Agenda
Public Policy Committee
July 22, 2021 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……Dana M. Warnez, Chairperson

A. Reports

1. Approval of June 9, 2021 minutes
2. Public Policy Report

B. Court Rules

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

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

Status:	09/01/21 Comment Period Expires.
Referrals:	06/14/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. Comment provided to the Supreme Court is included in the materials.
Liaison:	Kim Warren Eddie

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

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

Status:	08/01/21 Comment Period Expires.
Referrals:	04/09/21 Access to Justice Policy Committee; Children's Law Section.
Comments:	Access to Justice Policy Committee. Comment provided to the Supreme Court is included in the materials.
Liaison:	Lori A. Buiteweg

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

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

Status:	08/01/21 Comment Period Expires.
Referrals:	04/29/21 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee. Comments provided to the Court on the 2020 order are included in the materials. A comment from the Michigan Judges Association on the 2021 order is also included.
Liaison:	Takura N. Nyamfukudza

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

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

Status: 08/01/21 Comment Period Expires.
Referrals: 04/29/21 Civil Procedure & Courts Committee; Judicial Section.
Comments: Comments provided to the Court are included in the materials.
Liaison: Judge Cynthia D. Stephens

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

The addition of MCR 8.128 establishes the Michigan Judicial Council to strategically plan for Michigan's Judiciary.

Status: 08/01/21 Comment Period Expires.
Referrals: 06/14/21 All Sections.
Comments: Alternative Dispute Resolution Section.
Comments provided to the Court are included in the materials.
Liaison: Brian D. Shekell

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

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

Status: 09/01/21 Comment Period Expires.
Referrals: 06/14/21 All Sections.
Comments: Member Comment.
Comment provided to the Court is included in the materials.
Liaison: Nicholas M. Ohanesian

C. Court Rules

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

Status: 07/28/21 Comment Period Expires.
Referrals: 07/08/21 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.
Comments: None at this time.
Liaison: Thomas G. Sinas

D. Consent Agenda

To support the position submitted by Criminal Jurisprudence & Practice Committee on the following item:

Model Criminal Jury Instructions

1. M Crim JI 25.7

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

MINUTES
Public Policy Committee
June 9, 2021 – 12 p.m. to 1:30 p.m.

Committee Members: Dana M. Warnez, Lori A. Buiteweg, Kim Warren Eddie, E. Thomas McCarthy, Jr., Valerie R. Newman, Nicholas M. Ohanesian, Brian D. Shekell, Thomas G. Sinas, Judge Cynthia D. Stephens, Mark A. Wisniewski
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune, Samantha Zandee
Guest: Dominica Convertino

A. Reports

1. Approval of April 10, 2021 minutes

The minutes were approved unanimously (9).

B. Court Rules

1. ADM File No. 2002-37: Proposed Amendment of MCR 1.109

The proposed amendment of MCR 1.109 would address e- Filing issues relating to updating authorized user accounts and e-service of documents that are returned as undeliverable to a registered e-mail address.
The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

The committee voted unanimously (9) to support the proposed amendments to Rule 1.109(G)(1)(a) and (G)(3)(j) but oppose the proposed amendments to (G)(6)(a)(iv) for the reasons presented below:

> **This amendment fails to recognize that transmission issues are not only due to the recipient having an invalid email address but can be caused by (1) issues with the sender's server; (2) issues with the recipient's server beyond the recipient's control; and (3) file size limitations, which particularly arise with discovery issues. Given that Michigan does not currently have a statewide e-filing system with one place to update email addresses, attorneys need time to change their email address with the various courts in which they have cases pending. Until we implement a statewide e-filing system, when electronic service is returned as undeliverable, the filer should be required to serve by mail.**

2. ADM File No. 2020-36: Proposed Amendments of MCR 3.903, 3.966, 3.975, and 3.976

The proposed amendments of MCR 3.903, 3.966, 3.975, and 3.976 would make procedural changes for cases involving the placement of foster care children in a qualified residential treatment program as required by state and federal statutory revisions.
The following entities offered recommendations: Access to Justice Policy Committee.

The committee voted unanimously (10) to support the proposed amendments to Rules 3.903, 3.966, 3.975, and 3.976.

3. ADM File No. 2021-09: Amendments of MCR 3.903 and 3.925

The amendments of MCR 3.903 and 3.925 make the rules consistent with MCL 712A.28(5)(d) by requiring that previously-public juvenile case records be made nonpublic and accessible only to those with a legitimate interest. The effective date makes the rule change consistent with the statutory revision effective date in 2020 PA 362.
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee voted unanimously (10) to support the amendments to Rules 3.903 and 3.925.

4. ADM File No. 2021-09: Amendment of MCR 3.944

The amendment of MCR 3.944 incorporates new requirements for courts that detain juvenile status offender violators in secure facilities, in accordance with MCL 712A.15(3) and MCL 712A.18(1)(k). The effective date of these amendments is consistent with the effective date of the new statutory provisions included in 2020 PA 389.
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee voted unanimously (10) to support the amendment to Rule 3.944 and recommend that the rule include (1) more specific criteria about the qualifications of the person conducting the mental health or substance abuse assessment and (2) that the assessment is done in a culturally honoring manner.

5. ADM File No. 2018-29: Proposed Amendments of MCR 6.302 & 6.610

The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the "sentencing offense alone," not the charged offense. Further, an "offense to which defendant is pleading" would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the "charged offense" clause may well be unnecessary.

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

The committee voted unanimously (10) to oppose the proposed amendments of Rules 6.302 and 6.610 and include the explanations to the questions posed by the Court from the Access to Justice Policy Committee position.

C. Legislation

1. HB 4164 (Berman) Courts: records; online attorney access to court actions and filed documents without fees; provide for. Amends secs. 1985 & 1991 of 1961 PA 236 (MCL 600.1985 & 600.1991) & adds sec. 1991a.

The committee agreed unanimously that the legislation is *Keller* permissible in that it affects the improvement of the functioning of the courts and the availability of legal services to society.

The committee voted unanimously (10) to support the substance of the bill, with the recommendation of a deferral of the enactment timeline to no less than one calendar year as presented in the bill.

2. HB 4195 (Hornberger) Family law: marriage and divorce; public disclosure of divorce filings; modify. Amends 1846 RS 84 (MCL 552.1 - 552.45) by adding sec. 6a.

The committee agreed unanimously that the legislation is *Keller* permissible in that it affects the availability of legal services to society.

Because more information has come forward and the committee has reconsidered its previous position, the committee voted unanimously (10) for the Board of Commissioners to rescind its previous position on HB 5296 and defer a position on HB 4195 to the Sections.

3. SB 408 (Victory) Civil procedure: other; new trial; revise procedure for granting. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 309a.

The committee agreed unanimously that the legislation is *Keller* permissible in that it affects the improvement of the functioning of the courts and the availability of legal services to society.

The committee voted unanimously (10) to oppose this legislation for the reasons stated by the Civil Procedure & Courts Committee and Negligence Law Section.

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June 28, 2021

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

RE: ADM File No. 2002-37 – Proposed Amendments of Rule 1.109 of the Michigan Court Rules

Dear Clerk Royster:

At its June 11, 2021 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2002-37. In its review, the Board considered recommendations from the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and Criminal Law Section. The Board voted to support the proposed amendments to Rule 1.109(G)(1)(a) and (G)(3)(j). The Board, however, opposed the proposed amendments to Rule 1.109(G)(6)(a)(iv) regarding the treatment of undeliverable email.

The proposed amendment to (G)(6)(a)(iv) fails to recognize that transmission issues are not only due to the recipient having an invalid email address but can be caused by (1) issues with the sender's server; (2) issues with the recipient's server beyond the recipient's control; and (3) file size limitations, which particularly arise with discovery issues. Given that Michigan does not currently have a statewide e-filing system with one place to update email addresses, attorneys need time to change their email address with the various courts in which they have cases pending. Until Michigan's e-filing system has been fully implemented statewide, when electronic service is returned as undeliverable, the filer should be required to serve by mail.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

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P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2020-36 – Proposed Amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules

Dear Clerk Royster:

At its June 11, 2021 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2020-36. In its review, the Board considered a recommendation from the Access to Justice Policy Committee. The Board voted unanimously to support the proposed amendments.

The proposed amendments provide a clear process for court review of child placements in residential treatment programs with explicit standards that courts must consider when determining whether the initial or continuing placement is appropriate for that child.

Because the proposed amendments require courts to set forth their findings in relation to the child's placement in a written order, they may also facilitate better compliance with the Indian Child Welfare Act and Michigan Indian Family Preservation Act when a case is transferred to a tribal court.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

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June 28, 2021

Larry S. Royster
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P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2021-09 – Amendments of Rules 3.903 and 3.925 of the Michigan Court Rules

Dear Clerk Royster:

At its June 11, 2021 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-09. 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 amendments, as they are consistent with the statutory language and appropriately limit public access to juvenile proceedings.

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

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

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June 28, 2021

Larry S. Royster
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P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2021-09 – Amendment of Rule 3.944 of the Michigan Court Rules

Dear Clerk Royster:

At its June 11, 2021 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-09. 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 amendment to Rule 3.944 with the recommendation that the rule include more specific criteria about the qualifications of the person conducting the mental health or substance abuse assessment and that the assessment is done in a culturally competent manner.

We thank the Court for the opportunity to comment on the amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

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June 28, 2021

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P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2018-29 – Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules

Dear Clerk Royster:

At its June 11, 2021 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2018-29. In its review, the Board considered recommendations from the Access to Justice Policy Committee and the Criminal Jurisprudence & Practice Committee. The Board voted to oppose the proposed amendments and adopt the analysis of the Access to Justice Policy Committee, which is enclosed with this letter.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

Enclosure

Public Policy Position
ADM File No. 2018-29 – Proposed Amendments of MCR 6.302 and 6.610

Oppose

Explanation

The committee rejects the term "fictional plea" and is unaware of a pervasive problem with negotiated pleas. Prosecutors, defense attorneys, and judges act as safeguards to ensure that when a plea is taken, it is knowingly, freely, and voluntarily made. As such, if a defendant cannot make a factual basis for a plea, the court will not accept that plea and the integrity of the plea process is protected.

The Supreme Court seeks guidance as to the following factors, which the committee answered below:

(1) **the truth-seeking process:** Prosecutors have a duty to constantly review the current state of a case. As any prosecutor can attest, cases change as the investigation deepens: new evidence, including exculpatory evidence is discovered, witnesses refuse to testify or do not appear, or witnesses will recant, changing the fabric of the case. In response, prosecutors are bound by the oath to pursue justice and be flexible in their management of the case—as the evidence changes, so does the prosecutor's responsibility. This may result in the dismissal of charges, the amendment of charges, or the offering of a plea. Therefore, the truth-seeking process is fluid, and prosecutors must maintain the discretion to offer plea agreements.

(2) **sentencing goals, including rehabilitation and crime deterrence**: Plea agreements are a form of rehabilitation because it offers a chance for a defendant to avoid more severe consequences that may attach to the charged offense. Part of deterring criminal behavior is building respect for the process—if plea bargaining becomes a difficult process because of the court's reluctance to accept pleas, the defendant takes the brunt of that hurt. The defendant loses the benefit of the reduction and the defendant could begin to see the court of law as a place where the technicalities of the court could trump justice.

Negotiated pleas support sentencing goals in the same manner as traditional pleas. The policy of the state of Michigan favors individualized sentencing for every defendant. A proportionate sentence must be tailored to fit the particular circumstances of the offender and the offense. Further, the sentencing court must always consider the factors articulated in *People v Snow*, 386 Mich 586, 592 (1972). "Individualized sentencing furthers the goal of rehabilitation by respecting the inherent dignity of each person the law deprives of freedom, civil rights, or property." *People v Heller*, 316 Mich App 314, 2016, citing *People v Triplett*, 407 Mich 510, 515 (1980).

(3) **the scoring of sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility**:
(a) the sentencing guidelines

For the most part, the impact of so-called "fictional pleas" on the scoring of the sentencing guidelines is no different than traditional plea bargaining which regularly results in pleas to lesser offenses than originally charged. Offense variables are scored based on the facts of the offense as established by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438 (2013). When an individual provides a factual basis to a more serious crime than the one to which he or she ultimately pleads, the sentencing guidelines will be scored based on what was admitted during the plea.

Additionally, many of the offense variables recognize the existence of plea bargaining and build in additional points for it. For example, dismissed counts are accounted for under offense variable ("OV") 12 which instructs the court to assess points for contemporaneous felonious acts that will not result in a separate conviction. MCL 777.42. Similarly, the instructions to OV 16 establish that the amount of money or property involved in "admitted but uncharged offenses or in charges dismissed under a plea agreement" may be considered in scoring OV 16. MCL 777.46(2)(c). Still other variables include an instruction to consider the entire criminal transaction as opposed to just for the sentencing offense. See MCL 777.44(2)(a).

(b) restitution awards

Negotiated pleas impact restitution orders in the same manner as traditional pleas or a conviction after a trial. In all circumstances MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution ordered. This does not mean that when a conviction results from a plea, a defendant must specifically reference each stolen item in order for the prosecution to obtain a restitution order for stolen goods. On the contrary, once an individual is properly convicted, the prosecution is allowed to prove the amount of restitution related to that person's course of conduct by a preponderance of the evidence and by reference to the Presentence Investigation Report. MCL 780.767(2)

(c) habitual offender status

Negotiated pleas have no impact on habitual offender status. The only relevant consideration for determining habitual offender status is whether an individual has previous felony convictions.

(d) parole eligibility

Negotiated pleas have the same impact on parole eligibility as traditional pleas. In most instances, the plea hearing transcript is not part of the Michigan Department of Corrections file and has no bearing on parole eligibility. Instead, the Parole Board typically looks to the Agent's Description of the Offense portion the Presentence Investigation Report for an understanding of the criminal conduct at issue. This description customarily is taken from the police reports and reflects the original charges. The defendant, through counsel, has an opportunity to request corrections to the Presentence Investigation Report, including the Agent's Description of the Offense at sentencing.

