the rule simply stated that the court must let the lawyers conduct voir dire. While favoring the rule, the sections supports revising the change in subpart (a) – if the court conducts voir dire, it must allow the lawyers to ask further questions that the court considers proper AND respectfully states an opposition and concern over subpart (b) that would require all f/u questions to be filtered through the judge, as currently written.
The proposed changes are to MCR 2.511 and 6.412.

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

Contact Person: Madelyne Lawry
Email: neglaw@sharedresources.us

Name: FORBUSH

Date: 05/06/2023

ADM File Number: 2022-11

Comment:
I support this amendment.

Name: Benjamin J. Hall

Date: 06/21/2023

ADM File Number: 2022-11

Comment:
I support this proposed amendment.

Order

Michigan Supreme Court
Lansing, Michigan

May 24, 2023

ADM File No. 2023-05

Proposed Amendment of
Rule 3.613 of the Michigan
Court Rules

Elizabeth T. Clement,
Chief Justice

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

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.613 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.613 Change of Name

(A)-(G) [Unchanged.]

(H) The petitioner may request that the cost of publication under this rule be paid by the court. Upon the petitioner's request and supported by a verified statement that:

(1) a request to waive fees under MCR 2.002 is being filed with this request or payment of fees has been waived under MCR 2.002,

(2) publishing notice of the name change proceeding is required by law, and

(3) publication of the notice has not been waived under this rule,

the court must enter a nonpublic order either granting or denying the request under this subrule. The court must enter an order granting the petitioner's request under

this subrule only if the court enters an order to waive fees under MCR 2.002. The request and order under this subrule must be made on a form approved by the State Court Administrative Office. If known at the time of filing the petition that publication will be required, the request under this subrule may be included with the request to waive fees under MCR 2.002.

Staff Comment (ADM File No. 2023-05): To avoid confusion, the proposed amendment of MCR 3.613 incorporates the amendment of MCR 3.613 (ADM File No. 2021-21), which takes effect July 1, 2023.

The proposed amendment of MCR 3.613 in *this* ADM file would add a new subrule (H) that is similar to MCR 2.002(I) and would require a court to pay the costs of publication in a name change proceeding if fees are waived under MCR 2.002, publication is required by law, and publication has not been waived under MCR 3.613.

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 September 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-05. 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.

May 24, 2023

Clerk

Public Policy Position
ADM File No. 2023-05: Proposed Amendment of MCR 3.613

Support

Explanation:
The Committee voted unanimously (15) to support ADM File No. 2023-05. The Committee noted that the largest costs associated with a name change are the filing and publication fees. Adopting the proposed amendment of MCR 3.613 will decrease the financial burden associated with name changes and make these important proceedings more accessible.

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 12

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

Public Policy Position
ADM File No. 2023-05

Support

Explanation
Children's Law Section supports ADM File No 2023-05 as drafted.

Position Vote:
Voted for position: 11
Voted against position: 0
Abstained from vote: 2
Did not vote: 5

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

Name: Valerie Robbins, Mecosta County Probate Register

Date: 06/05/2023

ADM File Number: 2023-05

Comment:
This change, although would provide consistency across the state, is not a practical change. The cost of publication would have a significant effect to the county and municipality. Further, I highly expect that the amount of name changes would significantly increase. Additionally, I do not believe this to be a consistent change as a publication is a service, such as certified copies. Certified copies are not a cost that is waivable, nor should publication be. This change would have a large impact on the court budgets, of which are already under strain across much of the state.
Thank you for taking the time to hear my concerns.

ADM File No. 2021-21 Discussed at July 22, 2022 Meeting

Order

Michigan Supreme Court
Lansing, Michigan

April 13, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2021-21

Proposed Amendment of
Rule 3.613 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.613 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 3.613 Change of Name

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(A) [Relettered (B) but otherwise unchanged.]

(C) No Publication of Notice; Confidential Record. Upon receiving a request establishing good cause, the court may order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause may include but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger.

(1) Evidence of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available.

(2) The court must issue an ex parte order granting or denying a request under this subrule.

(3) If a request under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change; and

(c) if a minor is the subject of the petition, notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice of hearing must not include the current or proposed name of the minor.

(4) If a request under this subrule is denied, the court must issue a written order that states the reasons for denying relief and advises the petitioner of the right to request a hearing regarding the denial, file a notice of dismissal, or proceed with the petition and publication of notice.

(5) If the petitioner does not request a hearing under subrule (4) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4) or file a notice of dismissal within 14 days of entry of the order denying the request, the court may set a time, date, and place of a hearing on the petition and proceed with ordering publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4) must be held on the record.

(8) The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change.

(9) At the conclusion of the hearing under subrule (4), the court must state the reasons for granting or denying a request under this subrule and enter an appropriate order.

(B) [Relettered (D) but otherwise unchanged.]

(E~~C~~) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) [Unchanged.]

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent shall be served with a notice of hearing by publishing in a newspaper and filing a proof of service as provided by MCR 2.106(F) and (G). Unless otherwise provided in this rule, t~~T~~he notice must be published one time at least 14 days before the date of the hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (~~A~~B). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.

(D)-(E) [Relettered (F)-(G) but otherwise unchanged.]

Staff Comment: The proposed amendment of MCR 3.613 would clarify the process courts must use after receiving a request not to publish notice of a name change proceeding and to make the record confidential.

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 August 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. 2021-21. 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.

April 13, 2022

Clerk

SBM State Bar of Michigan | ACCESS TO JUSTICE POLICY COMMITTEE

Public Policy Position
ADM File No. 2021-21: Proposed Amendment of MCR 3.613

Support with Recommended Amendments

Explanation

The Committee voted to support the proposed amendment of MCR 3.613 with additional recommended amendments. The Committee believes that establishing a presumption of confidentiality for transgender individuals seeking a name change to affirm their gender identity is necessary as it will protect these individuals from the threat of violence, including sexual assault, physical harm, and even murder, occasioned by name change proceedings. In addition, such a presumption would serve to support transgender individuals undertaking the process of affirming their gender identity without neighbors, acquaintances, colleagues, future employers, and other individuals becoming aware of their transgender identity.

In a similar vein, establishing a presumption of confidentiality for victims and survivors of domestic violence would serve to protect individuals seeking a name change to evade their abusers and individuals who support and enable their abusers, such as family and friends, as well as minor children of abusers who do not have physical custody, legal custody, or parenting time. Further, publishing a minor child's change in name can provide abusers with the identity of partners who have left an abuser. With the noncustodial parent's name published, a noncustodial parent with some type of custody will have sufficient information to participate in the hearing, if desired.

Rule 3.613 Change of Name

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(~~A~~B) [Relettered (B) but otherwise unchanged.]

(B) No Publication of Notice; Confidential Record. Upon receiving a request establishing good cause, the court may order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause may include but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger with the fear of physical danger or harassment due to a change in name for gender affirmation or due to the threat of domestic violence establishing a presumption of good cause.

(1) Evidence of the possibility of physical danger or harassment must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger or harassment if the record is

published or otherwise available with this sworn statement confidential and not available for public viewing.

(2) The court must issue an ex parte order granting or denying a request under this subrule. This order must be confidential and not available for public viewing.

(3) If a request under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change; and

(c) if a minor is the subject of the petition, notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice of hearing must not include the ~~current or~~ proposed name of the minor.

(4) If a request under this subrule is denied, the court must issue a written confidential order not available for public viewing that states the reasons for denying relief and advises the petitioner of the right to request a hearing regarding the denial, file a notice of dismissal, or proceed with the petition and publication of notice.

(5) If the petitioner does not request a hearing under subrule (4) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4) or file a notice of dismissal within 14 days of entry of the order denying the request, the court may set a time, date, and place of a hearing on the petition and proceed with ordering publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4) must be held on the record with attendance in the court room limited to only those who are parties to the case and any persons requested by the petitioner to be present.

(8) The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change.

(9) At the conclusion of the hearing under subrule (4), the court must state the reasons for granting or denying a request under this subrule and enter an appropriate order **with the written order confidential and not available for public.**

(~~B~~D) [Relettered (D) but otherwise unchanged.]

(~~C~~E) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) [Unchanged.]

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent shall be served with a notice of hearing by ~~publishing in a newspaper~~ alternate service as approved by the Court and filing a proof of service as provided by MCR 2.106(F) and (G). A notice provided under this subrule shall not include the minor child's proposed name. ~~Unless otherwise provided in this rule, T~~the ~~notice must be published one time at least 14 days before the date of the hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (AB). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.~~

(~~D) (E~~)(F)-(G) [Relettered (F)-(G) but otherwise unchanged.]

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 2
Did not vote (absent): 9

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

SBM State Bar of Michigan | CIVIL PROCEDURE & COURTS COMMITTEE

Public Policy Position
ADM File No. 2021-21: Proposed Amendment of MCR 3.613

Support in Concept

Explanation

The Committee voted to support the concept of clarifying the procedures courts must use after receiving a request not to publish notice of a name change proceeding but took no position on the specific language of ADM File No. 2021-21. Among other concerns, the Committee believed that limiting "physical danger" language was too limiting and that it should be expanded to include stalking and financial abuse. The Committee was also concerned about a potential conflict between the proposed amendment and MCR 8.119(I)(6), which presently prohibits a court from sealing a court order or opinion. The Committee believes that consideration should be given to language permitting confidential orders or case files in the case of certain name change proceedings.

Position Vote:

Voted For position: 14
Voted against position: 1
Abstained from vote: 2
Did not vote (absence): 15

Contact Person:

Lori J. Frank lori@markofflaw.com

SBM State Bar of Michigan

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

July 29, 2022

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

RE: ADM File No. 2021-21 – Proposed Amendment of Rule 3.613 of the Michigan Court Rules

Dear Clerk Royster:

At its July 22, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-21. The Board voted unanimously to support the proposed amendment with two additional recommendations:

- The Court should make good cause required under proposed Rule 3.613(C) presumptive for persons whose name change is sought for affirmation of gender identity, and for victims of human trafficking and domestic violence.

- The Court should add language to the rule to provide for Court-approved alternative service for the notice of a hearing to noncustodial parents, rather than requiring publication of such notice in a newspaper. Additionally, such notice must not include a minor child's name.

In its review of this proposed amendment, the Board considered recommendations from the Access to Justice Policy Committee, Civil Procedure & Courts Committee, and Children's Law Section. Both the Access to Justice Policy Committee and Children's Law Section submitted detailed proposals for alternative language amending Rule 3.613. While the Board ultimately opted not to endorse either of these proposals in their entirety, the Board believes that a review of both alternatives may help inform the Court's deliberations on this matter. As such, a copy of the Access to Justice Policy Committee proposal is included for the Court's review. The Children's Law Section proposal will be provided to the Court under separate cover.

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

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Dana M. Warnez, President

Public Policy Position
ADM File No. 2021-21: Proposed Amendment of MCR 3.613

The Access to Justice Policy Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Access to Justice Policy Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar's position on this matter is to support the amendment to MCR 3.613 and recommend that the Court make the determination of good cause required by the proposed amendment presumptive for persons whose name change is sought for affirmation of gender identity, and for victims of human trafficking and domestic violence. The State Bar also recommends that language be added to the rule to provide for Court-approved alternative service for the notice of a hearing to noncustodial parents, rather than requiring publication of such notice in a newspaper, and further recommends that such notice not include a minor child's name.

The Access to Justice Policy Committee has a public policy decision-making body with 27 members. On June 29, 2022, the Committee adopted its position after a discussion at a scheduled meeting and an electronic discussion and vote. 16 members voted in favor of the Committee's position, 0 members voted against this position, 2 members abstained, 9 members did not vote.

Support with Recommended Amendments

Explanation

The Committee voted to support the proposed amendment of MCR 3.613 with additional recommended amendments. The Committee believes that establishing a presumption of confidentiality for transgender individuals seeking a name change to affirm their gender identity is necessary as it will protect these individuals from the threat of violence, including sexual assault, physical harm, and even murder, occasioned by name change proceedings. In addition, such a presumption would serve to support transgender individuals undertaking the process of affirming their gender identity without neighbors, acquaintances, colleagues, future employers, and other individuals becoming aware of their transgender identity.

In a similar vein, establishing a presumption of confidentiality for victims and survivors of domestic violence would serve to protect individuals seeking a name change to evade their abusers and individuals who support and enable their abusers, such as family and friends, as well as minor children of abusers who do not have physical custody, legal custody, or parenting time. Further, publishing a minor child's change in name can provide abusers with the identity of partners who have left an abuser.

With the noncustodial parent's name published, a noncustodial parent with some type of custody will have sufficient information to participate in the hearing, if desired.

Rule 3.613 Change of Name

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(~~A~~B) [Relettered (B) but otherwise unchanged.]

(B) No Publication of Notice; Confidential Record. Upon receiving a request establishing good cause, the court may order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause may include but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger with the fear of physical danger or harassment due to a change in name for gender affirmation or due to the threat of domestic violence establishing a presumption of good cause.

(1) Evidence of the possibility of physical danger or harassment must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger or harassment if the record is published or otherwise available with this sworn statement confidential and not available for public viewing.

(2) The court must issue an ex parte order granting or denying a request under this subrule. This order must be confidential and not available for public viewing.

(3) If a request under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change; and

(c) if a minor is the subject of the petition, notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice of hearing must not include the ~~current or~~ proposed name of the minor.

(4) If a request under this subrule is denied, the court must issue a written confidential order not available for public viewing that states the reasons for denying relief and advises the petitioner of the right to request a hearing regarding the denial, file a notice of dismissal, or proceed with the petition and publication of notice.

(5) If the petitioner does not request a hearing under subrule (4) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4) or file a notice of dismissal within 14 days of entry of the order denying the request, the court may set a time, date, and place of a hearing on the petition and proceed with ordering publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4) must be held on the record with attendance in the court room limited to only those who are parties to the case and any persons requested by the petitioner to be present.

(8) The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change.

(9) At the conclusion of the hearing under subrule (4), the court must state the reasons for granting or denying a request under this subrule and enter an appropriate order **with the written order confidential and not available for public.**

(~~B~~D) [Relettered (D) but otherwise unchanged.]

(~~C~~E) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) [Unchanged.]

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent shall be served with a notice of hearing by ~~publishing in a newspaper~~ alternate service as approved by the Court and filing a proof of service as provided by MCR 2.106(F) and (G). A notice provided under this subrule shall not include the minor child's proposed name. ~~Unless otherwise provided in this rule, T~~the

~~notice must be published one time at least 14 days before the date of the hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (AB). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.~~

(~~D~~) - (~~E~~)(F)-(G) [Relettered (F)-(G) but otherwise unchanged.]

Contact Persons:

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

Order

Michigan Supreme Court
Lansing, Michigan

April 20, 2023

ADM File No. 2022-26

Proposed Amendment of
Rule 6.425 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(C) [Unchanged.]

(D) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(b) [Unchanged.]

(c) before imposing sentence

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf,

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence,

(iii) provide the prosecutor an opportunity to speak equivalent to that of the defendant's attorney, and

(iv) address any victim of the crime who is present at sentencing and permit the victim to be reasonably heard,

~~(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,~~

(d)-(f) [Unchanged.]

(2)-(3) [Unchanged.]

(E)-(H) [Unchanged.]

Staff Comment (ADM File No. 2022-26): The proposed amendment of MCR 6.425(D)(1)(c) would require a trial court, on the record before sentencing, to personally address the defendant regarding his or her allocution rights and to address any victim who is present and allow the victim to be reasonably heard, similar to FR Crim P 32(i)(4).

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 August 1, 2023 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. 2022-26. 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.

April 20, 2023

Clerk

Public Policy Position
ADM File No. 2022-26: Proposed Amendment of MCR 6.425

Support with Amendment

Explanation:
The Committee voted unanimously (16) to support the proposed amendment to MCR 6.425 with an amendment to (D)(1)(c)(iv) to read: "address any victim of the crime who is present at sentencing and permit the victim the opportunity to speak or be reasonably heard, as the victim prefers ~~to be reasonably heard~~." This amendment is intended to remove any ambiguity in the proposed amendment, as published, that suggests that a crime victim must personally appear and address the court, as opposed to submitting a written statement or having their attorney or designee make a statement.

Position Vote:
Voted For position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 11

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

Public Policy Position
ADM File No. 2022-26: Proposed Amendment of MCR 6.425

Support

Explanation:
The Committee voted 9 to 8 to support ADM File No. 2022-26 as written.

Position Vote:
Voted For position: 9
Voted against position: 8
Abstained from vote: 0
Did not vote (absent):9

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
Sofia V. Nelson snelson@sado.org

Public Policy Position
ADM File No. 2022-26: Proposed Amendment of MCR 6.425

Oppose with Recommended Amendments

Explanation:
The Criminal Law Section opposes as written, but would support if it did not tie the prosecutor's ability to speak to that of defense counsel.

Position Vote:
Voted for position: 12
Voted against position: 1
Abstained from vote: 1
Did not vote: 0

Contact Person: Takura N. Nyamfukudza
Email: takura@cndefenders.com

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DAWUN EDWARDS,

Defendant-Appellant.

UNPUBLISHED
December 2, 2021

No. 351389
Berrien Circuit Court
LC No. 2018-000102-FC

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced as a fourth offense habitual offender, MCL 769.12, to 840 months to 120 years' imprisonment for the second-degree murder conviction, two years' imprisonment for each felony-firearm conviction, and 72 to 480 months' imprisonment for the felon-in-possession conviction and the CCW conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from his murder of the victim, Novena Mathis, his "on and off" girlfriend of nearly 25 years and the mother of his two children, Dasha Mathis and Daquan Edwards in Benton Harbor, Michigan. When Dasha reached her early teen years, she alleged that defendant sexually abused her when she was five years old. As a result of the allegations, Dasha went to live with her maternal grandparents.

At the time of her death, the victim lived with defendant and Daquan, and the couple had a volatile relationship with allegations of domestic violence committed by both parties. Recently, on her cellular telephone, the victim reportedly recorded defendant engaged in drug sales. She purportedly advised defendant of the recordings and warned him that if he assaulted her, she would turn the videos over to the police.

The victim had recently agreed to allow Dasha, now grown and a mother of two young children, to move into her home. On the night of the victim's death, Dasha was in the process of bringing her children and her stuff into the victim's home. Defendant was present, became upset that Dasha and her family were moving in, and asked the victim to drive him to a nearby apartment complex. The victim agreed, but did not promptly return home or respond to her family's telephone calls and texts. Eventually, defendant answered his telephone and gave conflicting answers about the health and welfare of the victim.

Unbeknownst to the family, defendant apparently argued with the victim in the car and shot her in the face. Defendant pushed the victim into the passenger seat of her vehicle. He called his friend Marvin Phillips and had Phillips drive his own car and follow the victim's car to a nearby apartment complex. Defendant apparently attempted to hide the victim's vehicle and her body in the back of the complex near a dumpster. Phillips claimed to have no knowledge of the victim's death and thought that defendant was angry with the victim and merely sought to hide her vehicle as revenge. Defendant later asked Phillips to drive him to Kalamazoo where defendant's mother, Lenora Holliday, was staying at a hotel room. After defendant arrived at the hotel room, he struck Holliday with his gun, and Holliday stabbed defendant with scissors. Holliday called the police and was arrested for domestic violence. Defendant was hospitalized for the cut to his arm, but then arrested for his domestic violence upon Holliday in Kalamazoo.

In response to the missing person's report filed by the victim's family, Benton Harbor Public Safety officers were able to locate the victim's body following interviews with family and friends, including Phillips who led the police to the location of her vehicle and body. Police went to interview defendant in Kalamazoo. He initially was not forthcoming about details of the victim's death and posited that she committed suicide. However, after the police noted that the couple had a history of domestic violence, including that the victim had assaulted defendant with a small hatchet, defendant claimed that the shooting of the victim was committed in self-defense. He presented evidence that the victim had assaulted other people. Nonetheless, the jury rejected this theory, and defendant was convicted of second-degree murder and the weapon offenses.

II. ADMISSION OF OTHER ACTS EVIDENCE

Defendant alleges that the trial court improperly admitted the other-acts evidence of accusations of sexual abuse by Dasha, our prior appellate decision addressing this issue was wrongly decided, and this Court is not bound by the law of the case doctrine. We disagree.

The appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Edwards*, 328 Mich App 29, 41-44; 935 NW2d 419 (2019). An abuse of discretion occurs when the trial court's decision rests outside the range of reasonable and principled outcomes. *People v Baskerville*, 333 Mich App 276, 287; 963 NW2d 620 (2020).

In the trial court, the prosecutor filed a notice to admit other-acts evidence, specifically the allegations by Dasha that defendant sexually abused her as a child, and it was the subject of a motion hearing. The prosecutor submitted that the evidence was pertinent to defendant's motive to kill the victim after he learned that Dasha would be moving into the home he shared with the victim. Defense counsel argued that the evidence was unfairly prejudicial because it involved the

serious allegation of sexual abuse. The trial court concluded that the evidence had probative value, was not unfairly prejudicial, and was admissible.