(4) determining collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender: There are literally hundreds

of collateral consequences of any conviction on multiple levels: state, federal, immigration, civil, employment, etc. Defendants should be advised of the existence of such consequences at the time of the plea even if no court can reasonably list all of them or even know or predict what they all are. In some cases, these consequences are obvious and glaring such as in cases where a non-citizen is pleading guilty (especially to a felony) or when a defendant pleads guilty to a sex offense. Courts typically specify the consequences in these cases. The collateral consequences are there and should be mentioned whether the defendant pleads guilty to the original charge or to another offense upon plea bargaining. In most situations, these consequences depend on the charge of conviction as opposed to the detailed factual basis. In cases where the factual basis matters (e.g., potential civil liability), defendants typically plead NOLO to avoid admitting to any facts on the record. Therefore, there should be no impact of the negotiated pleas on this factor.

(5) compilation of crime statistics: Crime statistics are a very important tool in helping prevent crime and improve the operation of the courts. To have reliable crime statistics, we need better data collection. The problem our criminal justice system currently faces is the difficulty in gathering data from the different courts and law enforcement agencies because they use different methods and systems, and they are not consistent when it comes to what is being kept track of. But regardless of how data is collected and what method is used, the details of the factual basis provided by the defendant at the time of the plea are not and cannot be included in statistics. At most, the court (or the prosecutor's office) will keep track of the original charge(s) and the charge(s) the defendant pleads guilty to because these items are more easily quantifiable, can be described with accuracy, and can be used to produce statistics and conduct comparisons, unlike a factual basis. Therefore, there should be no impact of the negotiated pleas on this factor.

(6) the constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime. There is a difference between the separation of powers and control of one branch of government over another. While the branches of government have power to check one another, a circuit court (the judiciary) does not have control over prosecuting attorneys (who act on behalf of the executive branch of government). *People v Curtis*, 389 Mich 698, 702–703; 209 NW2d 243 (1973); *Genesee Co Prosecutor v Genesee Co Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). Rather, the prosecutor is the sole authority regarding whom to prosecute, and the trial court violates the separation of powers when it interferes with prosecutorial authority. *People of the State of Michigan v Selesky* (consolidated), unpublished per curiam opinion of the Court of Appeals, issued [May 27, 2021] (Docket Nos. 352414–352417 and 352475 – 352477) (Beckering, J., concurring and Stephens, P.J., dissenting), p. 1, citing *People v Williams*, 244 Mich App 249, 251 – 252; 625 NW2d 132 (2001).

To elaborate, "[a] circuit judge does not enjoy supervisory power over a prosecuting attorney," nor does "a trial court… have authority to review the prosecuting attorney's decision outside [the] narrow scope of judicial function." *People v Cobbs*, 433 Mich 276, 505 NW2d 208 (1993); *People v Williams*, 186 Mich App 606, 612; 564 NW2d 376 (1990). A trial court's authority over prosecutorial duties, then, is limited only to a prosecutor's acts or decisions that are unconstitutional, illegal, or ultra vires. *People v Muniz*, 259 Mich App 176, 675 NW2d 597

(2003); *People v Williams*, 186 Mich App 606, 608–613; 564 NW2d 376 (1990). Plea negotiations do not fall within these limitations – rather, they are well within the bounds of prosecutorial discretion.

Furthermore, the Constitution does not "[contemplate] a complete division of authority between the three branches [of government]." *Nixon v Administrator of General Services*, 433 US 425, 443; 53 LEd2d 867 (1977). Rather, the government is structured so as to "[divide and allocate] the sovereign power among three coequal branches…not intended to operate with absolute independence." Id. Separation of powers is a political doctrine – not an official rule of law. Felix Frankfurter and James M. Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts – A Study in Separation of Powers. 37 Harvard Law Review 1010, 1014 (1924). That is, the separation of powers doctrine has failed to be treated as law in that the Court recognizes the interplay among the branches as necessary; the branches' interaction would be limited, therefore, by analytical divisions set by the Court. Id. An example of the necessary interplay among branches can be found in *Mistretta v US*, 488 US 361; 102 LEd2d 714 (1989), where the unique role of judges is discussed. This role allows judges to fashion sentences and other remedies not readily foreseeable by legislature, some of which may or may not deviate from statutory sentencing guidelines. Id. Judges, then, can deviate from the guidelines because of their unique role and experience in sentencing, and are well within their power to do so. Id.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Order

Michigan Supreme Court
Lansing, Michigan

May 19, 2021

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. 2021-12

Proposed Amendments of Rules 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, and 6.938 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, and 6.938 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 at Administrative Matters & Court Rules page.

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

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

Rule 2.117 Appearances

(A) [Unchanged.]

(B) Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) Appearance by Notice of Appointment.

(a) In some actions, an appointing authority independent of the judiciary determines the attorney that will represent a party for the entirety of the action. In some actions, an appointing authority independent of the judiciary determines that an attorney will represent a party for a single hearing—like an arraignment.

(b) In actions where an attorney is appointed for the entirety of the action, the appointing authority's notice of appointment constitutes an appearance on behalf of the appointed attorney.

(c) In actions where an attorney is appointed for a single hearing, the attorney should orally inform the court of the limited appointment at the time of the hearing. It is not necessary for the appointing authority to file an order of appointment or for the attorney to file an appearance.

(4~~3~~) [Renumbered but otherwise unchanged.]

(C) Duration of Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) In appointed cases, substitute counsel shall file an appearance with the court after receiving the assignment from the appointing authority.

(4~~3~~) [Renumbered but otherwise unchanged.]

(D)-(E) [Unchanged.]

Rule 3.708 Contempt Proceedings for Violation of Personal Protection Orders

(A)-(C) [Unchanged.]

(D) Appearance or Arraignment; Advice to Respondent. At the respondent's first appearance before the circuit court, whether for arraignment under MCL 764.15b, enforcement under MCL 600.2950, 600.2950a, or 600.1701, or otherwise, the court must:

(1)-(2) [Unchanged.]

(3) advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated a personal protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one,

(4) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority,

(5)-(6) [Unchanged.]

(E)-(I) [Unchanged.]

Rule 3.951 Initiating Designated Proceedings

(A) Prosecutor-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition designating the case for trial in the same manner as an adult.

(1) [Unchanged.]

(2) Procedure.

(a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointing authority.

(b) The court shall read the allegations in the petition and advise the juvenile on the record in plain language:

(i) of the right to an attorney at all court proceedings, including the arraignment~~pursuant to MCR 3.915(A)(1)~~;

(ii)-(vi) [Unchanged.]

(c)-(d) [Unchanged.]

(3) [Unchanged.]

(B) Court-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition charging an offense other than a specified juvenile violation and requests the court to designate the case for trial in the same manner as an adult.

(1) [Unchanged.]

(2) Procedure.

(a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointing authority.

(b) The court shall read the allegations in the petition, and advise the juvenile on the record in plain language:

(i) of the right to an attorney at all court proceedings, including the arraignment~~pursuant to MCR 3.915(A)(1)~~;

(ii)-(vii) [Unchanged.]

(c)-(d) [Unchanged.]

(3) [Unchanged.]

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

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all ~~subsequent~~ court proceedings, and

(2) that the defendant is entitled to~~court will appoint~~ a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must ask~~question~~ the defendant ~~to determine~~ whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent unless the court's local funding unit has designated an appointing authority in its compliance plan with the Michigan Indigent Defense Commission. If there is an appointing authority, the court must refer the defendant to the appointing authority for indigency screening. If there is no appointing authority, or if the defendant seeks judicial review of the appointing

authority's determination concerning indigency, t~~T~~he court's determination of indigency must be guided by the following factors:

(1)-(3) [Unchanged.]

(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; ~~and~~

(5) the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and

(6~~5~~) [Renumbered but otherwise unchanged.]

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer. The court reviews an appointing authority's determination of indigency de novo and may consider information not presented to the appointing authority.

(C) [Unchanged.]

(D) Appointment or Waiver of a Lawyer. Where~~If~~ the court makes the determination~~determines~~ that a~~the~~ defendant is financially unable to retain a lawyer, it must promptly refer the defendant to the local indigent criminal defense system's appointing authority for appointment of a lawyer~~appoint a lawyer and promptly notify the lawyer of the appointment~~. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first.

(1)-(2) [Unchanged.]

The court should encourage any defendant who appears without counsel to be screened for indigency and potential appointment of counsel.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) [Unchanged.]

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of~~appoint~~ one; or

(3) [Unchanged.]

The court may refuse to adjourn a proceeding for the appointment of~~to appoint~~ counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

(F) Multiple Representation. When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the local indigent criminal defense system~~court~~ must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

(I) Assistance of Lawyer at Grand Jury Proceedings.

(1) [Unchanged.]

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request refer the witness to the local indigent criminal defense system for appointment of an attorney~~appoint one for the witness~~ at public expense.

Rule 6.104 Arraignment on the Warrant or Complaint

(A) Arraignment Without Unnecessary Delay. Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A). The arrested person is entitled to the assistance of an attorney at arraignment unless

(1) the arrested person makes an informed waiver of counsel or

(2) the court issues a personal bond and will not accept a plea of guilty or no contest at arraignment.

(B)-(D) [Unchanged.]

(E) Arraignment Procedure; Judicial Responsibilities. The court at the arraignment must

(1) [Unchanged.]

(2) if the accused is not represented by a lawyer at the arraignment, advise the accused that

(a)-(c) [Unchanged.]

(d) if the accused does not have the money to hire a lawyer, the local indigent criminal defense system~~court~~ will appoint a lawyer for the accused;

(3) advise the accused of the right to a lawyer at all ~~subsequent~~ court proceedings~~ and, if appropriate, appoint a lawyer~~;

(4)-(6) [Unchanged.]

The court may not question the accused about the alleged offense or request that the accused enter a plea.

(F)-(G) [Unchanged.]

Rule 6.445 Probation Revocation

(A) [Unchanged.]

(B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must

(1) [Unchanged.]

(2) advise the probationer that

(a) [Unchanged.]

(b) the probationer is entitled to a lawyer's assistance at the hearing and at all ~~subsequent~~ court proceedings, including the arraignment on the violation/bond hearing, and that a lawyer~~the court~~ will be appointed ~~a lawyer~~ at public expense if the probationer wants one and is financially unable to retain one,

(3) if requested and appropriate, refer the matter to the local indigent criminal defense system's appointing authority for appointment of a lawyer~~appoint a lawyer~~,

(4)-(5) [Unchanged.]

(C)-(H) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(C) [Unchanged.]

(D) Arraignment; District Court Offenses

(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction, the defendant must be informed of

(a)-(b) [Unchanged.]

(c) the defendant's right

(i) to the assistance of an attorney at all court proceedings, including arraignment, and to a trial;

(ii)-(iii) [Unchanged.]

The information may be given in a writing that is made a part of the file or by the court on the record.

(2) [Unchanged.]

(3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant

(a)-(b) [Unchanged.]

If the defendant has not waived the right to counsel, the court must refer the matter to the Appointing Authority for the assignment of counsel.

(4) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Sentencing.

(1)-(3) [Unchanged.]

(4) Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

(a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the local indigent criminal defense system's appointing authority~~court~~ will appoint a lawyer to represent the defendant on appeal, and

(b) [Unchanged.]

(H)-(I) [Unchanged.]

Rule 6.625 Appeal; Appointment of Appellate Counsel

(A) [Unchanged.]

(B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the local indigent criminal defense system's appointing authority~~court~~ must ~~enter an order~~ appoint~~ing~~ a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. If the defendant makes a request on the record, the court shall inform the appointing authority of the request that same day. Unless there is a postjudgment

motion pending, the appointing authority~~court~~ must act~~rule~~ on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the appointing authority~~court~~ must act~~rule~~ on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment.

(C) If indigency was not previously determined or there is a request for a redetermination of indigency, the court shall make an indigency determination unless the court's local funding unit has designated this duty to its appointing authority in its compliance plan with the Michigan Indigent Defense Commission. The determination of indigency and, if indigency is found, the appointment of counsel must occur with 14 days of the request unless a postjudgment motion is pending. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(D) If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day the notice of appointment is filed with the court.

Rule 6.905 Assistance of Attorney

(A) [Unchanged.]

(B) ~~Court~~ Appointed Attorney. Unless the juvenile has a retained attorney, or has waived the right to an attorney, the magistrate or the court must refer the matter to the local indigent criminal defense system's appointing authority for appointment of~~appoint~~ an attorney to represent the juvenile.

(C)-(D) [Unchanged.]

Rule 6.907 Arraignment on Complaint or Warrant

(A)-(B) [Unchanged.]

(C) Procedure. At the arraignment on the complaint and warrant:

(1) The magistrate shall determine whether a parent, guardian, or an adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the local funding unit's appointment authority~~magistrate~~ appoints an attorney to

appear at arraignment with the juvenile or provided an attorney has been retained and appears with the juvenile.

(2) [Unchanged.]

Rule 6.937 Commitment Review Hearing

(A) Required Hearing Before Age 19 for Court-Committed Juveniles. The court shall schedule and hold, unless adjourned for good cause, a commitment review hearing as nearly as possible to, but before, the juvenile's 19th birthday.

(1) [Unchanged.]

(2) Appointment of an Attorney. The local funding unit's appointing authority~~court~~ must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or is waived pursuant to MCR 6.905(C).

(3)-(4) [Unchanged.]

(B) Other Commitment Review Hearings. The court, on motion of the institution, agency, or facility to which the juvenile is committed, may release a juvenile at any time upon a showing by a preponderance of evidence that the juvenile has been rehabilitated and is not a risk to public safety. The notice provision in subrule (A), other than the requirement that the court clearly indicate that it may extend jurisdiction over the juvenile until the age of 21, and the criteria in subrule (A) shall apply. The rules of evidence shall not apply. The local funding unit's appointing authority~~court~~ must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or the right to counsel waived. The court, upon notice and opportunity to be heard as provided in this rule, may also move the juvenile to a more restrictive placement or treatment program.

Rule 6.938 Final Review Hearings

(A)-(B) [Unchanged.]

(C) Appointment of Counsel. If an attorney has not been retained or appointed to represent the juvenile, the local funding unit's appointing authority~~court~~ must appoint an attorney and the court may assess the cost of providing an attorney as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply.

(D)-(E) [Unchanged.]

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

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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

May 19, 2021

Clerk

Public Policy Position
ADM File No. 2021-12

Support

Explanation
The committee supports the proposed amendments as drafted in ADM File No 2021-12.

The proposed amendments to Rules 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, and 6.938appear consistent with the rationale behind the Michigan Indigent Defense Commission Standard 5 to maintain the independence of the appointing authority from the judiciary.