Defendant filed an interlocutory appeal challenging the trial court's evidentiary rulings excluding evidence of domestic violence by the victim as well as the other-acts evidence of sexual abuse raised by Dasha. In a published decision, this Court reversed the evidentiary rulings pertaining to the victim, but affirmed the other-acts evidence issue as follows:

> Defendant also argues that the trial court erred by not excluding evidence of his alleged criminal sexual conduct against his daughter as inadmissible other-acts evidence under MRE 404(b). We disagree.
>
> Other-acts evidence is governed by MRE 404(b)(1), which provides:
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> In [*People v Dobek*, 274 Mich App 58, 85-86; 732 NW2d 546 (2007)], this Court considered the admissibility of other-acts evidence and stated:
>
> Evidence of other acts may be admitted under MRE 404(b)(1) if (1) the evidence is offered for a proper purpose, i.e., "something other than a character to conduct theory," (2) the evidence is relevant under MRE 402 as enforced by [MRE] 104(b), "to an issue or fact of consequence at trial," and (3) the probative value of the evidence is not substantially outweighed by its potential for undue or unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1295, 520 NW2d 338 (1994), citing and quoting *Huddleston v United States*, 485 US 681, 687, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). With respect to the first two *VanderVliet* requirements, our Supreme Court in *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004), reviewing the law regarding MRE 404(b), stated:
>
> In *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), this Court explained that the prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford, supra* at 387. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded.

This Court explained that the proponent of the other-acts evidence must recite one of the purposes stated in MRE 404(b) and articulate how the evidence relates to the recited purpose. *Dobek*, 274 Mich App at 85.

In this case, the prosecution gave the trial court a reason to allow the admission of the evidence of defendant's sexual assault of his daughter when she was five years old. The prosecution explained to the trial court that the alleged sexual-assault evidence had nothing to do with defendant's propensity to commit the charged offenses but that the evidence's admission would establish that defendant had a motive for killing the decedent. The prosecution explained that: (1) on the day of the incident, the daughter moved into the decedent's home where defendant resided; (2) defendant became angry at the decedent for allowing the daughter to move into the home because the daughter previously alleged that defendant had sexually assaulted her and because he could not live in the same home with the daughter because of her previous allegations against him; and (3) defendant directed his anger at the decedent and killed her out of anger over the situation.

The record establishes that the prosecution recited one of the proper purposes stated under MRE 404(b) and explained how the evidence related to the recited purpose. The record supports the prosecution's explanation for admission. A detective testified at defendant's preliminary examination that defendant told him that his argument with the decedent centered on the daughter's moving into the house in light of the sexual-assault allegations she had made against defendant. Defendant told the detective that his argument with the decedent escalated to the point where defendant pulled out a gun and shot the decedent. Therefore, the prosecution proposed admission of this evidence to prove defendant's motive for the homicide, which is an acceptable purpose.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. Under MRE 403, the trial court had to consider whether, although relevant, unfair prejudice substantially outweighed this evidence's probative value. The record reflects that the trial court applied the MRE 403 test and concluded that the evidence went to the issue of motive and could establish the fact that defendant became angry and that his anger was highly probative regarding the circumstances that led to the offense. The trial court further concluded that the anticipated testimony had significant probative value and stated that defendant could counter the evidence to balance any prejudicial effect. The admission of the evidence, like all inculpatory evidence, likely would be prejudicial to defendant, but the evidence's probative value respecting his motive for the shooting—an issue about which defendant and the prosecution disagreed vehemently—is not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion by ruling that evidence of the sexual assault would be admissible at trial. [*Edwards*, 328 Mich App at 41-44.]

Despite this Court's prior affirmance of the trial court's other-acts evidentiary ruling, defendant contends that the decision was erroneous and the law of the case doctrine should not apply.

The law of the case doctrine provides that if an appellate court has addressed a legal question and remanded the case for further proceedings, the determination of the legal questions by the appellate court will not be differently determined on a later appeal in the same case where the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). The decision binds the lower court, and the lower court must take any action consistent with the appellate court judgment. *Id*. at 260. "Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Id*. (citation omitted). Generally, the law of the case doctrine is applicable regardless of the correctness of the prior decision. *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). However, in criminal cases, the trial court is authorized to grant a new trial at any time when justice has not been done. *Id*.; MCL 770.1 ("The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs."). "Therefore, unlike in standard civil proceedings, in criminal cases the law of the case doctrine does not automatically doom the defendant's arguments or automatically render them frivolous and worthy of sanctions." *Herrera*, 204 Mich App at 341.

We disagree with defendant's contention that the *Edwards* decision, 328 Mich App at 41-44, was wrongly decided or caused justice to not be done. Other-acts evidence may be used to challenge a defendant's claim of self-defense or defense of others. *People v Denson*, 500 Mich 385, 399; 902 NW2d 306 (2017). "Other courts have recognized these theories of admission, and they are best understood as an attempt to rebut a defendant's claimed state of mind, that is, to show that a defendant did not have an honest and reasonable belief that his or her use of force was necessary to defend himself or herself or another." *Id*. Additionally, a claim of self-defense by a defendant renders his state of mind an issue. *Id*. (Citation omitted). Nonetheless, character evidence must be properly vetted by the appellate court and merely reciting a proper purpose for admission of evidence does not necessarily demonstrate the existence of a proper purpose. *Id*. at 400. "Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence[.]" *Id*.

The trial court appropriately admitted the evidence that Dasha claimed that she was sexually abused by defendant. This information was not offered for the truth of the matter asserted, (i.e., to show that defendant committed criminal sexual conduct and was a bad actor), but to dispute defendant's claim that he acted in self-defense. At trial, the family dynamics were explained to the jury. Specifically, defendant and the victim had a long-standing "on and off" turbulent relationship that produced two children. When Dasha raised claims of sexual abuse, the allegations were investigated, but defendant was not charged. The victim did not seemingly support Dasha's allegations, Dasha was hurt by the victim's response, and she went to live with her maternal grandparents. However, in recent years, Dasha and the victim had repaired their relationship, and the victim agreed to let Dasha and her two young children move into the victim's home that she shared with defendant and Daquan.

The victim's agreement to Dasha's living arrangement seemingly reflected another step in the victim's attempt to separate from or end her relationship with defendant. The victim advised defendant that she had recorded him engaged in drug transactions and threatened to take the recordings to the police and the prosecutor. Defendant admitted to the police that he had no intention of living with Dasha because of her prior false allegations of abuse, gathered his things, and had the victim drive him to the apartment complex where he allegedly sold drugs. Thus, while defendant claimed that the victim had injured him with a hatchet months earlier and that he feared the victim, the prosecutor theorized that Dasha moving into the couple's home was the final straw in the unraveling of the couple's relationship. In effect, the victim was no longer subject to the control of defendant. The victim was gainfully employed, had a home, had recordings of defendant's drug deals and threatened to release them, and allowed Dasha to move into the couple's home apparently aware that defendant would not live with Dasha in light of her prior allegations. Thus, this evidence was not used to show that defendant was a bad actor who committed acts of criminal sexual conduct. Rather, the evidence was offered to rebut defendant's claim of self-defense and demonstrate that the victim took action to eliminate defendant's power over her which angered defendant (i.e., state of mind) to the point that he killed her. Because the evidence was pertinent to defendant's claim of self-defense, was not offered for an improper purpose, was merely premised on Dasha's allegations that were investigated and not charged, and a limiting instruction was provided, the prior *Edwards* decision, 328 Mich App at 41-44, correctly determined the other-acts evidence was admissible.

Regardless of the application of the law of the case doctrine, "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990 that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." MCR 7.215(J)(1). The *Edwards* decision, 328 Mich App at 41-44, was rendered after 1990, was not reversed or modified by our Supreme Court, and was not the subject of a conflict panel. Therefore, it remains binding precedent. Accordingly, this claim of error does not entitle defendant to appellate relief.

III. FORFEITURE BY WRONGDOING

Defendant contends that the trial court improperly admitted evidence that the victim recorded defendant engaged in the sale of drugs on her telephone under MRE 804(b)(6), the codification of the doctrine of forfeiture by wrongdoing. We disagree.

The appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Edwards*, 328 Mich App at 34. An abuse of discretion occurs when the trial court's decision rests outside the range of reasonable and principled outcomes. *Baskerville*, 333 Mich App at 287. Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Under MRE 804(b)(6), a statement is not excluded by the hearsay rule if the declarant is unavailable and the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

Thus, a defendant can forfeit his right to exclude hearsay by his own wrongdoing. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . .
>
> The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . . [*People v Jones*, 270 Mich App 208, 212-213; 714 NW2d 362 (2006) (Citations omitted).]

"The forfeiture doctrine not only provides a basis for an exception to the rule against hearsay, it is also an exception to a defendant's constitutional confrontation right." *Burns*, 494 Mich at 110-111. "[T]he forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify." *Id*.

> To admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the defendant's unavailability; and (3) the wrongdoing did procure the unavailability. [*Id*. at 115.]

The timing of the wrongdoing is not a determinative inquiry. However, "it can inform the inquiry: a defendant's wrongdoing *after* the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability." *Id*. at 116 (Emphasis in original). The inferences differ contingent on whether intent relates to already-charged conduct or whether a homicide case is presented. *Id*. at 116 n 38. The trial court may act as a fact-finder to determine questions of fact that pre-determine the admissibility of the evidence. MRE 104(a); *Burns*, 494 Mich at 117 n 39.

In light of the above, we reject defendant's challenge to the admission of the evidence that the victim reportedly recorded defendant engaged in drug transactions and conveyed that information to her father and Daquan. First, the fact that the trial court made a preliminary finding of fact regarding admissibility of the evidence did not violate defendant's rights; there is a distinction between a preliminary question of admission and the ultimate determination of guilty beyond a reasonable doubt by the jury. Additionally, defendant's contention that the evidence could only be used in a drug prosecution is also without merit. The *Burns* Court noted that when there are existing charges, the analysis of defendant's intent to discourage a witness's testimony is easier. Nonetheless, the plain language of MRE 804(b)(6) provides that a statement is not excluded as hearsay if the declarant is unavailable and the statement is offered against a party that has engaged in wrongdoing intended to procure the unavailability of the witness. The plain language of the rule of evidence addresses when the evidence is admissible and contains no prohibition on the type of litigation in which the statement may be admitted.

Finally, to admit this evidence, the prosecutor had to show by a preponderance of the evidence that defendant engaged in wrongdoing, the wrongdoing was intended to procure the declarant's unavailability, and the wrongdoing did procure the unavailability. In the present case,

defendant was taken to a hospital and then into custody because of an incident of domestic violence with Holliday. While defendant was in Kalamazoo, the victim's body was discovered. Consequently, when defendant was interviewed and declined to make a statement, the interviewing detectives volunteered that they were aware of the couple's volatile relationship. At that time, defendant disclosed that he shot the victim in the face (engaged in wrongdoing) and this wrongdoing did procure the victim's unavailability. It should be noted that defendant attempted to negate the intent requirement, that the wrongdoing was intended to procure the declarant's unavailability, by claiming that he acted in self-defense. However, defendant also disclosed that he was angry with the victim because she had advised that she recorded his drug deals and moved Dasha into the couple's home which necessarily meant that defendant had to leave because he refused to live with Dasha in light of prior allegations of sexual abuse. Thus, defendant provided both positive and negative evidence of his intent to eliminate the victim. Under the circumstances, defendant's challenge to the admission of this evidence under MRE 804(b)(6) is without merit.