Standard 5 provides:

> The MIDC Act requires the agency to establish minimum standards, rules, and procedures to adhere to the following: "The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services." MCL 780.991 (1)(a).
>
> The United States Supreme Court addressed the issue of independence in *Polk v Dodson*, 454 US 312, 321-322; 102 S Ct 445, 451; 70 L Ed 2d 509 (1981):
>
> First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. . . . ***Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages***. (Emphasis added.)

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 2
Did not vote (absence): 4

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2021-12

Support

Explanation
The committee unanimously supports the proposed amendments in ADM File No. 2021-12.

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 11

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

From: David Makled
To: ADMcomment
Subject: Proposed amendments to MCR 2.117(B)(3)(b) Appearance of Attorney
Date: Sunday, June 6, 2021 11:11:31 AM

I would respectfully disagree with eliminating the attorney of record's obligation to file an appearance. The proposed section at issue is MCR 2.117(B)(3)(b) which states:

(b) In actions where an attorney is appointed for the entirety of the action, the appointing authority's notice of appointment constitutes an appearance on behalf of the appointed attorney.

I have no idea what a "notice of appointment" is. Rather, when the appointing authority assigns an individual attorney, like all other attorneys they should simply file their appearance indicating they are now the attorney of record. If the assigned attorney has a conflict or is otherwise unable to take the case for example, another attorney will be assigned who will then file an appearance. The "notice of appointment" contemplated should not be filed with the court. This should be an internal document between the Appointing Authority and the roster or staff attorney. There is no good reason to change the requirement of an appearance.

David A. Makled
Public Defender
Calhoun County Public Defender's Office
190 E. Michigan Avenue
Battle Creek, MI 49014
269-966-7556
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Order

Michigan Supreme Court
Lansing, Michigan

April 1, 2021

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. 2020-36

Proposed Amendment of Rule 3.945 and Proposed Addition of Rule 3.947 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.945 and a proposed addition of Rule 3.947 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 at Administrative Matters & Court Rules page.

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

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

Rule 3.945 Dispositional Review

(A) Dispositional Review Hearings

(1) Generally. The court must conduct periodic hearings to review the dispositional orders in delinquency cases in which the juvenile has been placed outside the home. Such review hearings must be conducted at intervals designated by the court, or may be requested at any time by a party or by a probation officer or caseworker. The victim has a right to make a statement at the hearing or submit a written statement for use at the hearing, or both. At a dispositional review hearing, the court may modify or amend the dispositional order or treatment plan to include any disposition permitted by MCL 712A.18 and MCL 712A.18a or as otherwise permitted by law; and shall permit the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.

(2) Required Review Hearings.

(a)-(b) [Unchanged.]

(c) At a review hearing held under this section, the court shall approve or disapprove of a child's initial placement or continued placement in a qualified residential treatment program.

(B)-(D) [Unchanged.]

[NEW] Rule 3.947 Other Placement Review Proceedings

(A) Review of Juvenile's Placement in A Qualified Residential Treatment Program.

(1) Ex Parte Petition for Review. Within 45 days of the juvenile's initial placement in a qualified residential treatment program, the Agency shall file an ex parte petition requesting the court approve or disapprove the placement.

(a) Supporting Documents. The petition shall be accompanied by the assessment, determination, and documentation made by the qualified individual.

(b) Service. The Agency shall serve the ex parte petition and accompanying documentation on all parties.

(2) Judicial Determination. Within 14 days of filing, the court, or an administrative body appointed or approved by the court independently, shall review the petition, and any supporting documentation filed pursuant to this subrule, and issue an order approving or disapproving of the placement. The order shall include individualized findings by the court or administrative body as to whether:

(a) the needs of the juvenile can be met in a foster family home, and if not,

(b) whether placement of the juvenile provides the most effective and appropriate level of care for the juvenile in the least restrictive environment, and

(c) whether that placement is consistent with the goals in the permanency plan for the juvenile.

The court shall serve the order on parties. The court is not required to hold a hearing on the ex parte petition under this subrule.

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

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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

April 1, 2021

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

April 14, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2020-36

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

Amendment of Orders Entered on March 10, 2021 and April 1, 2021

On order of the Court, the orders entered on March 10, 2021 (Proposed Amendments of Rules 3.903, 3.966, 3.975, and 3.976 of the Michigan Court Rules) and April 1, 2021 (Proposed Amendment of Rule 3.945 and Proposed Addition of Rule 3.947 of the Michigan Court Rules) in ADM File No. 2020-36 are now effective immediately. The comment period will continue to run through July 1, 2021, and August 1, 2021, respectively, as previously ordered.

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 14, 2021

Clerk

Public Policy Position
ADM File No. 2020-36 – Proposed Amendment MCR 3.945 and Proposed Addition of MCR 3.947

Support

Explanation

The committee voted unanimously (20) to support the proposed amendments, which incorpore the statutory requirements set forth in MCL 722.123a by (1) authorizing the court to approve or disapprove placement of the juvenile in a "qualified residential treatment program" in delinquency proceedings and (2) setting the same standards for *ex parte* review and judicial determination of placement.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

Contact Persons:

Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

President:
Hon. Martha D. Anderson
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President-Elect:
Hon. Christopher P. Yates
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Vice-President:
Hon. Michelle M. Rick
Clinton County

Secretary:
Hon. Kathleen A. Feeney
Kent County

Treasurer:
Hon. Charles T. LaSata
Berrien County

Immediate Past President:
Hon. Jon A. Van Allsburg
Ottawa County

Court of Appeals:
Hon. Michael F. Gadola

Executive Committee:
Hon. Margaret Bakker
Hon. Annette J. Berry
Hon. Kathleen M. Brickley
Hon. Janice K. Cunningham
Hon. Jeffrey Dufon
Hon. Prentis Edwards
Hon. Thomas R. Evans
Hon. Edward Ewell
Hon. John Gillis, Jr.
Hon. Michael P. Hatty
Hon. Charles Hegarty
Hon. Muriel D. Hughes
Hon. Tina Yost Johnson
Hon. Brian Kirkham
Hon. Shalina D. Kumar
Hon. Jeff Matis
Hon. Deborah McNabb
Hon. George J. Mertz
Hon. Julie Phillips
Hon. Gerald Prill
Hon. Joseph Rossi
Hon. Annette Smedley
Hon. Susan Sniegowski
Hon. Paul Stutesman
Hon. Joseph Toia

Executive Director:
Michael Griffie, MLC

Michigan Judges Association
Founded 1927

June 15, 2021

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

Re: ADM 2020-36

Dear Clerk Royster:

On May 18, 2021, the Executive Board of the Michigan Judges Association (MJA) voted to recognize the immediate effect of these court rules, but to also express concern that the current significant dearth of foster homes will harm Michigan's children by making it more difficult for them to be timely placed if it is determined that a foster placement would best suit their needs, but none is available. In this situation, the court's only option will be to place the child in the proposed Qualified Residential Treatment Program even though the child has been deemed ineligible. Thus, the local funding unit will be required to bear the costs created by the state's lack of foster homes.

Thank you for your consideration of these concerns.

Sincerely,

Martha Anderson

Hon. Martha Anderson
President
Michigan Judges Association

Order

Michigan Supreme Court
Lansing, Michigan

April 14, 2021

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. 2019-06

Proposed Amendments of
Rules 6.302 and 6.310 of
the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) [Unchanged.]

(2) the maximum possible prison sentence for the offense~~, including, if applicable, whether the law permits or requires consecutive sentences,~~ and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3)-(5) [Unchanged.]

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

Rule 6.310 Withdrawal or Vacation of Plea

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

(a) [Unchanged.]

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose~~.~~; or

(c) a consecutive sentence will be imposed and the defendant was not advised at the time of his or her plea that the law permits or requires consecutive sentencing in his or her case.

(3) [Unchanged.]

(C)-(E) [Unchanged.]

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

The 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 amendment may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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

April 14, 2021

Clerk

Public Policy Position
ADM File No. 2019-06 – Proposed Amendments of MCR 6.302 and 6.310

Oppose in Part

Explanation

The committee voted unanimously (20) to oppose the proposed change to MCR 6.302(B)(2), which removes the language requiring a defendant to be told about consecutive sentencing and recommend the language be reinstated. If the proposed change to MCR 6.302(B)(2) is rejected, then the committee would support the adoption of the new language added to Rule 6.310(B)(2)(c) that allows a defendant to withdraw a plea if they are not notified about consecutive sentencing.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

Contact Persons:

Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2019-06 – Proposed Amendments of MCR 6.302 and 6.310

Oppose

Explanation:
The committee voted unanimously (20) to oppose these proposed amendments to Rules 6.302 and 6.310.

The committee agreed that the recently adopted language in Rule 6.302 is more consistent with the ruling in *People v Warren*.

There was concern expressed that in the event of a withdrawn plea in the absence of advisement would result in more filings of ineffective assistance of counsel. The preferable manner of advising a defendant of a direct consequence of a plea is for the judge to advise the defendant on the record.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 3

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

President:
Hon. Martha D. Anderson
Oakland County
1200 N. Telegraph Road
Pontiac, MI 48341
Office: (248) 885-7954
Email:
andersonma@oakgov.com

President-Elect:
Hon. Christopher P. Yates
Kent County

Vice-President:
Hon. Michelle M. Rick
Clinton County

Secretary:
Hon. Kathleen A. Feeney
Kent County

Treasurer:
Hon. Charles T. LaSata
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Immediate Past President:
Hon. Jon A. Van Allsburg
Ottawa County

Court of Appeals:
Hon. Michael F. Gadola

Executive Committee:
Hon. Margaret Bakker
Hon. Annette J. Berry
Hon. Kathleen M. Brickley
Hon. Janice K. Cunningham
Hon. Jeffrey Dufon
Hon. Prentis Edwards
Hon. Thomas R. Evans
Hon. Edward Ewell
Hon. John Gillis, Jr.
Hon. Michael P. Hatty
Hon. Charles Hegarty
Hon. Muriel D. Hughes
Hon. Tina Yost Johnson
Hon. Brian Kirkham
Hon. Shalina D. Kumar
Hon. Jeff Matis
Hon. Deborah McNabb
Hon. George J. Mertz
Hon. Julie Phillips
Hon. Gerald Prill
Hon. Joseph Rossi
Hon. Annette Smedley
Hon. Susan Sniegowski
Hon. Paul Stutesman
Hon. Joseph Toia

Executive Director:
Michael Griffie, MLC

Michigan Judges Association
Founded 1927

May 6, 2021

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

Re: ADM File No. 2018-29
Proposed amendments of MCR 6.302 and MCR 6.610
ADM File No. 2019-06
The proposed amendment of MCR 6.302

Dear Clerk Royster:

At the April 20, 2021 meeting of the Michigan Judges Association, the Executive Committee considered and acted upon proposed amendments to the Michigan Court Rules.

ADM file 2018-29: The proposed amendments of MCR 6.302 and MCR 6.610 would
eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere.

This proposed amendment would preclude the court from accepting a guilty or nolo contendere plea to a reduced or lesser charge based upon a factual basis establishing the charged offense listed in the information. We oppose the change as it interferes with judicial discretion and impairs the parties' ability to resolve cases.

ADM file 2019-06: The proposed amendment of MCR 6.302 would eliminate the Court's previously-adopted language requiring a trial court to advise defendant whether the law permits or requires the court to sentence defendant consecutively. If such advisement is not given, then the defendant will be allowed to withdraw the plea under MCR 6.310. We oppose the change. The best practice is for the defendant to be fully informed of the likelihood of consecutive sentencing at the time of the plea. However, if the warning is not given in a case where a consecutive sentence is not imposed it should not be grounds to withdraw a plea.

Thank you for considering the Associations input on these matters. If we can provide any additional information or assistance, please do not hesitate to contact us.

Sincerely,

Martha Anderson

Hon. Martha Anderson President
Michigan Judges Association

Cc: Honorable Paul Stutesman
Honorable Prentis Edwards, Jr.
Co-Chairs Criminal Law Committee, Michigan Judges Association

Previous ADM File No. and Comments

Order

Michigan Supreme Court
Lansing, Michigan

September 16, 2020

ADM File No. 2019-06

Amendment of Rule 6.302 of the Michigan Court Rules

Bridget M. McCormack, Chief Justice

David F. Viviano, Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh, Justices

On order of the Court, this is to advise that the following amendment of Rule 6.302 of the Michigan Court Rules is adopted, effectively immediately, and that a public comment period has also begun. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) [Unchanged.]

(2) the maximum possible prison sentence for the offense, including, if applicable, whether the law permits or requires consecutive sentences, and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3)-(5) [Unchanged.]

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the

record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 6.302 makes the rule consistent with the Supreme Court's ruling in *People v Warren*, 505 Mich 196 (2020), and requires a judge to advise a defendant of the maximum possible prison sentence including the possibility of consecutive sentencing.

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 amendment may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page

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

September 16, 2020

Clerk

Previous ADM File No. and Comments

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

December 15, 2020

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

RE: ADM File No. 2019-06 – Amendment of Rule 6.302 of the Michigan Court Rules

Dear Clerk Royster:

At its November 20, 2020 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2019-06. In its review, the Board considered recommendations from the Access to Justice Policy and the Civil Procedure & Courts committees.

The Board voted unanimously to support the proposed amendment to Rule 6.302 with further amendments to Rule 6.302(B)(2), as follows:

> …the maximum possible prison sentence for the offense, including, if applicable **and based upon the matters pending before that judicial officer**, whether the law permits or requires consecutive sentences**, making clear to the defendant that the representation only relates to cases pending before that judicial officer,** and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

Because a judge may not have perfect information at the time of sentencing, the additional amendments to subsection (B)(2) would clarify that a judge's representations about the length and nature of a sentence are to be based only upon the information available to the judge at the time of sentencing. The amendment supports the spirit of the Rule 6.302 by reinforcing that defendants have the right to understand their maximum sentence. The proposed amendments also take the additional step of informing defendants that representations about their sentences are restricted to information known to the judicial officer at the time of sentencing and that their sentences could ultimately be recalibrated based on new information, such as newly pending federal matters.

The Board also recommends to the Court that the State Court Administrative Office bench books and cards be updated to reflect amended Rule 6.302.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

Previous ADM File No. and Comments

SBM State Bar of Michigan | ACCESS TO JUSTICE POLICY COMMITTEE

Public Policy Position
ADM File No. 2019-06

Support

Explanation
The committee unanimously supports the amendment to Rule 6.302.