Defendant's alternative contention that the drug dealing constituted improper MRE 404(b) evidence is also without merit. First, the evidence was not challenged on this basis in the trial court, and defendant failed to demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The evidence was offered to show motive and to negate defendant's state of mind that he acted in self-defense. Furthermore, defendant only challenges the evidence offered by the victim's father and Daquan, and he does not contest the cumulative testimony offered by Dasha and the victim's sister. Thus, this argument fails.

IV. RIGHT OF ALLOCUTION

Lastly, defendant submits that the trial court improperly denied defendant the right to allocute before the trial court imposed sentence. We disagree.

Generally, the appellate court reviews the interpretation and application of the court rules de novo. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). Defendant did not raise this issue in the trial court, and therefore, this unpreserved issue is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *People v Bailey*, 330 Mich App 41, 66; 944 NW2d 370 (2019). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *People v Lockridge*, 498 Mich 358, 392-393; 870 NW2d 502 (2015). The requirement that the error was plain generally requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id*. Even if the plain error criteria are satisfied, the appellate court must exercise discretion in determining if reversal is warranted. *Id*.

The right of allocution permits a defendant to request mitigation of the sentence, to accept responsibility, and to begin the process of atonement. *People v Petty*, 469 Mich 108, 119-120; 665 NW2d 443 (2003). In *People v Berry*, 409 Mich 774, our Supreme Court held that there must be strict compliance with the court rule permitting allocution and required "the trial court to inquire specifically of the defendant separately whether he or she wishes to address the court before the sentence is imposed." However, the *Berry* decision was overruled in part by *People v Petit*, 466 Mich 624; 648 NW2d 193 (2002). In *Petit*, our Supreme Court granted leave to determine

"whether defendant must be resentenced because the trial court did not specifically ask defendant if she wished to allocute, that is, speak on her own behalf." *Id*. at 625.

In *Petit*, the defendant was charged with the first-degree murder of her sister, but was allowed to plead no contest but mentally ill to second-degree murder and felony-firearm. As a result of the agreement, it was determined that the defendant would be sentenced to 16 ½ to 40 years for second-degree murder and two years' imprisonment for the felony-firearm conviction. Our Supreme Court further wrote:

> At the sentencing hearing, defendant's attorney allocuted on defendant's behalf. The court also heard from the victim's daughter. Although the court asked if there was "anything further" before it imposed sentence pursuant to the agreement, and defense counsel specifically responded, "No, Judge," the court did not specifically ask defendant if she had anything to say on her own behalf before the court sentenced her.
>
> Defendant argues that this failure violated MCR 6.425(D)(2)(c), and thus she is entitled to be resentenced.
>
> * * *
>
> MCR 6.425(D)(2)(c), the court rule that defendant alleges the trial court violated at sentencing, provides in relevant part:
>
> At sentencing the court, complying on the record, must:
>
> * * *
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . .
>
> As is apparent, this straightforward rule requires the trial court to provide a defendant an "opportunity" to address the court before the sentence is imposed. At issue here is whether defendant had such an opportunity. We conclude that she did.
>
> It is well established that we interpret the words of a court rule in accordance with their "everyday, plain meaning." *CAM Construction [v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 554, 640 NW2d 256 (2002)] quoting *Grievance Administrator v Underwood*, 462 Mich. 188, 194; 612 NW2d 116 (2000). "Opportunity" is commonly defined as:
>
> 1. an appropriate or favorable time or occasion. 2. a situation or condition favorable for attainment of a goal. 3. a good position, chance, or prospect, as for success. [*Random House Webster's College Dictionary* (1995).]
>
> Accordingly, this court rule means that the trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is

imposed. However, in order to provide the defendant an opportunity to allocute, the trial court need not "specifically" ask the defendant if he has anything to say on his own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he chooses.

In this case, although the court did not specifically ask defendant if she wished to allocute, it did ask if there was "anything further?" and defense counsel said, "No, Judge." While it is unclear to whom this question was addressed, it is clear that defendant's counsel responded to the court's inquiry by indicating that there was, in fact, nothing further to say. At this juncture, defendant had the option, that is, the opportunity, of addressing the court, and she was not precluded or prevented from doing so.

In our judgment, the trial court's failure to specifically ask defendant if she had anything to say did not violate MCR 6.425(D)(2)(c) because this rule simply does not require such a personal and direct inquiry. It is noteworthy that some of our court rules do require the court to personally address the defendant, see, e.g., MCR 5.941(C) (requiring the court to "personally address the juvenile"); MCR 6.302(B) (requiring the court to "speak[] directly to the defendant"); MCR 6.402 and MCR 6.410 (requiring the court to "address[] the defendant personally"). To give meaning to those instances where our court rules require the court to directly address the defendant and to those rules, like that at issue here, where they do not, we conclude that MCR 6.425(D)(2)(c) only requires that the opportunity to allocute be given. Accordingly, in our judgment, the trial court here complied with the rule by generally asking if there was "anything further."

We are reinforced in our conclusion that we have given the proper reading to MCR 6.425(D)(2)(c) by reference to the United State Supreme Court's handling of a similar matter in *Green v United States*, 365 US 301; 5 L Ed 2d 670; 81 S Ct 653 (1961). *Green* arose out of a dispute concerning an analogous federal rule covering sentencing in the federal courts. In *Green*, the trial court asked, "Did you want to say something?" 365 US at 302. As in our case, it is unclear to whom this question was directed. However, also as in our case, it is clear that it was the defendant's counsel who responded to the court's inquiry.

Faced with the claim that these trial court proceedings were not in compliance with FR Crim P 32(a), the United States Supreme Court first noted that "if Rule 32(a) constitutes an inflexible requirement that the trial judge specifically address the defendant, e.g., 'Do you, the defendant, Theodore Green, have anything to say before I pass sentence?' then what transpired in the present case falls short of the requirement." 365 US at 303. However, the Court ultimately concluded that such a personal and direct inquiry is not necessary to provide the defendant with an opportunity to allocute. Accordingly, the Court provided, "we do not read the record before us to have denied the defendant the *opportunity* to which Rule 32(a) entitled him. The single pertinent sentence--the trial judge's question 'Did you want to say something?'--may have been directed to the defendant and not to

his counsel." 365 US at 304 (emphasis added). On these facts, the Court concluded that the judge's question afforded the defendant a sufficient opportunity to allocute, and thus the court rule was not violated. [*Id*. at 627-630.]

MCR 6.425(D)[1] governs the sentencing procedure and provides in pertinent part:

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

* * *

(c) *give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence* [Emphasis added.]

In the presentence investigation report (PSIR) for this offense, the probation officer wrote that defendant engaged in high risk behavior, attempted to justify his criminal behavior, refused to accept responsibility, and minimized the seriousness of his criminal activity. With regard to the PSIR's section entitled "Defendant's Description of the Offense," defendant provided the following statement:

"Based on the advice from my attorney regarding the pending appeal in this matter, I will not be making a statement regarding this offense for purposes of the presentence investigation."

Defendant filed a lengthy sentencing memorandum with the trial court before any hearing was held. Additionally, before the trial court sentenced defendant, defense counsel requested that the court strike that portion of the PSIR that cited to a lack of remorse. Defense counsel noted that the probation officer's opinion addressing a lack of remorse was rendered after a limited interview over a video phone system, and it contradicted defense counsel's experience with defendant after spending hundreds of hours together. Further, defense counsel noted that he expressly apprised defendant not to make a statement about the case to the probation officer in the event there was a successful appeal and subsequent proceedings held in the trial court. The trial court agreed that the probation agent's conclusion that there was a lack of remorse was premised on conjecture, and defendant had a right to remain silent that existed throughout the appellate process. Therefore, the trial court removed the lack of remorse statement from the PSIR.

After the trial court's statements, defense counsel addressed jail credit. Three members of the victim's family were then permitted to give impact statements. The family members criticized defendant for not showing any remorse in court and for failing to even look at the victim's picture during the trial. Following the family members, the prosecutor made her statement. Defense counsel then made a statement for the record, and the transcript seemingly indicates that defendant stood with his counsel during the statement in light of defense counsel's request that they be

[1] Before January 1, 2021, this court rule was found at MCR 6.425(E)(1)(c).

allowed to stand at the podium. Defense counsel generally responded to the family's claims, but noted that he did not want to get into a "back and forth" exchange. Defense counsel ended his statement by indicating that is "all I have," and defendant did not make a statement.

On appeal, defendant contends that he was deprived of the right of allocution. We disagree. In the first instance, when interviewed for the PSIR, defendant expressly declined to give a statement addressing his description of the offense premised on the advice of counsel. Next, when defense counsel addressed the contents of the PSIR at sentencing, he objected to the inclusion in the report that defendant did not express remorse. Defense counsel cited to the fact that defendant may be pursuing a claim of appeal, and defense counsel expressly advised defendant not to state anything about the case for that reason. The trial court agreed that defendant did not have to make a statement and struck that portion of the PSIR.

Finally, when defense counsel gave his allocution to the trial court, he asked for permission to approach the podium with another individual, and we can surmise that it was defendant. The trial court questioned whether the court reporter could hear "them" from their location. Defense counsel minimally responded to representations made by the family to avoid going "back and forth" over the case. Defense counsel then submitted comparable sentences of other defendants convicted of the same offense. He requested that the trial court sentence defendant to allow him to be paroled in light of his age and his health. At the conclusion of his statement, defense counsel stated "that's all I have[.]" Thus, it is apparent that defense counsel expressly advised defendant not to give a statement seeking mitigation in light of the possibility of an appeal and, in turn, a remand back to the trial court. Indeed, when defendant was interviewed by the police, he initially declined to make a statement, but then admitted that he was angry with the victim for allowing Dasha to move into the couple's home in light of her prior allegations of sexual abuse and acknowledged drug dealing. Defense counsel may have purposefully advised defendant not to allocute in order to prevent repercussions if an appeal was pursued and successful. Further, a statement by defendant might have made things worse for his situation, as it did when he gave a statement to the police.

Finally, this issue is reviewed for plain error affecting substantial rights. "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Lockridge*, 498 Mich at 392-393. The requirement that the error was plain generally requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id*. Even if the plain error criteria are satisfied, the appellate court must exercise discretion in determining if reversal is warranted. *Id*.

In *Bailey*, 330 Mich App at 66, the defendant pleaded guilty and used his allocution at his first sentencing hearing to profess his innocence. He was permitted to withdraw his plea, but was convicted, following a bench trial, of murdering the drug dealer who sold him poor quality narcotics. At his second sentencing, the trial court expressly inquired if defendant had anything to say before sentencing. However, after defendant began to apologize to the victim's wife, the trial court interjected and admonished that murder was an inappropriate way to address a "bad deal." This Court held that defendant was not afforded a "meaningful opportunity for allocution" when the trial court interrupted defendant almost immediately and without justification. It further concluded that plain error was established because the "error likely affected the outcome of the

proceedings in that [the defendant] was not given an opportunity to inform the trial court of 'any circumstances' that he believed the trial court should consider when crafting and imposing the sentence." *Id*. at 66-68.