The committee supports the rule amendment because it mirrors the Court's ruling in *People v Warren*, 505 Mich 196 (2020), mandates that defendants are informed of 1) the maximum possible prison sentence that they could receive, and 2) the possibility that a court could impose consecutive, instead of concurrent, sentences. Court rules should be consistent with case precedent.

Position Vote:
Voted for position: 23
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 5

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Previous ADM File No. and Comments

SBM State Bar of Michigan | CRIMINAL JURISPRUDENCE & PRACTICE COMMITTEE

Public Policy Position
ADM File No. 2019-06

Support

Explanation
The committee supports the amendment to Rule 6.302.

The committee supports the rule amendment because it would make the court rule reflective of the Court's ruling in *People v. Warren*. 505 Mich 196(2020). In compliance with *Warren*, the amended rule requires a court to inform a defendant of the maximum possible prison sentence that could be imposed and that any such sentences may be consecutive. In compliance with the *Warren* decision, the amended rule requires a court to inform a defendant of a) the maximum possible prison sentence that could be imposed, and b) that sentences may be consecutive.

The majority of the committee supported the proposed rule change because it makes the court rule consistent with precedent. Furthermore, all the proposed rule requires is that *if* a court has knowledge of the possibility of consecutive sentences at the time a defendant pleas, the court must advise the defendant of that possibility; therefore, while the amended rule may not solve "all the problems" with guilty pleas under MCR 6.302, it does nothing objectionable and brings the rule in greater accord with the *Warren* ruling.

Position Vote:
Voted For position: 16
Voted against position: 4
Abstained from vote: 0
Did not vote (absent): 3

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

Previous ADM File No. and Comments

From: Warren, Michael
To: ADMcomment
Subject: ADM File No. 2019-06
Date: Friday, September 25, 2020 3:12:27 PM

Dear Justices,

Philosophically I am in complete agreement that a criminal defendant who tenders a plea in connection with several new charges should be advised of the possibility of consecutive sentencing within the case. (How could I not, the rule being laid down in *People v Warren*?).

However, I write in connection with perhaps an unintended consequence for the current revision of MCR 6.302. As you know, many defendants have several cases across the State and perhaps the nation. The most obvious example that is pertinent to the rule change is when a defendant is on parole and commits another offense. After the defendant is sentenced in the new case, sometimes the Michigan Department of Corrections will remand the defendant back to prison in light of the new case as a violation of parole. The new case is then consecutive to parole on the old case. Another example may be a defendant who is on probation under the Holmes Youthful Training Act status and is avoiding an otherwise mandatory 2 year felony firearm sentence, and a subsequent criminal conviction could result in a violation of probation revocation of HYTA and a consecutive sentence on the old HYTA case. Likewise, a defendant who is on bond on another case can also face consecutive sentencing.

If the intention of the amended language is to ensure that a defendant knows "whether the law permits or requires consecutive sentences" **in the case at hand**, it might be best to add such qualifying language.

Unfortunately, at the time of a plea, judges and lawyers often have incomplete information. There are countless times when a judge takes a plea thinking the defendant was not on probation, parole, bond, etc. and that information is simply incorrect. For what it is worth, not clarifying the language could easily result in a small cottage industry of plea withdrawals of defendants who face consecutive sentences related to other cases without the knowledge of the lawyers or judge at the time of the plea.

Thank you in advance for your thoughtful consideration of this matter.

Very truly yours,

Michael Warren
Oakland County Circuit Court

Previous ADM File No. and Comments

State Appellate Defender Office
3031 W. Grand Blvd., Ste. 450, Detroit, MI 48202
(Phone) 313.256.9833 (Client calls) 313.256.9822
(Fax) 313.263.0042 www.sado.org

Jonathan Sacks
Director

Marilena David-Martin
Deputy Director

Julianne Cuneo
Chief Investigator

Katherine Marcuz
Managing Attorney, Direct Appeals Unit

Tina Olson
Managing Attorney, Juvenile Lifer Unit

Jessica Zimbelman
Managing Attorney, Direct Appeals Unit

February 4, 2021

Justices of the Michigan Supreme Court
Hall of Justice
P.O. Box 30052
Lansing, MI 48909

ADM File No. 2019-06: Amendment of MCR 6.302

Dear Justices,

The State Appellate Defender Office supports the proposed amendment of MCR 6.302 to require that a court advise a person entering a plea of the possibility of consecutive sentencing.

SADO agrees with the State Bar of Michigan and Judge Michael Warren that the rule should be clear that the court is only required to advise on possible consecutive sentences in the matters pending before it.

Thank you for your consideration.

Sincerely,

Jessica Zimbelman
Managing Attorney

Order

Michigan Supreme Court
Lansing, Michigan

April 14, 2021

ADM File No. 2021-14

Proposed Administrative Order No. 2021-X

Mandatory Submission of Case Data to the Judicial Data Warehouse

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On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order that would require mandatory submission of case data to the Judicial Data Warehouse. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

Administrative Order No. 2021-X – Mandatory Submission of Case Data to the Judicial Warehouse

For two decades, the Judicial Data Warehouse has been an essential tool allowing users to locate trial court records from throughout the state, informing judicial decisions, enhancing court administration, improving public policy through data-driven research, and promoting transparency.

Nearly all trial courts provide a daily or weekly feed of case-level data to the JDW, but frequently, certain data elements are missing or reported inconsistently by different courts, and several courts do not participate at all, creating problematic data gaps. To address these problems, courts should be required to submit data in a uniform manner and across all courts. Doing so will ensure the JDW contains uniformly reported data that will be more useful to courts, law enforcement, researchers, and other users. In addition, a

more complete database will relieve courts of the requirement to submit certain reports that are currently prepared manually or with special programming, and ultimately is intended to be a resource for the general public about how courts in Michigan operate.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, §4, which provides for the Supreme Court's general superintending control over all state courts, all trial courts must submit all case data including nonpublic and financial records to the Judicial Data Warehouse in a format and frequency defined by the SCAO . This order replaces all existing Memoranda of Understanding between SCAO and any trial courts regarding the JDW.

This order shall remain in effect until further order of the Court.

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

The 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 sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-14. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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

April 14, 2021

Clerk

From: Susan Hartman
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Thursday, May 20, 2021 10:11:29 PM

Clerk, Michigan Supreme Court

Dear Clerk,

I am writing to support this proposed order, which would require all courts to submit case information to the Judicial Data Warehouse in a uniform manner as required by SCAO. An unbiased judicial system is central to our democracy's understanding of equal justice under law. As Chief Justice McCormack stated in an opinion piece in the Detroit News on January 6 of this year, "Michigan's decentralized court system with different funding units, using different technology, and with different resources means we don't have the comprehensive data needed to evaluate our policies."

The proposed order would remedy this lack, give more transparency, and allow the courts and the public to address racial inequities and other sources of injustice in our legal system. Having sufficient and uniform data is a needed first step to inform fair and just policies in our courts.

Respectfully submitted,
Susan D. Hartman
840 Starwick Drive
Ann Arbor, MI 48105
Member Emeritus, State Bar of Michigan

From: Audrey
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Tuesday, May 25, 2021 3:44:21 PM

I am filing the following comment:

As a taxpayer who funds the local courts, as a voter who elects trial court judges at the local level in my county and as an active member in my community I am highly recommending greater transparency for the decisions that judges are adjudicating in our courts. Therefore I support the adoption of the proposed administrative order in ADM File No. 2021-14.
I am looking at the need for the sharing of data that is standardized in the State of Michigan with an equity lens. True justice upholds equity and breakdown inequities in the juvenile and criminal legal systems. Data is imperative in looking at patterns, trends and exploring means of quality improvement and better outcomes.
Lastly I join and support the following:

- We expect our institutions to be transparent in a standardized way to collect and use data to write and improve equitable just and fair policies. Data reporting opens the road to quality in practice and administering justice across our State of Michigan.
- We expect our Supreme Court of Michigan to use this data and make it available to the public via accessible means using the advancement of technology that we have today.

- We expect to see a better quality of living for every human being who is deserving of justice in our State of Michigan. I pay for this with my taxes, I vote for this with my time, my mind and the function of my limbs to complete a ballot to elect a candidate that will administer justice wisely and justly for all people in our State. I want to see a return on my investment with good transparent data. That is called public service. We want assurance that judges we elect are fair and unbiased, we can only assess this when we have data that is made public.

Audrey Anderson
3653 Cloverlawn, Ypsilanti, MI 48197
audreya479@gmail.com
Board Member of Interfaith Council for Peace and Justice

From: A C Jayne
To: ADMcomment
Subject: proposed administrative order: ADM File No. 2021-14
Date: Tuesday, June 1, 2021 3:36:03 PM

ADM File No. 2021-14 - I support the court's adoption of this proposed administrative order.

- We expect our institutions to collect data in a uniform way and use that data to inform fair and just policies. There is no reasonable excuse for local courts to shield themselves from reporting what they do to the Supreme Court of Michigan which is the institution responsible for the administration of justice across the state.
- Once a uniform dataset is collected from each local court, we expect the Supreme Court of Michigan to make court data available to the public via dashboards or other publicly accessible means.
- As taxpayers and voters, we have an interest in assuring that the judges we elect are fair and unbiased and can only assess whether that is the case when relevant data is made public.

Please try to adopt this order in 2021.

Jayne
CFII
MICHIGAN *flyers*
Cell: 734.604.4410

From: Lama Hassoun Ayoub
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Wednesday, June 2, 2021 6:02:00 PM

I am writing in support of the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

It is not possible for the Michigan courts to truly administer justice and hold people accountable without adequate data technology and data practices. While many court stakeholders may be resistant to uniform court data, it is necessary for courts to track information consistently across the state. Many other states already do this and Michigan is far behind.

Local courts can use data to advance their own funding and priorities. They can also use the data to set their own benchmarks and judges and prosecutors can use data to ensure that they are achieving their goals. There is no need to treat data as a problem; it provides insight and often highlights successes, while at the same time allowing court stakeholders to address areas of improvement.

Michigan can follow the example of many other states by collecting statewide court data and publishing public (aggregate de-identified) reports to ensure that the public has access to information about the courts. Michigan *could* also be a leader in this area, by making de-identified court data easily accessible to both public and researchers. Data can be used to evaluate ongoing programs, initiatives, or reforms; it can also be used to assess the progress of courts towards achieving true justice for all.

Sincerely,
Lama Hassoun Ayoub
Dearborn Heights, MI

From: kayperry@aol.com
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Thursday, June 3, 2021 7:50:47 PM

I support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14. It is important that the citizens of Michigan have the information they need to determine if judges are performing in a fair and unbiased manner.

Kay Perry
204 Oakhurst Ave.
Kalamazoo, MI 49001

From: Lynn Drickamer
To: ADMcomment
Subject: Data collection and sharing ADM File No. 2021-14
Date: Thursday, June 3, 2021 7:00:43 PM

Dear Friends,

I strongly support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

To properly follow and assess the activity of courts throughout the state it is essential that there be a mechanism for collecting data in a uniform way. There is no reason that the judicial arm of government should not be subject to the same transparency as other aspects.

Once such a data set is collected, I would want the Supreme Court to make it available to the public via dashboards or other readily accessible means.

As voters and taxpayers, we need to be accurately informed about the unbiased and equitable administration of justice by those we elect.

Please adopt the order as drafted and help make Michigan justice solid justice for all. Thank you.

Sincerely,
Lynn Drickamer

From:	Rita Turner-Sheerin
To:	ADMcomment
Subject:	ADM File No. 2021-14 Public Comment-SUPPORT
Date:	Thursday, June 3, 2021 2:05:51 PM

I am writing to support the Administrative Rule 2021-14 to improve the data that is collected by all of the courts in Michigan covered by this rule. The standardization of data elements and tools to gather the data are critical to the community's understanding of equal justice for all with Michigan courts.
If we are to assure the principal of equal justice is afford all Michigan citizens then we need to have transparency within the judicial process. We also need to support the jurisdictions that may need resources to comply with this rule.

I urge you to proceed with this effort and hope that you will ensure that the system is technologically hardened to assure that the system is robust and is protected from malicious acts. the myriad of interactions between the citizens and the judicial system that we support with our votes and taxes to administer equal justice under the law.

Rita Turner-Sheerin, M.S.W.
a Member of the Washtenaw Regional Organizing Coalition
.

From: sarosia2@gmail.com
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Friday, June 4, 2021 5:37:01 PM

I am writing in support of the Court adopting the administrative order outlined in ADM File No. 2021-14. Individual courts are not islands unto themselves, they are part of one court system which is led by the Michigan Supreme Court. So whether you live in Menominee or Monroe, all courts should submit court data to the MSC in a way that is consistent across courts. In the 21st century, there is no reason why taxpayers shouldn't expect our institutions to use sound data to drive policy and to make as much data transparent as possible. Fortune 500 companies use data to inform their work and public institutions such as the court should do the same.

As a government institution, I urge the Michigan Supreme Court to make as much data transparent as possible so taxpayers understand what we are paying for and voters can make reasoned decisions about the judges for which they elect.

I applaud the Supreme Court's effort.

MaryAnn Sarosi

From: Ann Putallaz
To: ADMcomment
Subject: ADM File No. 2021-14 - Support
Date: Tuesday, June 8, 2021 2:12:48 PM

I support the Court's adoption of the proposed administrative order laid out in **ADM File No. 2021-14**.

It is my understanding that the local courts in Michigan that do send case data to the Judicial Data Warehouse (JDW) often send in data that is incomplete or in a format that differs from court to court. In addition, some courts do not send any data. The lack of information, as well as the inconsistency and incompleteness of the data that is received, makes the actions of local courts significantly less transparent. Without complete and accurate information, it is much harder for the Michigan Supreme Court to pursue initiatives to improve the administration of justice in Michigan. For example, there is no way to determine if a judge in a particular county is fair and unbiased in his or her rulings.

While missing and inconsistently reported data is indeed a problem, I am particularly troubled by the fact that some courts refuse to report what they do to Michigan's Supreme Court, which is the body that is responsible for the fair and equitable administration of justice across our state. All local courts must be required to provide data to the Michigan Supreme Court - data that is complete and consistent in format.

Once a uniform database has been established, I would expect the Michigan Supreme Court to make the data provided by local courts available to the public, perhaps through dashboards or some other method for ensuring that the data is publicly accessible. Publicly accessible data relating to local courts is the only way for taxpayers and voters to know that the judges elected and paid are fair and unbiased in their rulings.

Thank you for the opportunity to submit comments on **ADM File No. 2021-14**.

Ann Putallaz
495 Woodgrove Dr
Ann Arbor, MI 48103
annp1025@yahoo.com
734-827-4443

From: Joseph Summers
To: ADMcomment
Subject: “ADM File No. 2021-14”
Date: Tuesday, June 8, 2021 2:23:33 PM

Friends,

I am writing today to state my support for the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

As various kinds of bias and discrimination become more and more evident, it is clear without good data we will not be able to pursue the reforms that are so badly needed. To do such reforms well-we need data that is uniform and transparent. If our Supreme Court in Michigan doesn't have that data how can they be responsible for overseeing the administration of justice in our state? Without such data, how can we as the pubic see that fair and unbiased justice happens in our state?

I hope you will move towards adopting this order.

Thank you,

The Rev. Joseph H. Summers

Pastor, The Episcopal Church of the Incarnation

Pittsfield Twp. Michigan

From: Christine Modey
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Tuesday, June 8, 2021 2:26:15 PM

I support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

As a citizen of the state of Michigan, I expect our institutions to collect data in a uniform way and use that data to inform fair and just policies. There is no reasonable excuse for local courts to shield themselves from reporting what they do to the Supreme Court of Michigan which is the institution responsible for the administration of justice across the state.

The collection and distribution of data about courts' decisions is crucial information that can inform judicial and criminal justice reform--or reassure the public about the fairness of judges' and courts' decisions. Once a uniform dataset is collected from each local court, we expect the Supreme Court of Michigan to make court data available to the public via dashboards or other publicly accessible means. Without this information, though, judges cannot be held accountable.

As a taxpayer and a voter, I have an interest in assuring that the judges we elect are fair and unbiased and I can only assess whether that is the case when relevant data is made public.

Therefore, I urge the court to keep faith with me and other Michigan citizens and adopt the administrative order.

Sincerely,

Christine Modey

1607 Granger Avenue

Ann Arbor

From: Julie Fend
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Wednesday, June 9, 2021 1:10:08 PM
Attachments: image001.wmz
image002.png

Michigan Court Administration Association

Re: ADM File No. 2021-14

Mandatory Submission of Case Data to the Judicial Data Warehouse

This proposed administrative order would make it mandatory for all trial courts to submit all case data including nonpublic and financial records to the Judicial Data Warehouse (JDW) in a format and frequency defined by the State Court Administrators Office (SCAO).

While the Michigan Court Administrators Association recognizes the value the JDW has provided users of the system over the last two decades, this proposed order does not take into consideration the numerous case management systems in the various trial courts throughout the state of Michigan with an equally numerous number of system vendors and providers.

Initial system programming costs that made it possible for trial courts to submit data to JDW was provided by SCAO. If subsequent programming costs were necessary due to system changes, upgrades, modifications, etc. to continue submissions to JDW the financial burden were placed on the trial courts.

This order does not include provisions for financial assistance to trial courts to meet format and frequency requirements to be established by SCAO. These programming costs can range from $5,000 to $60,000 for each trial court. Such an order would place a significant financial burden on courts in consideration of the current financial duress each is experiencing with significant reduced revenues due to the COVID-19 pandemic.

Due to these factors, the Michigan Court Administrators Association is not supportive of the proposed administrative order at this time.

From:	Pam Smith
To:	ADMcomment
Subject:	letter of support
Date:	Wednesday, June 9, 2021 3:17:19 PM

We support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

• We expect our institutions to collect data in a uniform way and use that data to inform fair and just policies. There is no reasonable excuse for local courts to shield themselves from reporting what they do to the Supreme Court of Michigan which is the institution responsible for the administration of justice across the state.

• Once a uniform dataset is collected from each local court, we expect the Supreme Court of Michigan to make court data available to the public via dashboards or other publicly accessible means.

• As taxpayers and voters, we have an interest in assuring that the judges we elect are fair and unbiased and can only assess whether that is the case when relevant data is made public.

Pam Smith
President/CEO
United Way of Washtenaw County
734-677-7204

From: Olivia DeTroyer-Cooley
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Thursday, June 10, 2021 3:44:22 PM

Hello,
I wanted to submit a comment to say that I support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

I expect our institutions to collect data in a uniform way and use that data to inform fair and just
policies. There is no reason for local courts to shield themselves from reporting what they do to the Supreme Court of Michigan, which is the institution responsible for the administration of
justice across the state.

Once a uniform dataset is collected from each local court, I expect the Supreme Court of Michigan to make court data available to the public via dashboards or other publicly accessible means.

As a taxpayer and voter, I have an interest in assuring that the judges elected are fair and unbiased and I can only assess whether that is the case when relevant data is made public.

Thank you so much for your time and attention,

--
Olivia DeTroyer-Cooley (she/her)

From: Dawn Jaggers
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Thursday, June 10, 2021 4:11:45 PM

Hello!

I'm writing you in support of Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14.

I expect my public institutions to collect data in a uniform way and use that data to inform fair and just policies. There is no reasonable excuse for local courts to shield themselves from reporting what they do to the Supreme Court of Michigan which is the institution responsible for the administration of justice across the state.

Once a uniform dataset is collected from each local court, we expect the Supreme Court of Michigan to make court data available to the public via dashboards or other publicly accessible means.

As a taxpayer and Michigan voter, I have an interest in assuring that my elected judges are fair and unbiased. I can only assess whether that is the case when relevant data is made public.

Thank you for your consideration.

Sincerely,

Dawn Jaggers
248.622.9516
dawn.jaggers@gmail.com

From: Dave Rosenfeld
To: ADMcomment
Subject: ADM File No. 2021-14
Date: Thursday, June 10, 2021 6:35:54 PM

Honorable Justices,

I strongly support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14. Requiring trial courts to provide data in this manner will impose a minimal burden on those courts, but the benefits of doing so — particularly if the compiled data is made available to the public — will be potentially massive.

Those who are in the business of administering justice should have no problem with sharing this type of data freely. Why would they? Justice shrouded in secrecy is no justice at all. Real justice demands transparency… and if it truly is real justice, it will certainly withstand the light of day.

Thank You,
Dave Rosenfeld (he/him)
3800 Meadow Lane
Saline, MI 48176
734-716-7604

From: Rick DeMent
To: ADMcomment
Subject: Re: ADM File No. 2021-14
Date: Friday, June 11, 2021 8:50:15 AM

Hello!
I'm writing you in support of the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14. I expect my public institutions to collect data uniformly and use that data to inform fair and just policies. There is no reasonable excuse for local courts to shield themselves from reporting what they do to the Supreme Court of Michigan which is the institution responsible for the administration of justice across the state. Once a uniform dataset is collected from each local court, we expect the Supreme Court of Michigan to make court data available to the public via dashboards or other publicly accessible means. As a taxpayer and voter, I have an interest in assuring that my elected judges are fair and unbiased. I can only assess whether that is the case when relevant data is made public.

Rick DeMent
(h) 248 518-0857

5731 Leeward Ct.
Clarkston Mi

From: Carolyn Christopher
To: ADMcomment
Subject: ADM File No. 2021-1
Date: Saturday, June 12, 2021 3:03:18 PM

I support the Court's adoption of the proposed administrative order laid out in ADM File No. 2021. However, this is my recommendation to strengthen the initial statement on support.

"It is expected that our institutions collect data in a uniform manner to ensure fair and just policies.

Thank you,
Carolyn Christopher

From:	Nick Roumel
To:	ADMcomment
Subject:	2021-14
Date:	Saturday, June 12, 2021 10:42:18 AM

I support this administrative order. As an attorney of 36+ years, I am acutely aware that sometimes, justice may not be uniform depending on factors such as a person's socio-economic status, race, gender, age, ethnicity, LGBTQ+ status, or other protected characteristic. It is important that we have a uniform method of collecting data so that we can begin to assess whether there are justice issues that need addressing.

Nicholas Roumel
P37056
NachtLaw, P.C. | Employment Law Firm in Ann Arbor

NachtLaw, P.C. | Employment Law Firm in Ann Arbor

The Ann Arbor-based law office of NachtLaw offers guidance in employment matters, business law counsel and crimi...

President:
Hon. Martha D. Anderson
Oakland County
1200 N. Telegraph Road
Pontiac, MI 48341
Office: (248) 885-7954
Email:
andersonma@oakgov.com

President-Elect:
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Hon. Annette Smedley
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Hon. Joseph Toia

Executive Director:
Michael Griffie, MLC

Michigan Judges Association
Founded 1927

June 15, 2021

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

Re: ADM 2021-14

Dear Clerk Royster:

On May 18, 2021, the Executive Board of the Michigan Judges Association (MJA) voted to support the proposed court rule changes as written.

Thank you for your consideration.

Sincerely,

Martha Anderson

Hon. Martha Anderson
President
Michigan Judges Association

From: Desirae Simmons
To: ADMcomment
Subject: Comment: ADM File No. 2021-14
Date: Wednesday, June 23, 2021 6:05:25 PM

Hello,

I am writing in support of the Court's adoption of the proposed administrative order laid out in ADM File No. 2021-14. As part of a citizen data centered research project, I saw upfront how important transparency and consistency across our legal system is to us knowing what is going on in our community. Local courts should not be able to shield themselves from accountability by keeping their records separate. We need to be able to see patterns where they exist if we hope to mov the legal system closer to being a space of justice. It is not enough for the Supreme Court to collect the data either, it must be shared in a public and accessible manner, such as through an online dashboard. This can also serve as a powerful voter engagement tool. Currently, most people don't know much about the judges we elect, and it is hard to find information even if you try to look as I have. For these reasons and more I support this administrative order.

In Peace,
Desirae Simmons
City of Ypsilanti, Washtenaw County

--
Desiraé Simmons
She/They

From: Terri Gilbert
To: ADMcomment
Subject: ADM File No. 2021-14.
Date: Wednesday, June 30, 2021 8:30:52 AM

Regarding the Mandatory submission of case data to the Judicial Data Warehouse

Dear Clerk of the Court, Michigan Supreme Court:

I am writing to support ADM File No. 2021 - 14, the proposed administrative order requiring all trial courts to submit case data to the Judicial Data Warehouse.

We do not know the most basic information on the juvenile justice system in Michigan.

Michigan citizens should know, for example, how many young people have been served by the juvenile justice system each year, what crimes were committed, and what interventions were provided to justice-involved young people. Our citizens should know whether or not the justice system is successful in deterring young people from future system involvement. Policy and funding decisions should be made based on data.

As a former MDHHS state bureau director overseeing juvenile justice and now as a researcher working with justice-involved populations, I have experienced first-hand the difficulty in obtaining data to depict the scope, cost and effectiveness of the juvenile justice system.

As noted in the published order, the Judicial Data Warehouse has served the courts well for the past twenty years. Unfortunately, the lack of data from some courts and missing or inconsistent data from others has made using the JDW challenging in terms of analysis, reporting, and transparency. The beauty of the JDW is that, as a data warehouse, data can be imported from any case management system, so new systems do not need to be developed to obtain the data you seek. Certainly, data standardization must be tackled and a usable interface with each court's case management system must be developed. But these are not insurmountable problems.

By requiring courts to submit their data to the JDW, the first step toward using data to inform decisions on a local and state level will be accomplished.

- Best Regards,
Terri Gilbert

July 1, 2021
Office of Administrative Counsel Michigan Supreme Court
PO Box 30052 Lansing, MI 48909

Re: ADM File No. 2021-14 Proposed Administrative Order No. 2021-X Mandatory Submission of Case Data to the Judicial Data Warehouse

Dear Administrative Counsel:

I am a researcher with Poverty Solutions at the University of Michigan, writing in support of the proposed administrative order to mandate the submission of consistent and timely case data to the Judicial Data Warehouse (JDW). Specifically, I am writing with respect to the pressing need for accurate and comprehensive data on landlord-tenant cases and eviction proceedings.

My research evaluates how programs and policies aimed at preventing eviction, displacement, and housing instability can improve the health and well-being of Detroit residents. My methods rely almost entirely on administrative data records, such as those provided by the JDW.

Studies using court records and similar data sources tell us that eviction is an especially prevalent feature of low-income tenancy that deepens and reproduces poverty;[1] disproportionately impacts Black and Latinx populations, women, and families with children;[2] precipitates job loss, chronic school absenteeism, and subsequent housing instability;[3] and is associated with depression, anxiety, and long-term chronic disease development and premature mortality.[4] Hence evictions are a devastating, worsening, and *preventable* social problem that threaten to further entrench social, economic, and health inequities in our society without urgent and substantive public policy interventions.

Sound research is essential for understanding the eviction crisis and possible solutions to it. Uniform, adequate, and timely court data is not only necessary to monitor and describe the

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[1] Desmond, M. (2012). Eviction and the reproduction of urban poverty. *American journal of sociology*, *118*(1), 88-133; Lundberg, I., & Donnelly, L. (2019). A research note on the prevalence of housing eviction among children born in US cities. *Demography*, *56*(1), 391-404.

[2] Hepburn, P., Louis, R., Fish, J., Lemmerman, E., Alexander, A. K., Thomas, T. A., … Desmond, M. (2021). U.S. Eviction Filing Patterns in 2020. *Socius*, *7*(1). https://doi.org/10.1177/23780231211009983

[3] Desmond, M., & Gershenson, C. (2016). Housing and employment insecurity among the working poor. *Social Problems*, *63*(January), 46–67; Desmond, M., Gershenson, C., & Kiviat, B. (2015). Forced Relocation and Residential Instability among Urban Renters. *Social Service Review*, *89*(2), 227–262.

[4] Vásquez-Vera, H., Palència, L., Magna, I., Mena, C., Neira, J., & Borrell, C. (2017). The threat of home eviction and its effects on health through the equity lens: A systematic review. *Social Science and Medicine*, *175*, 199–208; Burgard, S. A., Seefeldt, K. S., & Zelner, S. (2012). Housing instability and health: Findings from the Michigan recession and recovery study. *Social Science and Medicine*, *75*(12), 2215–2224.

causes and consequences of eviction, but also can allow scholars and public agencies to evaluate the effectiveness of interventions like eviction diversion and rental assistance programs, access to counsel, legal protections for tenants, and affordable housing investments.