Unlike in *Bailey*, plain error was not met in this case. Specifically, defendant was required to show that an error occurred. Defendant only demonstrated that the trial court did not expressly invite defendant to allocute. However, the record does not establish that defendant was deprived of the "opportunity" to allocute. Curiously, defendant minimally did not present an affidavit from his co-counsel to validate the assertion that the trial court failed to permit allocution by defendant and the omission did not reflect a strategic decision by the defense. Thus, defendant failed to show that an error occurred, that it was plain (clear or obvious) and that it was prejudicial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael F. Gadola

Tukel, P.J., not participating.

Order

Michigan Supreme Court
Lansing, Michigan

April 20, 2023

Elizabeth T. Clement,
Chief Justice

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

ADM File No. 2023-08

Amendment of Rule 7.202 of the Michigan Court Rules

On order of the Court, the following amendment of Rule 7.202 of the Michigan Court Rules 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted on the Public Administrative Hearings page.

Immediate adoption of this proposal does not necessarily mean that the Court will retain the amendments in their present form following the public comment period.

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

Rule 7.202 Definitions

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(v) [Unchanged.]

(vi) in a foreclosure action involving a claim for remaining proceeds under MCL 211.78t, a postjudgment order deciding the claim.

(b) [Unchanged.]

Staff Comment (ADM File No. 2023-08): The amendment of MCR 7.202 includes in the definition of "final judgment" or "final order" postjudgment orders deciding a claim for remaining proceeds under MCL 211.78t.

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 August 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-08. 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.

April 20, 2023

Clerk

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 14, 2023

Re: HB 4563 & HB 4564 – Electronic Meetings of the Michigan Tax Tribunal

---

Background
House Bills 4563 and 4564 are a tie-barred package of two bills that would permit the Michigan Tax Tribunal to conduct hearings electronically by telephone or video conferencing.

HB 4564 would amend the Tax Tribunal Act, 1973 PA 186, to permit Tax Tribunal hearings to be held in person or, if agreed upon by the parties and approved by the Tribunal, electronically by telephone or video conferencing.

HB 4563 would make corresponding amendments the Open Meetings Act, 1976 PA 267, to permit the Tax Tribunal, which is subject to the Open Meetings Act, to meet electronically. Generally, after December 31, 2021, the Open Meetings Act only permits a meeting of a public body to be held electronically in circumstances requiring accommodation of members absent due to military duty.[1] HB 4563 would create an exception to this general rule.

In April 2023, the Board of Commissioners discussed a similar piece of legislation. SB 150 would amend the Tax Tribunal Act, 1973 PA 186, to allow the Residential Property and Small Claims Division of the Michigan Tax Tribunal to conduct hearings and rehearings telephonically, by videoconferencing, or in person. The Board voted to support SB 150 at that time.

***Keller* Considerations**
While the Michigan Tax Tribunal is not a court, it does have exclusive and original jurisdiction over those tax-related matters assigned to it by statute and functions in a quasi-judicial manner. Parties before the Tribunal are entitled to be represented by counsel. Therefore, the State Bar of Michigan has historically treated Tribunal proceedings as akin to court proceedings for *Keller* purposes. As such, the question of by what means parties and the public are permitted to access Tribunal proceedings (and under what conditions/procedures) are necessarily related to the functioning of the Tribunal. Thought of as akin to legislation surrounding virtual court proceedings, HB 4563 and 4564 are therefore *Keller*-permissible.

---

[1] MCL 15.263a(1)(d) also permits certain agriculture commodity groups, as defined in that section, to meet electronically.

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

HB 4563 and 4564 are necessarily related to the functioning of the Tribunal and are therefore *Keller*-permissible. The bills may be considered on their merits.

HOUSE BILL NO. 4563

May 16, 2023, Introduced by Reps. Hoadley, Bierlein, Bezotte and Outman and referred to the Committee on Tax Policy.

A bill to amend 1976 PA 267, entitled

"Open meetings act,"

by amending section 3a (MCL 15.263a), as amended by 2021 PA 54.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 3a. (1) A meeting of a public body held, in whole or in part, electronically by telephonic or video conferencing in compliance with this section and, except as otherwise required in this section, all of the provisions of this act applicable to a nonelectronic meeting, is permitted by this act in the following

circumstances:

(a) Before March 31, 2021 and retroactive to March 18, 2020, any circumstances, including, but not limited to, any of the circumstances requiring accommodation of absent members described in section 3(2).

(b) Subject to subdivision (d), ~~,~~ on and after March 31, 2021 through December 31, 2021, only those circumstances requiring accommodation of members absent for the reasons described in section 3(2). For the purpose of permitting an electronic meeting due to a local state of emergency or state of disaster, this subdivision applies only as follows:

(*i*) To permit the electronic attendance of a member of the public body who resides in the affected area.

(*ii*) To permit the electronic meeting of a public body that usually holds its meetings in the affected area.

(c) Subject to ~~subdivision~~ **subdivisions** (d) **and (e)**, after December 31, 2021, only in the circumstances requiring accommodation of members absent due to military duty as described in section 3(2).

(d) On and after March 31, 2021, for a public body that is an agricultural commodity group, any circumstances, including, but not limited to, any of the circumstances requiring accommodation of absent members described in section 3(2). As used in this subdivision, "agricultural commodity group" means any of the following:

(*i*) A committee as that term is defined in section 2 of the agricultural commodities marketing act, 1965 PA 232, MCL 290.652.

(*ii*) The state beef industry commission created in section 3 of the beef industry commission act, 1972 PA 291, MCL 287.603.

(*iii*) The potato industry commission created in section 2 of 1970 PA 29, MCL 290.422.

(*iv*) The Michigan bean commission created in section 3 of 1965 PA 114, MCL 290.553.

(e) The prerequisite circumstances to holding an electronic meeting described in subdivision (c) do not apply to an electronic proceeding held pursuant to section 26, 34, or 62 of the tax tribunal act, 1973 PA 186, MCL 205.726, 205.734, and 205.762.

(2) A meeting of a public body held electronically under this section must be conducted in a manner that permits 2-way communication so that members of the public body can hear and be heard by other members of the public body, and so that public participants can hear members of the public body and can be heard by members of the public body and other participants during a public comment period. A public body may use technology to facilitate typed public comments during the meeting submitted by members of the public participating in the meeting that may be read to or shared with members of the public body and other participants to satisfy the requirement under this subsection that members of the public be heard by others during the electronic meeting and the requirement under section 3(5) that members of the public be permitted to address the electronic meeting.

(3) Except as otherwise provided in subsection (8), a physical place is not required for an electronic meeting held under this section, and members of a public body and members of the public participating electronically in a meeting held under this section that occurs in a physical place are to be considered present and in attendance at the meeting for all purposes.

(4) If a public body directly or indirectly maintains an

official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, the public body shall, in addition to any other notices that may be required under this act, post advance notice of a meeting held electronically under this section on a portion of the public body's website that is fully accessible to the public. The public notice on the website must be included on either the homepage or on a separate webpage dedicated to public notices for nonregularly scheduled or electronic public meetings that is accessible through a prominent and conspicuous link on the website's homepage that clearly describes its purpose for public notification of nonregularly scheduled or electronic public meetings. Subject to the requirements of this section, any scheduled meeting of a public body may be held as an electronic meeting under this section if a notice consistent with this section is posted at least 18 hours before the meeting begins. Notice of a meeting of a public body held electronically must clearly explain all of the following:

(a) Why the public body is meeting electronically.

(b) How members of the public may participate in the meeting electronically. If a telephone number, internet address, or both are needed to participate, that information must be provided specifically.

(c) How members of the public may contact members of the public body to provide input or ask questions on any business that will come before the public body at the meeting.

(d) How persons with disabilities may participate in the meeting.

(5) Beginning on ~~the effective date of the amendatory act that added this section,~~ **October 16, 2020**, if an agenda exists for an

electronic meeting held under this section by a public body that directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, the public body shall, on a portion of the website that is fully accessible to the public, make the agenda available to the public at least 2 hours before the electronic meeting begins. This publication of the agenda does not prohibit subsequent amendment of the agenda at the meeting.

(6) A public body shall not, as a condition of participating in an electronic meeting of the public body held under this section, require a person to register or otherwise provide his or her name or other information or otherwise to fulfill a condition precedent to attendance, other than mechanisms established and required by the public body necessary to permit the person to participate in a public comment period of the meeting.

(7) Members of the general public otherwise participating in a meeting of a public body held electronically under this section are to be excluded from participation in a closed session of the public body held electronically during that meeting if the closed session is convened and held in compliance with the requirements of this act applicable to a closed session.

(8) At a meeting held under this section that accommodates members absent due to military duty or a medical condition, only those members absent due to military duty or a medical condition may participate remotely. Any member who is not on military duty or does not have a medical condition must be physically present at the meeting to participate.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No. 4564 (request no.

00154'23) of the 102nd Legislature is enacted into law.

HOUSE BILL NO. 4564

May 16, 2023, Introduced by Reps. Outman, Bierlein and Bezotte and referred to the Committee on Tax Policy.

A bill to amend 1973 PA 186, entitled

"Tax tribunal act,"

by amending sections 26 and 34 (MCL 205.726 and 205.734), section 26 as amended by 2008 PA 126 and section 34 as amended by 1980 PA 437.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 26. **(1)** The tribunal may appoint 1 or more hearing officers to hold hearings. ~~Hearings, except~~ **Except** as otherwise provided in chapter 6 **and subject to subsection (2),** ~~shall~~ **hearings**

must be conducted pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to ~~24.287,~~ **24.288,** and the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. Public notice of the time, date, and place of ~~the~~ **a** hearing ~~shall~~ **must** be given in the manner required by the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. A proposed decision of a hearing officer or referee ~~shall~~ **must** be considered and decided by 1 or more members of the tribunal.

(2) Hearings conducted under subsection (1) may be held in person or, if agreed upon by the parties and approved by the tribunal, electronically by telephone or video conferencing.

Sec. 34. (1) One or more members of the tribunal may hear and decide proceedings. **Proceedings conducted under this subsection may be held in person or, if agreed upon by the parties and approved by the tribunal, electronically by telephone or video conferencing.**

(2) The tribunal shall sit at places throughout the state as the tribunal determines. The county board of commissioners for the county in which the tribunal is sitting, except when the tribunal is sitting in the city of Lansing, shall provide the tribunal with suitable accommodations and equipment on request of the chairperson. ~~The business which the tribunal may perform shall be conducted at a public meeting on the tribunal held in compliance with Act No. 267 of the Public Acts of 1976, as amended.~~ **The tribunal shall conduct its business in compliance with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275.** Public notice of the time, date, and place of ~~the~~ **a** meeting ~~shall~~ **subject to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, must** be given in the manner required by ~~Act No. 267 of the Public Acts of 1976, as amended.~~**the open meetings act, 1976 PA 267, MCL 15.261 to**

15.275.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No. 4563 (request no. 00155'23) of the 102nd Legislature is enacted into law.