The court's present data regime does not permit critical analyses necessary to monitor and promote the housing stability and health of Michiganders. Since COVID-19 brought new urgency to the longstanding epidemic of evictions in Michigan's low-income rental market, we have witnessed unprecedented public attention to eviction as well as public-policy efforts aimed at eviction prevention. The state's Eviction Diversion Program (EDP), Coronavirus Eviction Relief Assistance program (CERA), and Administrative Orders from the State Court Administrative Office (SCAO) regarding landlord-tenant procedures and the eviction moratorium dramatically altered eviction proceedings and outcomes.

Pandemic response provides an urgent and unprecedented learning opportunity for policy makers: To what extent do funds for rental assistance and legal counsel prevent eviction and disease transmission? How do changes to landlord-tenant procedures undertaken by courts influence eviction outcomes? Are eviction prevention procedures implemented consistently across jurisdictions? These are questions that researchers can only undertake with the proper data. The increased frequency of SCAO's state-level reporting on the number and rate of new filings and conditional dismissals are a step in the right direction, but these reports are incomplete and do not enable local or more detailed understanding of the current crisis.

Hence, more timely and consistent data required by this proposed Administrative Order is a welcome change that I strongly encourage the Court to adopt. Ultimately however, the usefulness of this AO for researchers, state agencies, courts, and public policy makers will be largely dependent on whether the data is comprehensive and accessible. I encourage the Court to use this opportunity to collect and report data on case-level factors including case type (e.g. non-payment, termination), judgement type (e.g., default, consent), whether a judgment was for the landlord or the tenant, the amount at issue in non-payment cases, presence of an attorney, and whether the court issued an order of eviction. To improve transparency while protecting privacy, these aspects should be reported at the state *and* local court levels, ideally on a monthly or quarterly basis.

Thank you for your consideration and commitment to data integrity and transparency.

Alexa Eisenberg, PhD, MPH

Poverty Solutions at the University of Michigan
alexae@umich.edu

TAUBMAN COLLEGE
ARCHITECTURE & URBAN PLANNING
UNIVERSITY OF MICHIGAN

July 8, 2021

Clerk
Michigan Supreme Court
P.O. Box 30002
Lansing, MI 48909
<ADMcomment@court.mi.gov>

Re: ADM File No. 2021-14

Dear Clerk,

We are writing in support of this proposed rule.

We are authors of the 2020 Poverty Solutions report on Michigan evictions and the recently published update to that report.[1] Our research was organizationally sponsored by the Poverty Solutions program at the University of Michigan, the Taubman College of Architecture and Urban Planning at the University of Michigan, the Michigan Advocacy Program and the Michigan State Planning Body.

We began our research on evictions in Michigan in 2018, shortly after the Eviction Lab published its national study using eviction data.[2] We had two main goals: to understand why the Eviction Lab reported unusually high rates of eviction in Michigan; and to fill in the many gaps in the Eviction Lab's Michigan data.

We learned that the initial Eviction Lab report used data that was purchased from a commercial service – because the Eviction Lab researchers determined that court data was unavailable and/or incomplete. Our 2020 Report was based on analysis of data from SCAO's Judicial Data Warehouse, supplemented by some local court data, including file pulls from local courts. We learned that while (according to the Eviction Lab) Michigan's eviction rate was among the highest in the country, the Eviction Lab data undercounted evictions in Michigan by a factor of about 35%. Our analysis, which provided the first statewide analysis of eviction, would not have been possible without the Judicial Data Warehouse. However, our research was hampered by missing data from several courts across the state. In addition, inconsistent data recording meant we could not analyze the locations of actual eviction orders, limiting the usefulness of the data to understand the issue and guide policymaking.

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[1] The initial report ("Michigan Evictions – Trends, Data Sources, and Neighborhood Determinants") was published in May 2020. https://poverty.umich.edu/files/2020/06/Michigan-Eviction-Project-working-paper.pdf
The update to the report ("Reducing Michigan Evictions – the Pandemic and Beyond") was published June 2, 2021. http://sites.fordschool.umich.edu/poverty2021/files/2021/05/Poverty-Solutions_Reducing-Michigan-Evictions_June2021.pdf

[2] https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html

2000 Bonisteel Boulevard, Ann Arbor, MI 48109-2069 USA
p: 734 764 1300 f: 734 763 2322 taubmancollege.umich.edu

The 2020 Poverty Solutions report pointed out the gaps in and problems with SCAO eviction data and recommended that SCAO improve the quality and availability of this data. See Report, at p. 28.

Beginning in 2020, SCAO began to publish some eviction data on a weekly basis, drawn from the JDW. We applaud this and used it in our 2021 report. However, this data doesn't include all courts and – because the data is not formatted consistently – does not allow SCAO to calculate accurate eviction order statistics.

Our 2021 Report recommends improvements to the data provided by SCAO – and specifically supports the adoption of this proposed rule. See Updated Report, at p. 17.

Based on our experience with court data, we note that there are four main groups that have an interest in reliable and comprehensive court data. The primary and most important data consumer is the court system itself. It is critical that the court have access to its own data for management and planning purposes. The second and third groups are advocacy organizations and academic researchers. Improving the quality and access to JDW data through formal requests for bulk data, or other derivative reports such as the eviction reports created by SCAO, will enable stakeholders to make informed decisions about court system problems and solutions. Finally, there are individuals and corporations who make commercial use of court data. Some commercial entities use this data to discriminate against court users (e.g., landlord "blacklists" of undesirable tenants); others use the data to target court users for sales approaches or even scams. It is important that the court protect court users from inappropriate commercial uses of its data.

In sum, we support the proposed rule – which is an important first step in implementing the data recommendations in our report and in establishing a stronger foundation for evidence-based decision making about changes in court procedures, state and local housing policy, and ways to prevent homelessness. We recognize that if the rule is adopted it is important that SCAO develop and publish data access protocols along the lines suggested in this letter. If the proposed rule is adopted, we would be happy to work with SCAO in developing these protocols.

Respectfully submitted,

Elizabeth Benton
Michigan Advocacy Program

Margaret Dewar
Poverty Solutions, Taubman College of Architecture and Urban Planning, University of Michigan

Robert Gillett
Michigan State Planning Body

Robert Goodspeed
Taubman College of Architecture and Urban Planning, University of Michigan

Order

Michigan Supreme Court
Lansing, Michigan

April 14, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-15

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

Addition of Rule 8.128 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the addition of Rule 8.128 of the Michigan Court Rules is adopted, effectively immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual public 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 at Administrative Matters & Court Rules page.

[NEW] Rule 8.128 Michigan Judicial Council

(A) Duties. There shall be a Judicial Council to plan strategically for the Michigan judicial branch, to enhance the work of the courts, and to make recommendations to the Supreme Court on matters pertinent to the administration of justice.

(B) Diversity and Inclusion. The Judicial Council shall be representative of Michigan's diverse population and regions, ensuring and advancing diversity, equity, and inclusion.

(C) Membership

(1) The membership of the Judicial Council shall consist of 29 members as follows:

(a) The Chief Justice of the Michigan Supreme Court, who shall preside over the council as chairperson;

(b) A Justice of the Michigan Supreme Court, nominated by the Chief Justice;

(c) The State Court Administrator;

(d) The Chief Judge of the Court of Appeals or designee;

(e) Two judges nominated by the Michigan Judges Association;

(f) Two judges nominated by the Michigan Probate Judges Association;

(g) Two judges nominated by the Michigan District Judges Association;

(h) Two judges nominated by the Association of Black Judges of Michigan;

(i) A judge nominated by the Michigan Tribal State Federal Judicial Forum;

(j) Four at-large judges;

(k) Four trial court administrators, probate or juvenile registers;

(l) Two county clerks;

(m) Three attorneys licensed to practice law in the State of Michigan;

(n) A member of the Michigan Justice for All Commission;

(o) Two members of the public who are not attorneys.

(2) All members shall be appointed by the Supreme Court. Members serving on the Judicial Council by nature of their positions designated in subparagraphs (C)(1)(a), (c) and (d) shall serve on the Judicial Council so long as they hold that position. Of the remaining members appointed by the Supreme Court, one-third shall initially be appointed to a two-year term, one-third appointed to a three-year term and one-third appointed to a four-year term. All members appointed or reappointed following these inaugural terms shall serve three-year terms. Terms commence January 1st of each calendar year. No member may serve more than two consecutive terms.

(D) Other Committees, Task Forces, and Work Groups. The Judicial Council will establish such other committees, task forces, and work groups as are necessary to further the work of the Judicial Council.

(E) Meetings of Council. The Judicial Council shall meet regularly as needed to accomplish its work, but at least quarterly, at a place and on a date designated by the Chief Justice.

(F) Administration. The State Court Administrative Office shall staff the Judicial Council.

(G) Deliberations. In all of their deliberations and decisions, members of the Judicial Council shall place the welfare of the public and the judicial branch as a whole above the individual interests of a judicial district, court organization, or class of judge or employee.

(H) Vacancies. In the event of a vacancy on the Judicial Council, a replacement member shall be appointed by the Supreme Court for the remainder of the term of the former incumbent. After serving the remainder of the term, the new member may be reappointed to two full consecutive terms.

(I) Annual Report. The Judicial Council shall prepare an annual report on the status of judicial administration in the courts and the work of the Judicial Council.

(J) Compensation. Judicial Council members shall serve without compensation.

(K) Removal of a Member. The Supreme Court has authority to remove a Judicial Council member. The vacancy created when a member is removed shall be filled in accordance with subrule (H).

Staff comment: The addition of MCR 8.128 establishes the Michigan Judicial Council to strategically plan for Michigan's Judiciary.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-15. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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

April 14, 2021

Clerk

Public Policy Position
ADM File No. 2021-15 – Addition of MCR 8.128

Support

Explanation
The ADR Section Council heartily expresses our Section's support for the adoption of MCR 8.128 and the creation of the Michigan Judicial Council.

Position Vote:
Voted for position: 21
Voted against position: 0
Abstained from vote: 2
Did not vote (absent): 0

Contact Person: Betty R. Widgeon
Email: bwidgeon@gmail.com

From:	Mary Barglind
To:	ADMcomment
Cc:	"Chris Ninomiya"
Subject:	Rule 8.128; ADM File No. 2021-15
Date:	Tuesday, April 20, 2021 12:21:11 PM

Dear Honorable Justices:

I agree and wholeheartedly support the concept and goals of creating a Michigan Judicial Council as set forth in Rule
8128. However, I write to point out what I hope is an inadvertent oversight. MCR 8.128(B) states: "Diversity and Inclusion.
The Judicial Council shall be representative of Michigan's diverse population and regions, ensuring and advancing diversity,
equity, and inclusion." Yet, the Upper Peninsula Judges Association is not listed as an association that is permitted to nominate
even one member from its organization to sit on the Council. In order to "strategically plan for the state's judiciary", I believe
the unique insight, concerns and experiences of a judge from the Upper Peninsula should be represented on this council.

Thank you for considering my request.

Judge Mary B. Barglind
41st Circuit Court, Chief Judge
Dickinson, Iron, Menominee Counties
Iron Mountain, MI
906-774-2266

TIMOTHY A. BAUGHMAN
2213 Glenview, Royal Oak, MI 48073
Telephone: H: 248 591-4086
W: 313 224-5792

Email: tbaughman-temp@comcast.net

Larry Royster
Clerk
Michigan Supreme Court

Re: Adm. File 2021-15

Dear Clerk Royster:

I write to comment on the creation of a state Judicial Council under new MCR 8.128, adopted immediately, but with comments invited, and the matter to be considered at a later public hearing. I applaud the Court's creation of the Council, which appears to me similar to the federal Judicial Conference of the United States.

My purpose here is principally with regard to section (D) of the rule, "Other Committees, Task Forces, and Work Groups. The Judicial Council will establish such other committees, task forces, and work groups as are necessary to further the work of the Judicial Council." I note that the federal Judicial Conference has a very large number of standing committees, with advisory committees composed of judges, academicians, and members of the bar; indeed, more committees than certainly should be created by the Michigan Judicial Council. But I think several would be worthwhile: one on civil court rules, one on criminal court rules, one on appellate court rules, and one on the rules of evidence. I would note that the Judicial Conference of the United States has a Committee on Rules of Practice and Procedure, which is served by advisory committees on civil rules, criminal rules, rules of evidence, and bankruptcy rules,[1] and a number of states have such advisory committees.[2] I attach the rosters of those advisory committees as composed in 2020.

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[1] See https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference#:~:text=Judicial%20Conference%20committees%20review%20issues%20within%20their%20established,United%20States%20courts%20or%20for%20the%20Administrative%20Office

[2] See e.g. https://www.azcourts.gov/rules/advisory-committee-on-rules-of-evidence; https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/criminal-procedure-committee;

My suggestion is that the Court urge the State Judicial Council to exercise its authority under paragraph (D) to create similar advisory standing committees with similar memberships; I think these would be of great aid to the Council and the Court.

Sincerely,

Timothy A. Baughman

Attachments

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https://www.jud.ct.gov/Committees/ap_rules/#:~:text=%20%20%20%20Date%20%20%20,meeting%20Trans%20...%20%2034%20more%20rows%20 (Connecticut);
https://www.mass.gov/info-details/standing-advisory-committee-on-rules-of-civil-procedure

(2020)

Advisory Committee on Appellate Rules

Chair:
Honorable Michael A. Chagares
United States Court of Appeals

Reporter:
Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law

Members:
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Duke Law School

Danielle Spinelli, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP

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United States District Court

Consultant:
Professor Liesa Richter
University of Oklahoma School of Law

Order

Michigan Supreme Court
Lansing, Michigan

May 19, 2021

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. 2019-34

Proposed Amendments of Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and Proposed Addition of Rule 3a and Rule 4a of the Rules for the Board of Law Examiners

_____

On order of the Court, this is to advise that the Court is considering amendments of Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and proposed additions of Rule 3a and Rule 4a of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

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

Rule 2 Admission by Examination

(A)-(C) [Unchanged.]

(D) Every applicant for admission must achieve a passing score, as determined by the board, on the Multistate Professional Responsibility Examination (MPRE) prepared and administered by the National Conference of Bar Examiners.

(E)-(F) [Unchanged.]

Rule 3 Examination Administration~~Subjects and Grading~~

(A) The examination shall be the Uniform Bar Examination (UBE) as prepared and defined by the NCBE and administered on dates and under regulations set by NCBE. The UBE consists of ~~two sections~~:

(1) The Multistate Bar Examination (MBE)~~prepared by the National Conference of Bar Examiners and administered on dates and under regulations set by the Conference.~~

(2) The Multistate Essay Examination (MEE)

(3) Two Multistate Performance Test items (MPT)

~~(2) An essay examination prepared by or under the supervision of the Board or by law professors selected by the Board, on these subjects:~~

~~(a) Real and Personal Property~~

~~(b) Wills and Trusts~~

~~(c) Contracts~~

~~(d) Constitutional Law~~

~~(e) Criminal Law and Procedure~~

~~(f) Corporations, Partnerships, and Agency~~

~~(g) Evidence~~

~~(h) Creditor's Rights, including mortgages, garnishments and attachments~~

~~(i) Practice and Procedure, trial and appellate, state and federal~~

~~(j) Equity~~

~~(k) Torts (including no-fault)~~

~~(l) The sales, negotiable instruments, and secured transactions articles of the Uniform Commercial Code~~

~~(m) Michigan Rules of Professional Conduct~~

~~(n) Domestic Relations~~

~~(o) Conflicts of Laws~~

~~(p) Worker's Compensation~~

(B) The NCBE~~National Conference of Bar Examiners~~ will grade the MBE~~Multistate section~~. The Board or its agents will grade the MEE and the MPT~~essay section~~, with the Board having final responsibility. The Board will adopt policies for grading that are consistent with the sound testing practices followed by all jurisdictions that administer the UBE. The policies shall include a provision for the NCBE to convert the raw scores on the written portion of an examination to the MBE scale by the methodology used for UBE jurisdictions. The Board will determine a method for ~~combining the grades and~~ selecting a passing score.

(C) To earn a portable UBE score that is transferable to other UBE jurisdictions, persons taking the UBE in Michigan shall sit for and take all components of the bar examination in a single administration.

(D) An applicant's raw bar examination score shall be provided to the NCBE to calculate scaled scores. Upon request by an applicant, the NCBE will certify and transfer the applicant's scaled score, scaled MBE score, and total UBE score to other UBE jurisdictions. The NCBE may also release to an applicant, upon request by the applicant, the applicant's scaled MBE score, scaled written score, and total UBE score.

[NEW] Rule 3a Michigan Law Component

(A) Before being admitted to the practice of law in Michigan by UBE examination, by transferred UBE score, or on Application for Admission Without Examination, an applicant shall take any Michigan Law Component course required by the Board and provide proof of completion to the Board of Law Examiner's office.

(B) If a Michigan Law Component course is required by the Board, the course shall contain relevant Michigan-specific topics attorneys licensed in Michigan are reasonably expected to know as determined by the Board. The course shall be in the form prescribed by the Board.

(C) An applicant shall pay any fee determined by the Board that is associated with taking the Michigan Law Component.

Rule 4 Post-Examination Procedures; Appeal; Application for Re-Examination

(A) Except where a mathematical or clerical error has been made, scores determined in accordance with these rules shall be final. In the unlikely event of a mathematical or clerical error, the Board shall issue a corrected score.

(B~~A~~) The Executive Director will release examination results at the Board's direction. Any b~~B~~lue books will be kept for 3 months after results are released.

~~(B) Within 30 days after the day the results are released, the applicant may ask the Board to reconsider the applicant's essay grades. The applicant shall file with the Executive Director two (2) copies of~~

~~(1) the request;~~

~~(2) the answer given in the applicant's blue books; and~~

~~(3) an explanation why the applicant deserves a higher grade.~~

(C) An applicant who has failed and seeks to retake the UBE in Michigan shall file an Application for Reexamination. An applicant for re-examination may obtain an application from the Executive Director. The application must be filed at least sixty (60) days before the examination. If the applicant's character and fitness clearance is more than three (3) years old, the applicant must be approved by the State Bar Committee on Character and Fitness.

[New] Rule 4a Admission by Transferred UBE Score

(A) An applicant may apply for admission to the practice of law in Michigan by filing an application to transfer a UBE score if all of the following apply:

(1) The applicant earned a UBE score that meets or exceeds the minimum score required by the Board of Law Examiners.

(2) The qualifying UBE score was earned in an administration of the UBE that occurred within three years before the date of the applicant's submission of an application under this rule, but no earlier than the date of the July 2022 administration of the UBE.

(3) The applicant has taken the MPRE prepared and administered by the NCBE and earned the scaled score required by the Board.

(4) The applicant has met all requirements of these rules, including successful completion of any Michigan Law Component.

(B) An applicant who desires to be admitted as a member of the Michigan bar shall file with the Board of Law Examiners an Application for Admission to the Practice of Law by Transferred UBE Score. The application shall include the following:

(1) An affidavit stating that the applicant has studied the Michigan Court Rules, the Michigan Rules of Professional Conduct, and the Michigan Code of Judicial Conduct.

(2) An application provided for use by the State Bar of Michigan Standing Committee on Character and Fitness for the purpose of conducting a character and fitness investigation of the applicant and the required fee;

(3) An application fee as prescribed by BLE Rule 6.

(C) An applicant under review shall have a continuing duty to update the information contained in the State Bar of Michigan Standing Committee on Character and Fitness application and to report promptly to the State Bar of Michigan Standing Committee on Character and Fitness all changes or additions to information in the application that occur prior to the applicant's admission to practice.

(D) An applicant under this section shall successfully complete any required Michigan Law Component within the time period required by the Board.

(E) An applicant under this section who has been approved for admission under this section shall be entitled to take the oath of office under Rule 15, section 3, of the Rules Concerning the State Bar of Michigan. An applicant under this section shall not engage in the practice of law in Michigan before approval and administration of the oath. An application under this section shall be considered withdrawn if the applicant does not take the oath of office within three years after being approved for admission to the practice of law in Michigan.

Rule 5 Admission Without Examination

(A) An applicant for admission without examination must

(1)-(4) [Unchanged.]

(5) have, after being licensed and for 3 of the 5 years preceding the application,

(a)-(c) [Unchanged.]

The Board~~Supreme Court~~ may, for good cause, increase the 5-year period. Active duty in the United States armed forces not satisfying Rule 5(A)(5)(c) may be excluded when computing the 5-year period.

(6) Complete any Michigan Law Component requirement set out in Rule 3a.

(B)-(C) [Unchanged.]

(D) An applicant for whom a certificate of admission is issued must take the oath and become a member of the State Bar of Michigan within three years of the date the certificate is issued. Otherwise, the applicant must reapply.

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

Rule 6 Fees

The fees are as follows:

(A) ~~an application for~~ examination under the Uniform Bar Exam, $400 and an additional fee for the late filing of an application or transfer of an application for examination, $100; an application for re-examination, $300;

(B) application for admission by transferred UBE score, $400;

(C) ~~an~~ application for recertification, $300;

(D) ~~an~~ application for admission without examination, $800 plus the requisite fee for the National Conference of Bar Examiners' character report. Certified checks or money orders must be payable to the State of Michigan. Online bar examination payments for first time takers must be paid by credit card.

(E) Any fee for a Michigan law component as determined by the Board.

Rule 7 Exceptions

An applicant may ask the board to waive any requirement except the payment of fees and the administration of the UBE. The applicant must demonstrate why the request should be granted.

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

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-34. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

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

May 19, 2021

Clerk

From: State Bar of Michigan
To: Peter Cunningham; Carrie Sharlow; webmaster@mail.michbar.org
Subject: Public Policy Member Comments [#20]
Date: Thursday, June 24, 2021 2:48:21 PM

Member Name: *	Theresa Bodwin
E-mail: *	tbodwin@zausmer.com
Proposed Court Rule or Administrative Order Number:	Implementation of the Uniform Bar Examination
Other:	Proposed Amendments of Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and Proposed Addition of Rule 3a and Rule 4a of the Rules for the Board of Law Examiners

Comment:

To Whom It May Concern:

I was advised by my colleague that the Michigan State Bar is considering ending the Michigan-specific essay section of the bar exam. I was also advised that the State Bar will rely on comments in regards to this change. Although I can understand the appeal to a Uniform Exam, I do not think the Michigan State Bar should end the Michigan-specific essay section. My reasoning is simple, the laws of each state are substantially different from other states. There are nuisances that are imperative for any attorney practicing in the State of Michigan to know. During my years of practice in Michigan, I have called upon the knowledge I learned only from the Michigan-specific essay questions. The Michigan-specific essays allowed me to learn and know a great base of general knowledge regarding Michigan laws. In fact, last week I was asked about easements in Michigan. I had to go back on my knowledge of Michigan property law that I only learned for the Michigan Bar Exam. The Michigan-specific essay questions are imperative for any lawyer that wants to practice in Michigan. I think would be a travesty of justice should these Michigan-specific questions be eliminated. The Michigan-specific essays require potential lawyers to have a basic understanding of Michigan Law, which is imperative to practice law in Michigan. I strongly disagree with eliminating the Michigan-specific essay section as if we do we will have lawyers that do not know Michigan law.

May the State Bar post your comment on its website?	Yes
May a member of the State Bar contact you concerning this comment?	Yes

From: Scott Bassett
To: ADMcomment
Subject: ADM File No. 2019-34
Date: Friday, June 18, 2021 1:30:05 PM

I write to urge the Court to adopt ADM 2019-34. Michigan is one of only a handful of states not yet using the Uniform Bar Exam (UBE). This is an access to justice issue. Adopting the UBE and its enhanced portability of scores provisions will make it easier for new lawyers to relocate their practices to states with unmet demand for legal services. Michigan is one of those states, as is clear from the increasing number of pro se litigants in family law and other court matters involving individuals.

The UBE benefits both graduating law students seeking to join the Bar and lawyers who are already members of the Bar. It will provide a standard and predictable exam that assures new lawyers have a base of knowledge needed to competently represent clients. Students interesting in practicing in multiple jurisdictions will have reduced preparation and administration costs.

For reasons I don't understand, Michigan lags in recognizing and adopting lawyer regulatory reforms. We were among the last states to adopt a technology competency requirement. We remain one of only a couple of states without mandatory CLE. We should not become the last state to recognize the improvements offered by the UBE.

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MICHIGAN TRIAL COURTS: LESSONS LEARNED FROM THE PANDEMIC OF 2020-2021

Findings, Best Practices, and Recommendations

State Court Administrative Office

Lessons Learned Committee

June 29, 2021

The Michigan Supreme Court and the State Court Administrative Office would like to thank the Lessons Learned Committee, the various courts, and stakeholders for their invaluable assistance in contributing to the compilation of information and preparing these findings and recommendations.

Committee Members

Hon. T. J. Ackert, Co-Chair
17th Circuit Court, Kent County

Hon. Patricia P. Fresard, Co-Chair
3rd Circuit Court, Wayne County

Ms. Jennifer Grieco
Trial Attorney, Oakland County

Mr. Shaheen Imami
Probate Attorney, Oakland County

Ms. Brandy Robinson
Supervising Attorney,
Neighborhood Defender Service of Detroit

Mr. Matthew Wiese
Prosecuting Attorney, Marquette County

State Court Administrative Office Staff

Mr. Tom Boyd
State Court Administrator

Mr. Paul Paruk
Region 1 Administrator

Ms. Tanya Morrow
Management Analyst, Juvenile

Mr. John Ort
MSC Security and Emergency Management Director (Retired)

Contributing Members and Stakeholders

The Committee prepared this report based on information compiled from the review of local administrative orders, policies, and information generated from interviews and/or surveys conducted by the Committee, the State Court Administrative Office, and the State Bar of Michigan of:

- Michigan Supreme Court Security & Emergency Management
- American Board of Trial Advocates – Michigan
- Michigan Defense Trial Counsel
- Prosecuting Attorneys Association of Michigan
- Criminal Defense Attorneys of Michigan
- Michigan Sheriffs' Association
- Tribal State Federal Judicial Forum
- Attorneys throughout the state
- Judges, magistrates, referees, court administrators, clerks, registers, friends of the court, probation staff, mediation clerks, prosecutors, and public defenders from a diverse selection of courts from counties, including Berrien, Calhoun, Cass, Cheboygan, Chippewa, Genesee, Gogebic, Iron, Kent, Lapeer, Lenawee, Mason, Marquette, Mecosta, Oakland, Saginaw, St. Clair, Tuscola, Van Buren, and Wayne.

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Introduction

The Michigan Supreme Court (Court) aptly stated, "Michigan has never faced a challenge like COVID-19."[1] Our judicial system managed the shutdown of court buildings, coordination of essential workers, redistribution of resources to maintain services, and development of virtual courtrooms, while implementing ever-evolving standards to maintain the safety of the public and court staff, and reducing the risk of spreading the virus. While the court system might fairly be perceived as tradition laden, our courts, nonetheless, adapted quickly to the pandemic by incorporating technology and modified procedures that in January 2020 would have been considered impossible. As of April 2021, Michigan trial courts had logged more than 3 million hours of Zoom® hearings and are considered one of the leaders in the country.

The Lessons Learned Committee was formed in May of 2020 and charged with assessing the experiences of our justice system during the pandemic, from implementing emergency procedures following the issuance of the Governor's Executive Order and the Court's Administrative Orders, to the efforts undertaken to continue operations for an indefinite period with judges and court staff working remotely, to the modification of hearing procedures to accommodate a virtual courtroom. The Committee considered what court users reported they struggled with throughout the pandemic; what worked and what didn't work well; and recommendations for the future of the courts based on our shared experience.

Sophocles said, "I have no desire to suffer twice, in reality and then in hindsight." This report is not intended to inflict more suffering, but to critically assess the work the courts performed during the pandemic, the difficulties experienced during the transition to a remote workforce and virtual courtroom, and what the judicial system should consider to manage our courts more efficiently in the future.

Many counties, and the circuit, district, and probate courts located within those counties, encountered both common and unique experiences. This report does not attempt to recount or quantify every disclosure, but highlights the common experiences that are representative of what shaped our justice system in this pandemic. Every court tried its best, and many courts collaborated with other courts and stakeholders to help direct and lead a path through the challenges. Although many of the issues and struggles that arose during the pandemic overlap different operations of the courts, this report focuses on the following:

- emergency preparedness and response,
- continuity of operations and planning for return to full capacity,
- the virtual courtroom and remote proceedings, and
- a review of criminal procedure issues arising as the courts begin to tackle the backlog of criminal cases.