Public Policy Position
HB 4563 – HB 4564

Support

Explanation:
The Committee voted unanimously (17) to support House Bills 4563 and 4564. The Committee believes that permitting Tax Tribunal proceedings to be conducted electronically will create greater flexibility and improve public and party access to such proceedings. The Committee believes that this position is consistent with SBM's support for Senate Bill 150 (which would permit the Tax Tribunal's Residential Property and Small Claims Division to conduct hearings telephonically or by videoconferencing) earlier in this legislative session.

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

Keller-Permissibility Explanation:
The Committee concluded that House Bills 4563 and 4564 are *Keller* permissible. The question of whether the quasi-judicial proceedings of the Tax Tribunal may be conducted electronically is necessarily related to the functioning of the tribunal, which has exclusive and original jurisdiction over tax matters committed to it by state statute. The bill is therefore *Keller*-permissible.

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

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 14, 2023

Re: HB 4657 – Pretrial Services Division

Background

HB 4657 is the eighth and final piece of legislation in a package of pretrial reform bills (HB 4655-4662). The Board of Commissioners previously considered the other seven bills, both in the current and immediately preceding legislative session, and voted to support each of those bills. House Bill 4657 is the only new bill this session and is being considered at this time because it was introduced too late in May to allow SBM committees to review and make recommendations on the legislation, and comply with the Bar's notice requirements, prior to the Board's June meeting. In large part, the bill was introduced to address questions about what agency/institution would be charged with implementing several of the substantive requirements established by the bill package.

Generally speaking, HB 4657 requires the State Court Administrative Office ("SCAO") to establish a Pretrial Services Division ("Division") and outlines the responsibilities of that Division. The bill also establishes certain minimum requirements and duties of local pretrial service agencies ("agency/agencies"), which must be certified by the Division.

In addition to performing a certification function, the Division would be responsible for collecting, publishing, and analyzing data related to pretrial services.

***Keller* Considerations**

Legislation proposing significant changes to the pretrial system could be considered *Keller*-permissible to the extent that one of the rationales of pretrial detention/release decisions is to maintain the integrity of the judicial process by securing defendants for trial. Therefore, this bill package, taken as a whole, is *Keller*-permissible because it significantly affects the functioning of the courts.

By creating a new Pretrial Services Division within SCAO and a system of local pretrial service agencies, HB 4657 will have significant impacts on how Michigan courts oversee and interact with defendants pretrial. Some local pretrial agencies exist today, but they are not presently under any meaningful state oversight. They lack consistency and there are no minimum standards governing their responsibilities. On the other hand, many courts do not presently have access to this type of support. In addition, the mandated data collection will also inform future decision-making by the courts and the Legislature as both evaluate the implementation of pretrial reform policies.

***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

Whether considered as part of the pretrial reform package, or taken individually, HB 4657 would have a significant impact on pretrial court procedures and implicate issues that are central, and necessarily related to the functioning of the courts. It is therefore *Keller*-permissible.

HOUSE BILL NO. 4657

May 24, 2023, Introduced by Reps. Pohutsky, Wilson, Meerman, Price, Byrnes, Hood, O'Neal, Hope, Hoskins, Grant, Weiss, Morse, Rheingans, Scott, Andrews, Rogers, McKinney, Tsernoglou, Brabec, Edwards and Young and referred to the Committee on Criminal Justice.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding sections 11 and 11a to chapter V.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER V

Sec. 11. (1) The state court administrative office shall create a pretrial services division. The pretrial services division shall do all of the following:

(a) For each judicial circuit, certify, contract with, and

regularly review for recertification 1 or more agencies to provide pretrial services in the judicial circuit.

(b) Develop and publish the certification criteria used to select pretrial services agencies under subdivision (a) and update the published criteria every 5 years to reflect research on or developments in providing effective pretrial services.

(c) Maintain a list on the division's public website that identifies, by judicial circuit, each pretrial services agency certified under subdivision (a).

(d) Identify and disseminate evidence-based best practices to pretrial services agencies for the provision of pretrial services that will increase the likelihood that a defendant is not rearrested and attends all required court appearances.

(e) Establish training protocols to ensure pretrial services agencies are following the evidence-based best practices identified and disseminated under subdivision (d).

(f) Establish performance measures for pretrial services agencies and ensure complete and accurate information and data collection for those performance measures.

(g) Request and collect by January 31 of each year and publish on the division's website by April 30 of each year information and data, by judicial circuit, from each pretrial services agency regarding all cases closed during the previous calendar year, including, but not limited to, all of the following:

(*i*) Disaggregated by the defendants who receive supportive services only, pretrial supervision only, or both supportive services and pretrial supervision, all of the following information, as applicable:

(A) The number and rate of defendants released on pretrial

services who fail to appear.

(B) The number of defendants who missed 1 or more court dates.

(C) Any known reason for a failure to appear collected by the pretrial services agency.

(D) The number of warrants issued for failures to appear.

(E) The number of defendants detained during the pretrial period or placed on pretrial electronic monitoring after a failure to appear.

(*ii*) Information regarding defendants in pretrial electronic monitoring programs, including, but not limited to, the total number of defendants in each program, each defendant's demographic information including race, ethnicity, age, and sex, the charges for which each defendant was ordered to electronic monitoring, and the length of time that each defendant was subject to electronic monitoring.

(*iii*) Information on the pretrial rearrest of defendants released during the pretrial period, including the number of the defendants rearrested and charged with a new misdemeanor, serious misdemeanor, nonviolent felony, and violent felony offense while on pretrial release, the outcome of any rearrest, and how long after the initial release during the pretrial period these rearrests occurred.

(*iv*) Information on the voluntary supportive services offered by the agency, including the number of defendants receiving each available service and those defendants' pretrial rearrest and court appearance rates.

(*v*) The ratio of full-time pretrial services agency staff to defendants who are under pretrial supervision and receiving supportive services from each agency.

(*vi*) The average salaries and other compensation paid to pretrial services agencies administrators and staff.

(h) Evaluate the performance of each pretrial services agency, assist each agency that does not meet the performance standards set by the division to improve pretrial services, and decertify agencies that are unable to meet the standards after assistance by the division.

(i) Analyze and evaluate the data collected and undertake any research or studies necessary to improve the delivery of pretrial services in a manner that is consistent with meeting the needs and circumstances of each county and of the defendants receiving pretrial services, ensuring the appropriate use of pretrial services, and identifying and mitigating racial or other disparities.

(j) Request and receive, from any department, division, board or commission, bureau, agency or political subdivision of this state, or public authority, any assistance or legally available information or data necessary to enable the division to properly carry out the division's functions, powers, and duties.

(k) Investigate and monitor any other matter related to pretrial services, as needed.

(*l*) Develop recommendations for the distribution and expenditure of appropriations for pretrial services. In developing the recommendations, the division may consider all of the following:

(*i*) A pretrial services agency's performance measures.

(*ii*) The commitment of local resources and changes to the pretrial services provided by a judicial circuit.

(*iii*) The geographic balance of funding by region, population,

crime rate, poverty rate, and individual community need.

(m) Target grants that support innovative and cost-effective improvements to the provision of evidence-based pretrial services, including collaborative efforts serving multiple counties.

(n) Apply for and accept any grant or gift intended for a purpose of the division. Subject to the laws and regulations that apply to appropriated funds, the grants or gifts received under this subdivision may be expended by the division to effectuate any division purpose.

(2) From amounts appropriated to the pretrial services division to fund pretrial services agencies, the division shall determine the amount of funding to provide after consulting with the local funding unit and considering all of the following:

(a) The local needs and resources identified by local funding units.

(b) The average number of defendants receiving supervision or supportive services at any 1 time by the agency and in the judicial circuit.

(c) Any other factor as may be deemed necessary.

(3) As used in this section, "local funding unit" means a funding unit as that term is defined in section 4803 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4803.

Sec. 11a. (1) A pretrial services agency certified by the division under section 11 shall provide supportive services and supervision to defendants released during the pretrial period and ordered to pretrial services. A pretrial services agency shall comply with the requirements of this section and section 11.

(2) A pretrial services agency must be a public entity under the supervision and control of a county or municipality or a

nonprofit entity under contract to the county, the municipality, or this state. A county or municipality may contract with another county or municipality in this state to provide pretrial services in its area. A county, a municipality, and this state shall not contract with a private or for-profit entity for pretrial services.

(3) In addition to the requirements developed by the division under section 11, to be certified by the division, a pretrial services agency shall demonstrate all of the following:

(a) Independent operation from law enforcement and probation with separate leadership, staff, and operating budget.

(b) Collaboration experience with other community-based organizations.

(c) The capacity to create individualized plans and provide supportive services for each defendant released during the pretrial period and ordered to pretrial services.

(4) For each defendant, a pretrial services agency shall do all of the following:

(a) Conduct an individualized needs assessment to determine the least restrictive means of supervision or voluntary supportive services, if any are necessary, to reasonably ensure the defendant remains free of rearrest during the pretrial period and attends all required court appearances. The assessment tool utilized by the agency must be approved by the division and must not lead to unnecessary supervision practices.

(b) Provide evidence-based and voluntary supportive services that have been shown to increase the likelihood that a defendant is not rearrested during the pretrial period and attends all required court appearances, including all of the following:

(*i*) Automated text message reminders for required court

appearances.

(*ii*) A dedicated and reliable procedure for communicating with the court regarding rescheduling court appearances.

(*iii*) Transportation assistance.

(*iv*) Child care assistance during required court appearances, where practicable.

(*v*) Resources and referrals for housing and employment, where practicable.

(c) If necessary, provide evidence-based supervision to reasonably ensure the defendant is not rearrested during the pretrial period and attends all required court appearances. The supervision must be limited to text message, telephone, or video check-ins unless the court determines, in accordance with section 6b of this chapter, that a significant liberty restraint is necessary to address the defendant's risk. The defendant must not be required to pay for services provided or mandated by a court or provided by a pretrial services agency.

(5) By January 30 of each year, each pretrial services agency shall prepare and file a report with the division that contains all of the information required under section 11(1)(g) for cases closed during the previous calendar year. The report must not include any personal identifying information for a defendant.

(6) As used in this section:

(a) "Division" means the pretrial services division created in section 11.

(b) "Personal identifying information" means a name, number, or other information that is used for the purpose of identifying a specific person or providing access to a person's court records, including, but not limited to, a person's name, address, telephone

number, driver license or state personal identification card number, Social Security number, or criminal history report.

(c) "Public entity" means this state, including all agencies thereof, any public body incorporated in this state, including all agencies thereof, any registered nonprofit agency in this state, or any non-incorporated public body in this state of whatever nature, including all agencies thereof.

Enacting section 1. This amendatory act takes effect 2 years after the date it is enacted into law.

Public Policy Position
HB 4657

Support with Amendments

Explanation:
The Committee voted to support House Bill 4657 with proposed amendments.

The Committee recommends that the legislation include a definition of qualitative and quantitative evidence-based practices to ensure that such practices reflect the communities served. The Committee believes that specific consideration should be given to tribal sovereignty. The Committee further recommends that data on violations of pretrial release orders be included in the data collection.

The Committee believes that the creation of a Pretrial Services Division as a centralized system to certify and support pretrial services agencies will provide greater consistency in pretrial services across the state and will streamline this work. The proposed data collection will be critical to the task of identifying and mitigating racial and other disparities and its publication will provide necessary transparency. Such a centralized system will be essential to implementing the other pieces of legislation in the pending pretrial reform package, which are supported by SBM.

Position Vote:
Voted For position: 9
Voted against position: 2
Abstained from vote: 4
Did not vote (absent): 12

Keller-Permissibility Explanation:
The Committee concluded that House Bill 4657 is *Keller*-permissible because it will improve the delivery of pretrial services in a manner that is consistent with the needs and circumstances of each county and of the individuals receiving pretrial services. As such, the bill is reasonably related to the functioning of the courts.

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

Public Policy Position
HB 4657

Support

Explanation:
The Committee voted to support House Bill 4657. The Committee believes that the creation of a pretrial services division within the State Court Administrative Office, and the certification of local pretrial service agencies, will help ensure that such services are available in a more consistent fashion across the state, while also providing institutional infrastructure that is necessary to implement other components of the pending pretrial reform legislative package, which is supported by SBM.

Position Vote:
Voted For position: 14
Voted against position: 3
Abstained from vote: 0
Did not vote: 9

***Keller* Permissibility Explanation:**
The Committee concluded that House Bill 4657 is *Keller*-permissible because, consistent with the Board of Commissioner's *Keller* determination on the other bills in the pretrial reform package, because securing the presence of defendants for trail is essential to the functioning of the courts.

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
Sofia V. Nelson snelson@sado.org

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 14, 2023

Re: HB 4738 & HB 4739 – Witness/Victim Personal Information

Background

In large part, House Bills 4738 and 4739 are a legislative response to the Michigan Court of Appeals opinion in *People v Jack*, 507 Mich 948 (2021), which held that "absent an applicable exception provided for in MCR 6.201, a prosecutor is required to produce unredacted police reports under MCR 6.201(B)(2)."[1] HB 4738 would amend the Code of Criminal Procedure, 1927 PA 115, and HB 4739 would amend the William Van Regenmorter Crime Victim's Rights Act, 1985 PA 87, to require prosecuting attorneys to redact personal information of witnesses and victims of crime from certain court documents. The bills would permit disclosure of personal information to defense counsel or defendants only upon court order. Unauthorized disclosure would be a misdemeanor offense under the legislation.

In a similar vein, following *Jack*, the Michigan Supreme Court issued a proposed amendment of MCR 6.201 (ADM File No. 2021-29) in June 2022. The Criminal Jurisprudence & Practice Committee ("CJAP") voted to support the proposed amendment with an additional amendment striking "the address, telephone or cell phone number, or" from the proposed language. The practical effect of the proposed CJAP amendment was to leave the Court of Appeals holding in *Jack* undisturbed, while allowing other personal information less essential to the preparation of a defense to be redacted. The Access to Justice Policy Committee then voted to support CJAP's position. The Board of Commissioners followed suit and voted to support CJAP's proposed amendment, which SBM has been advocating since that time. The comment period on ADM File No. 2021-29 expired on October 1, 2022. As of now, the matter has not been scheduled for a public administrative hearing before the Court.

***Keller* Considerations**

HB 4738 and 4739 are fundamentally about the proper scope and application of a court rule: MCR 6.201. As a preliminary matter, there is a question of whether the Legislature or the Court is most appropriately situated to address this issue.

The passage of this legislation would have the effect of overturning *Jack* and indirectly amending MCR 6.201. While there is disagreement between prosecutors and the defense bar about where the balance

---

[1] *Jack* concerned access to witness information. Subsequently, in *People v Antaramian* (Docket No. 362604), the Court of Appeals applied the same holding to the redaction of crime victims' information.

between witness/victim privacy and a defendant's constitutional right to adequate representation by counsel should be struck, there is no disagreement that the resolution of this issue will have a significant impact on functioning of the courts, as it goes directly to how criminal matters are developed and then proceed in court. Additionally, limitations on how defense counsel is able to develop a defense, and by extension the adequacy of the legal representation and the defense, are considerations reasonably related to access to legal services.

***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 Bills 4738 and 4739 are each reasonably (perhaps necessarily) related to both the functioning of the courts and access to legal services and are therefore *Keller*-permissible. They may be considered on their merits.

HOUSE BILL NO. 4738

June 13, 2023, Introduced by Reps. Breen, Mentzer, Hope, Tyrone Carter, Scott, Byrnes, Pohutsky, McFall, Paiz, Tsernoglou, Liberati, Farhat, Conlin, Shannon, Arbit, Rogers, Morse, Hoskins, Andrews, Coffia, Hill and Young and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding section 40b to chapter VII.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER VII

Sec. 40b. (1) Except as otherwise provided under this section, the prosecuting attorney shall keep the personal information of a witness confidential unless the personal information is a part of the res gestae of the charged crime.

(2) The prosecuting attorney shall redact the personal

information of a witness required to be kept confidential under subsection (1) from both of the following:

(a) A document provided to the defendant's counsel or the defendant.

(b) A document that the prosecuting attorney submits as an ordinary court document or that will be entered into the court file.

(3) This section does not alleviate the obligation otherwise required under law to make a witness available for interview by the other party.

(4) On motion by the defendant, and subject to subsection (7), the court may order the prosecuting attorney to provide personal information of a witness to the defendant's counsel or the defendant.

(5) A motion under subsection (4) must meet the following requirements:

(a) Demonstrate that the personal information requested is reasonably necessary to provide an adequate defense.

(b) Explain the limited purpose for which the personal information is sought.

(6) If the court grants a motion under subsection (4), the order must do all of the following:

(a) Limit the disclosure of the personal information to the extent the disclosure is reasonably necessary to provide an adequate defense.

(b) Specify the limited purpose for which the personal information may be used.

(c) Except as provided in subdivision (d), require the personal information to remain in the exclusive custody of the

defendant's counsel or the defendant if the defendant is not represented by counsel.

(d) Include conditions and terms for the defendant's counsel or, if the defendant is not represented by counsel, the defendant, to provide the personal information to the counsel's or the defendant's agent, employee, or expert witness if it is necessary for a limited purpose that is approved by the court.

(e) Prohibit the reproduction, copying, or dissemination of the personal information unless authorized in the order.

(7) This section does not authorize the disclosure of the confidential address of a program participant.

(8) This section does not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services.

(9) A person who is required to keep confidential or redact personal information under this section and who intentionally and willfully discloses that personal information in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

(10) As used in this section:

(a) "Confidential address" means that term as defined in section 3 of the address confidentiality program act, 2020 PA 301, MCL 780.853.

(b) "Internet identifier" means a designation used for self-identification or routing used in posting on the internet or in other internet communications.

(c) "Personal information" means the following information of an individual but does not include the location of a charged crime:

(*i*) Home address.

(*ii*) Telephone number and cellular telephone number.

(*iii*) Driver license number or official state personal identification card number.

(*iv*) Social Security number.

(*v*) Date of birth.

(*vi*) Place and address of employment.

(*vii*) Employee identification number.

(*viii*) Mother's maiden name.

(*ix*) Demand deposit account, savings account, or checking account number, or other financial identification information.

(*x*) Credit card number.

(*xi*) Email address.

(*xii*) Internet identifier.

(*xiii*) Home address, telephone number, and cellular telephone number of a family member.

(d) "Program participant" means that term as defined in section 3 of the address confidentiality program act, 2020 PA 301, MCL 780.853.

HOUSE BILL NO. 4739

June 13, 2023, Introduced by Reps. Mentzer, Breen, Hope, Tyrone Carter, Scott, Byrnes, Pohutsky, McFall, Paiz, Liberati, Farhat, Conlin, Shannon, Arbit, Rogers, Morse, Hoskins, Andrews, Hill, Coffia and Young and referred to the Committee on Judiciary.

A bill to amend 1985 PA 87, entitled

"William Van Regenmorter crime victim's rights act,"

(MCL 780.751 to 780.834) by adding section 8a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 8a. (1) Except as otherwise provided under this section, the prosecuting attorney shall keep the personal information of a victim confidential unless the personal information is a part of the res gestae of the charged crime.

(2) The prosecuting attorney shall redact the personal information of a victim required to be kept confidential under

subsection (1) from both of the following:

(a) A document provided to the defendant's counsel or the defendant.

(b) A document that the prosecuting attorney submits as an ordinary court document or that will be entered into the court file.

(3) This section does not alleviate the obligation otherwise required under law to make a victim available for interview by the other party.

(4) On motion by the defendant, and subject to subsection (7), the court may order the prosecuting attorney to provide personal information of a victim to the defendant's counsel or the defendant.

(5) A motion under subsection (4) must meet the following requirements:

(a) Demonstrate that the personal information requested is reasonably necessary to provide an adequate defense.

(b) Explain the limited purpose for which the personal information is sought.

(6) If the court grants a motion under subsection (4), the order must do all of the following:

(a) Limit the disclosure of the personal information to the extent the disclosure is reasonably necessary to provide an adequate defense.

(b) Specify the limited purpose for which the personal information may be used.

(c) Except as provided in subdivision (d), require the personal information to remain in the exclusive custody of the defendant's counsel or the defendant if the defendant is not

represented by counsel.

(d) Include conditions and terms for the defendant's counsel or, if the defendant is not represented by counsel, the defendant, to provide the personal information to the counsel's or the defendant's agent, employee, or expert witness if it is necessary for a limited purpose that is approved by the court.

(e) Prohibit the reproduction, copying, or dissemination of the personal information unless authorized in the order.

(7) This section does not authorize the disclosure of the confidential address of a program participant.

(8) This section does not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services.

(9) A person who is required to keep confidential or redact personal information under this section and who intentionally and willfully discloses that personal information in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

(10) As used in this section:

(a) "Confidential address" means that term as defined in section 3 of the address confidentiality program act, 2020 PA 301, MCL 780.853.

(b) "Internet identifier" means a designation used for self-identification or routing used in posting on the internet or in other internet communications.

(c) "Personal information" means the following information of an individual but does not include the location of a charged crime:

(*i*) Home address.

(*ii*) Telephone number and cellular telephone number.

(*iii*) Driver license number or official state personal identification card number.

(*iv*) Social Security number.

(*v*) Date of birth.

(*vi*) Place and address of employment.

(*vii*) Employee identification number.

(*viii*) Mother's maiden name.

(*ix*) Demand deposit account, savings account, or checking account number, or other financial identification information.

(*x*) Credit card number.

(*xi*) Email address.

(*xii*) Internet identifier.

(*xiii*) Home address, telephone number, and cellular telephone number of a family member.

(d) "Program participant" means that term as defined in section 3 of the address confidentiality program act, 2020 PA 301, MCL 780.853.

Legislative Analysis

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

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

REQUIRE PERSONAL INFORMATION OF VICTIMS AND WITNESSES TO BE CONFIDENTIAL

House Bill 4738 as introduced
Sponsor: Rep. Kelly Breen

House Bill 4739 as introduced
Sponsor: Rep. Denise Mentzer

Committee: Judiciary
Complete to 6-14-23

SUMMARY:

House Bill 4738 would amend the Code of Criminal Procedure, and House Bill 4739 would amend the William Van Regenmorter Crime Victim's Rights Act, to require the prosecuting attorney to redact the personal information of witnesses and victims of crimes from certain court documents and to allow disclosure of the personal information to the defense counsel or the defendant (if not represented by counsel) only upon an order of the court. An unauthorized disclosure would be a misdemeanor offense.

The William Van Regenmorter Crime Victim's Rights Act identifies various rights afforded to **victims** of a crime, including not having certain information in the court file or ordinary court documents, with some exceptions, and exempting certain information from disclosure under the Freedom of Information Act (FOIA). The Code of Criminal Procedure, among other things, provides for proceedings before trial and the filing of informations, including the required prosecutorial disclosure of the names of certain **witnesses**.

The bills would each add a new section to their respective acts to require the prosecuting attorney to keep the ***personal information*** of any victim or witness confidential unless the personal information is a part of the *res gestae* of the charged crime.[1] Personal information would have to be redacted by the prosecuting attorney from a document provided to the defendant or the defendant's counsel, as well as from a document submitted by the prosecutor as an ordinary court document or that will be entered into the court file.

Personal information would mean the following information of an individual, but would not include the location of a charged crime:

- Home address.
- Telephone number and cell phone number.
- Driver's license number or official state personal identification card number.
- Social Security number.
- Date of birth.
- Place and address of employment and employee identification number.
- Mother's maiden name.

[1] *Res gestae* is a common law doctrine pertaining to the facts and events of a crime and that allows certain testimony to be admitted as evidence that otherwise would be inadmissible under the hearsay rule.

- Demand deposit account, savings account, or checking account number or other financial identification information.
- Credit card number.
- Email address.
- Internet identifier, defined to mean a designation used for self-identification or routing used in posting on the internet or in other internet communications.
- Home address, telephone number, and cell phone number of a family member.

The bills would not alleviate the obligation otherwise required under law to make a victim or witness available for interview by the other party.

In addition, the bills would not authorize the disclosure of the confidential address of a program participant under the Address Confidentiality Program Act or preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services. (Among other things, the Address Confidentiality Program Act provides a participant with a designated address to use for various legal purposes instead of the participant's actual home address, which is kept confidential.)

On motion by the defendant, and subject to the above provision, the court could order the prosecuting attorney to provide personal information of a witness or a victim to the defendant or the defendant's counsel. The motion would have to meet the following requirements:

- Explain the limited purpose for which the personal information is sought.
- Demonstrate that the personal information requested is reasonably necessary to provide an adequate defense.

If the motion were granted, the order would have to do all of the following:

- Limit the disclosure of the personal information to the extent the disclosure is reasonably necessary to provide an adequate defense.
- Specify the limited purpose for which the personal information may be used.
- Prohibit the reproduction, copying, or dissemination of the personal information not authorized in the order.
- Except as provided below, require the personal information to remain in the exclusive custody of the defendant (if not represented by counsel) or the defendant's counsel.
- Include conditions and terms for the defendant (if not represented by counsel) or the defendant's counsel to provide the personal information to the counsel's or defendant's agent, employee, or expert witness if necessary for a limited purpose approved by the court.

A person who is required to keep confidential or redact personal information under the bills and who intentionally and willfully disclosed that personal information in violation of the bills would be guilty of a misdemeanor punishable by imprisonment for up to 93 days or a fine of up to $500, or both.

House Bill 4738 (Code of Criminal Procedure): Proposed MCL 767.40b
House Bill 4739 (Crime Victim's Rights Act): Proposed MCL 780.758a

BACKGROUND:

Section 2(1)(m) of the William Van Regenmorter Crime Victim's Rights Act defines the term ***victim***, for purposes of that act, to mean any of the following:

- Except as provided below, an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.
- Except for the purpose only of submitting or making an impact statement as provided below, the following individuals other than the defendant if the victim is deceased:
    - The spouse of the deceased victim.
    - A child of the deceased victim if the above does not apply and the child is 18 years of age or older.
    - A parent of the deceased victim if the above do not apply.
    - The guardian or custodian of a child of the deceased victim if the above do not apply and the child is less than 18 years of age.
    - A sibling of the deceased victim if the above do not apply.
    - A grandparent of the deceased victim if the above do not apply.
- A parent, guardian, or custodian of a victim who is less than 18 years of age if the parent, guardian, or custodian so chooses and is neither the defendant nor incarcerated.
- A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if the parent, guardian, or custodian is neither the defendant nor incarcerated.
- For the purpose only of submitting or making an impact statement, if the individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime is deceased, is so mentally incapacitated that they cannot meaningfully understand or participate in the legal process, or consents to the individual's designation as a victim, the following individuals other than the defendant:
    - The spouse of the victim.
    - A child of the victim if the child is 18 years of age or older.
    - A parent of the victim.
    - The guardian or custodian of a child of the victim if the child is less than 18 years of age.
    - A sibling of the victim.
    - A grandparent of the victim.
    - A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and the guardian or custodian is not incarcerated.

FISCAL IMPACT:

The bills would have an indeterminate fiscal impact on local units of government. Information is not available on the number of persons that would be convicted under provisions of the bills. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Increased costs could be offset, to some degree, depending on if additional court-imposed fee revenue is generated. Any increase in penal fine revenue would increase

funding for local libraries, which are the constitutionally designated recipients of those revenues.

There would be no fiscal impact on local prosecutors' offices or the Prosecuting Attorneys Coordinating Council (PACC).

Legislative Analysts: Susan Stutzky
Rick Yuille
Fiscal Analyst: Robin Risko

Public Policy Position
HB 4738 – HB 4739

Oppose

Explanation:
The Committee voted to oppose House Bills 4738 and 4739. The Committee believes that the legislation will impose unnecessary limitations on defense counsel's ability to access information that is essential to the preparation of a defense (e.g., witness contact information) and thereby undermine the Sixth Amendment rights of individuals that have been accused of a crime. The Committee also took note of the fact that its position on this legislation is consistent with the Board of Commissioners position on the proposed amendment of MCR 6.201 (ADM File No. 2021-29), which would have imposed similar, unnecessary limitations.

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

Keller-Permissibility Explanation:
The Committee concluded that House Bills 4738 and 4739 were each *Keller*-permissible, because they are reasonably related the functioning of the courts.

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

Public Policy Position
HB 4738 & HB 4739

Support

Explanation:
The Committee voted to support House Bills 4738 and 4739.

Position Vote:
Voted For position: 9
Voted against position: 7
Abstained from vote: 0
Did not vote: 10

***Keller* Permissibility Explanation:**
The Committee concluded that both House Bill 4738 and 4739 are *Keller*-permissible because they are each reasonably related to the functioning of the courts. Both bills will have a significant impact of on discovery and case development in criminal cases.

Contact Persons:
Nimish R. Ganatra ganatran@washtenaw.org
Sofia V. Nelson snelson@sado.org

HOUSE BILL NO. 4850

June 27, 2023, Introduced by Reps. Glanville, DeBoer, Hill, DeSana, St. Germaine, Phil Green, Meerman, Roth, Schmaltz, Rigas, Kunse, Koleszar, Price, Hood, Young, Weiss, Conlin, Liberati, Stone, Grant, Brabec, Andrews, Brixie, McFall, Byrnes, Tyrone Carter, Snyder, Coleman, Rheingans, Hope, Steckloff, Dievendorf, Edwards, O'Neal, Haadsma, MacDonell, Martus, Skaggs, Morse, Churches, Puri, Scott, Neeley, Paiz, Breen, McKinney and Whitsett and referred to the Committee on Criminal Justice.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 1307a (MCL 600.1307a), as amended by 2020 PA 307.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1307a. (1) To qualify as a juror, ~~a person~~ **an individual** must meet all of the following criteria:

(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the ~~person~~ **individual** is selected, and in the case of a district court in districts of

the second and third class, be a resident of the district.

(b) Be able to communicate in the English language.

(c) Be physically and mentally able to carry out the functions of a juror. Temporary inability must not be considered a disqualification.

(d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.

(e) Not have been convicted of a felony.

(2) ~~A person~~ **An individual** more than 70 years of age may claim exemption from jury service and must be exempt upon making the request.

(3) ~~A~~ **An individual who is a** nursing mother may claim exemption from jury service for the period during which she is nursing her child and must be exempt upon making the request if she provides a letter from a physician, a lactation consultant, or a certified nurse midwife verifying that she is a nursing mother.

(4) An individual who is a participant in the address confidentiality program created under the address confidentiality program act, **2020 PA 301, MCL 780.851 to 780.873,** may claim exemption from jury service for the period during which ~~he or she~~ **the individual** is a program participant. To obtain an exemption under this subsection, the individual ~~shall~~ **must** provide ~~his or her~~ **the** participation card issued by the department of attorney general upon ~~his or her~~ **the individual's** certification as a program participant to the court ~~providing~~ **as** evidence that ~~he or she~~ **the individual** is a current participant in the address confidentiality program.

(5) An individual who is a service member of the United States Armed Forces may claim exemption from jury service for the period

during which the individual is on active duty and must be exempt upon making the request of the court and providing a copy of the service member's orders.

(6) ~~(5)~~ For the purposes of this section and sections 1371 to 1376, ~~a person~~ **an individual** has served as a juror if that ~~person~~ **individual** has been paid for jury service.

(7) ~~(6) For purposes of~~ **As used in** this section:

(a) "Certified nurse midwife" means an individual licensed as a registered professional nurse under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, who has been issued a specialty certification in the practice of nurse midwifery by the board of nursing under section 17210 of the public health code, 1978 PA 368, MCL 333.17210.

(b) "Felony" means a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.

(c) "Lactation consultant" means a lactation consultant certified by the International Board of Lactation Consultant Examiners.

(d) "Physician" means an individual licensed by the state to engage in the practice of medicine or osteopathic medicine and surgery under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.