The COVID-19 Emergency: Preparedness and Response

Judge James Alexander, Oakland County Circuit Court (now retired), best summarized the Michigan trial courts' level of preparedness for the pandemic and initial shutdown orders: "Anyone who tells you they were prepared for this is either lying or living in Oz!" Of the courts

[1] Michigan Supreme Court, Return to Full Capacity: COVID-19 Guidelines for Michigan's Judiciary

surveyed, only 24 percent had a documented emergency plan or continuity of operations plan in place prior to the pandemic. Those plans did not anticipate a complete shutdown of services; rather, they prescribed the continuation of operations with reduced level of services either in a different location or by combining all court operations at a central location. The idea of remote operations with nearly all personnel working from home had not previously been considered by any court in the state.

Interestingly, prior to the pandemic some courts had consulted with their local health department regarding the impact of an infectious disease/epidemic outbreak on the justice system and others were experimenting with Zoom® for certain limited hearings.[2] However, these courts admit their actions were initiated not in anticipation of the shut-down, but as a result of their desire to evaluate and assess all aspects of their court operations. In that regard, they were "lucky" to be in a better position than most courts to quickly pivot into a virtual courtroom environment because of their entrepreneurial approach to solutions.

Of those courts with an emergency plan in place prior to March 2020, 83 percent identified essential workers, and those workers had been fully briefed and informed of the emergency plan. Beyond the identification of essential workers, the preparedness for and implementation of emergency protocols were primarily managed day-to-day to address immediate needs. The more coordinated a court's operations were among administration, judges, magistrates, referees, clerks, registers, staff, prosecutors, public defenders, city/county operations, sheriffs, jails, friends of the court (FOC), bar associations, Michigan Department of Health and Human Services (MDHHS), local health departments, and other key stakeholders, the more nimble and responsive the court – and the more positive the experience for those using and relying on the courts.

The Difficulties Experienced by Courts Implementing Emergency Protocols

On March 10, 2020, Governor Whitmer declared a state of emergency to address the COVID-19 pandemic.[3] On March 15, 2020, the Court authorized trial courts to "implement emergency measures to reduce the risk of transmission of the virus and provide the greatest protection possible to those who work and have business in our courts."[4] By April 1, 2020, Michigan had confirmed 9,334 cases of COVID-19 and 337 deaths, with thousands presumed infected but not tested. By May 2020, the confirmed cases within the state rose to 42,356, resulting in 3,866 deaths from the disease.[5] During this rapid spread of the disease, the metro-Detroit area was the epicenter in Michigan, and rural areas such as Northern Michigan, the Thumb, and the Upper Peninsula had minimal, if any, reported cases. The trial courts were left trying to decipher what

[2] SCAO had secured Zoom® licenses in May of 2019 and began working with courts to expand the use of virtual proceedings to compliment the Polycom® videoconferencing system or serve as a substitute. SCAO was ahead of the curve in 2019 in moving to expand remote hearing capabilities. The use of Polycom units in several Michigan courts over the past decade played an important role in the transition to remote hearings in many jurisdictions. The majority of the Polycom units were funded by the state (SCAO and MDOC).

[3] Executive Order 2020-4.

[4] MSC Administrative Order No. 2020-1.

[5] Executive Order 2020-151.

"emergency measures" should be implemented for their location and how to manage personnel, budgets, and the docket.

Trial courts were immediately faced with whether to adjourn matters and for how long, and how to quickly and efficiently communicate adjournments to litigants, attorneys, and jails. Additionally, courts began to assess their capacity to conduct videoconferencing hearings, whether and how that capacity could be expanded, and what employees were necessary to manage the video sessions of the court.

The Court's March 15, 2020 administrative order[6] provided trial courts with the authority to:

- Adjourn any civil matters and any criminal matters where the defendant is not in custody; where a criminal defendant is in custody, trial courts should expand the use of videoconferencing when the defendant consents;
- Maximize the use of technology in civil cases to enable and/or require parties to participate remotely and waive any fees currently charged to allow parties to participate in remotely;
- Reduce the number of cases set to be heard at any given time to limit the number of people gathered in entranceways, lobbies, corridors, or courtrooms;
- Maximize the use of technology to facilitate electronic filing and service to reduce the need for in-person filing and service;
- Waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements, wherever possible;
- Coordinate with local probation departments to allow discretion in monitoring probationers' ability to comply with conditions without the need for amended orders of probation;
- Take any other reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 virus;
- Take into careful consideration public health factors arising out of the present state of emergency: a) in making pretrial release decisions, including in determining any conditions of release, b) in determining any conditions of probation; and
- If a chief judge or the court's funding unit decided to close the court building to the public, then the court must provide the State Court Administrative Office (SCAO) with the court's plan to continue critical services.[7]

Shortly thereafter, the Court directed trial courts "to the extent possible and consistent with constitutional and statutory rights" to conduct hearings remotely or adjourn all non-emergency or out-of-custody criminal matters to April 3, 2020.[8] Also, the courts were directed to limit access to the courtrooms and other spaces to no more than 10 people, including staff, and to practice social distancing.[9] At that time, it was not clear how long the pandemic would last, but the trial courts faced a prolonged period of uncertainty.

[6] MSC Administrative Order No. 2020-1, March 15, 2020

[7] Id.

[8] MSC Administrative Order No. 2020-2, March 18, 2020.

[9] MSC Administrative Order No. 2020-2, March 18, 2020.

Identifying Essential Services AND Essential Workers

The Court's March 18, 2020 administrative order helped courts identify those hearings that were considered essential and those that could be adjourned. The Court continued to update administrative orders and by May 2020, SCAO developed a Remote Participation Chart.

Initially, most courts adjourned all hearings except emergency matters (i.e., personal protection orders, in-custody criminal proceedings, certain child protective hearings, domestic relations matters involving ex parte requests, involuntary mental health treatment, emergency matters involving guardians). During this initial period of adjournments, many courts directed "non-essential" workers to remain home pending further instruction while the courts attempted to identify what services were essential, how to provide those services, and the personnel necessary to provide the services.

The courts identified essential hearings that could be conducted remotely and those requiring in-person hearings. The ability to make these decisions quickly and efficiently was dependent upon whether a court had prior capacity to work remotely and to accept pleadings online or by e-mail/ fax. If a court had remote capacity, then it was able to use those employees familiar with remote hearings to manage the hearings. Likewise, if a court was able to accept pleadings online through the OnBase program or by e-mail filings, it had the option to close most, if not all, in-person filing in the clerk's office, thereby reducing the number of employees needed in the building. Courts that did not have electronic capacity were left to coordinate a filing system based on few employees while limiting the public access to the courts, which slowed the process of filing and managing the docket system. Additionally, clerks' and registers' offices were required to coordinate filings and hearing schedules with the judges' offices, but those offices were – for many – trying to manage remote hearings for the first time; all of which significantly slowed the process.

The courts struggled to identify and coordinate essential workers. As noted, of the small percentage of courts that had an emergency plan in place in March 2020, 83 percent of those identified essential workers. Unfortunately, many courts quickly learned they were neither structured for nor equipped to have employees work remotely. Trial courts faced the immediacy of having to take actions without adequate support staff, technology, and fully vetting the practicality of the procedures to be utilized.

A remote hearing requires not only court staff, judges, magistrates, and referees to be familiar with remote hearing procedures, but also those involved in the hearing, including litigants, prosecutors, public defenders, retained attorneys, probation officers, and witnesses. Self-represented litigants, already unfamiliar with the standard procedures of the court, grappled with the process of remote connection to the court. The courts had to develop protocols and tutorials to educate the users of the court's remote platform; a role the courts had not typically served pre-pandemic. The courts were not initially equipped to do these tasks and improvised "on the fly."[10]

[10] In the summer of 2020, SCAO developed a toolkit document entitled Guidance on Conducting Remote Hearings with Self-Represented Litigants. The toolkit included practice tips learned from various courts around the state, along with resources shared from other sources.

Various courts – including those from small to large counties – discovered their IT departments would not support the Zoom® format, notwithstanding that SCAO had secured licenses for the platforms. The difficulties in managing the remote technology are addressed later in this report.

Even though the courts wanted to offer remote hearings, the essential workers were often not equipped with the hardware to connect to the court network remotely, and even if they could connect, their Internet connections were weak, especially in rural areas. In some courts, the judges loaned personal laptops or tablets to employees so that the employees could work from home while they waited for the county funding source to approve acquisition of equipment necessary to support employee remote connectivity to the court system.

Even when judges and staff had personal computers at home or in the office, the computers typically were not equipped with microphones and/or cameras. The courts had to secure resources to purchase the equipment necessary to work remotely and conduct remote proceedings. The courts faced budget constraints or reluctance of a funding unit to approve expenditures because the funding unit did not understand the need for remote access. Several courts negotiated discounts with local box stores to purchase 10 or more camera/microphone sets every 10 to 20 days to equip personnel.

At the same time, courts attempted to coordinate emergency planning with stakeholder groups, including prosecutors, public defenders, sheriffs, jails, probation offices, FOC, DHHS, mental health providers, and county boards of commissioners. These efforts were almost immediately hampered for two reasons:

1) The stakeholder groups were making the same emergency decisions for themselves and were not readily available; and,
2) In those counties where relationships were strained due to lack of communication or other intragovernmental conflicts, the communication lines were not well defined or open.

Courts struggled to prioritize criminal cases for in-person hearings and the amount of staff necessary to manage the hearings. In some counties, hearings were delayed because prosecutors and public defenders could not agree on procedures.

Some courts initially identified one or two "emergency" judges to handle essential cases within the courthouse. However, the plan proved unmanageable in the mid-sized to larger counties because the case volume was too large in both civil and criminal dockets. Judges were required to hear the essential cases to maintain the dockets, and to consider remote virtual hearings by Zoom® or Polycom®. Probate judges remained with their primary docket, focused on essential hearings, and adjourned most hearings until the later part of April or early May 2020.

When courts identified necessary judges and essential hearings, hearings were often delayed because the processing of pleadings was slowed in the county clerk's office. Courts accepting online filing of pleadings could process the records more quickly than courts that only permitted in-person or mail filings. Also, clerks' offices were working with reduced staff and limiting the number of persons who could enter the office to file documents; these procedures slowed the typical processing time and made it difficult to coordinate with judicial staff the time required to permit processing of the pleadings before scheduling hearings. These delays, while annoying to standard hearings, resulted in critical delays in emergency hearings such as personal protection orders, child protective hearings, guardianships, and child custody emergencies.

The courts were not immune from the political divisions experienced throughout the country regarding the nature of the pandemic and its health risk. Whether a court shut-down or remained open could, in some measure, depend on where the court was located and whether a funding source directed a shut-down. Courts in much of the Upper Peninsula and some regions of the upper Lower Peninsula continued to operate, but limited the number of people who could enter the court to file pleadings, review files, pay fines, or appear in court. Courts in more urban areas initially shut down all operations except for emergency hearings. This status lasted between two to four weeks.

Some courts were directed to shut down by their county funding source. In these instances, the county identified the essential operations to be maintained within the county and didn't recognize the need for the courts to be open. Courts were required to explain to the county boards or managers that the courts were the third branch of government and that the Michigan Supreme Court expected emergency and essential hearings to proceed even if personnel were working from home.

The need to communicate with and secure approval from the local funding unit to permit operations and approve designated essential employees slowed the court process. Importantly, many local governmental units had not experienced nor anticipated governmental functions operated from remote locations, and could not easily comprehend services continuing without personnel located inside the brick and mortar locations commonly identified for governmental services. In some counties, the funding units would not initially approve wages unless the employees were working at the courthouse.

There were numerous examples across the state where a circuit court was not conducting in-person hearings except when required under the Court's administrative orders, but the district court (or vice versa) would hold in-person hearings for many categories of cases. The courts were not consistent within their county in managing hearings. These discrepancies were primarily caused by a failure to coordinate the needs of all stakeholders within the county and how to effectively address those needs, and this caused confusion for attorneys over which courts were conducting in-person hearings and which were primarily relying on remote virtual hearings.

Those courts with strong and collaborative relationships with their funding unit managed these staffing and resource issues more quickly and efficiently.

Courts coordinated with the jails and prisons to transfer inmates for essential hearings. While this function had relatively few complications pre-pandemic, the transfer to/from and housing of inmates in the courts while waiting for a hearing was complicated by the need for personal protection, social distancing, and quarantines. Additionally, the Sheriffs' Association noted uncertainty with respect to the rules for transporting, quarantining inmates, managing inmates at the courthouses, and whether there would be limited inmates permitted in the court each day. These issues were addressed at the local level.

Inmates were required to have personal protection, and the need to practice social distancing limited the number of inmates that could be transported, which, in turn, limited the number of hearings that could be conducted at a court. The courts and county sheriffs had difficulty in the first few weeks, and in some instances months, coordinating an efficient schedule. In a joint statement released on March 26, 2020,[11] by Michigan Supreme Court Chief Justice Bridget M. McCormack and Michigan Sheriffs' Association Executive Director Sheriff Matt Saxton, judges

[11] Michigan Courts News Release, March 26, 2020

and sheriffs across the state were acknowledged for working together to safely reduce jail populations while focusing on keeping the communities safe.

Jails reduced the number of transport guards and staff working each shift and this burdened the system by slowing the process to transport inmates to hearings or return inmates to the jail. The logistics were further complicated by the vast difference of resources and location of jails in each county. Many counties do not have centrally located jails, and travel time to and from the court reduced the number of inmates that could be transported each day while still maintaining safety practices. This reduced the time available for essential hearings in the court.

Courts worked diligently to reduce workers in the courthouse and limit possible exposure to the virus, but it was quickly discovered that the sheriffs transporting inmates had been working a full shift inside the jail and created risks to the court staff for possible exposure to the virus. The courts and sheriffs worked through the logistics to ensure proper transport and safe operations, but this delayed criminal proceedings.

Wayne County was initially crippled in coordinating criminal hearings because of inflexibility of the jails to work with the court plan. The Wayne County Sheriff and the jails were legitimately concerned about the spread of the virus that was rampant in the Detroit metropolitan area, and acted to protect the sheriffs and inmates. The court and the Sheriff's Association worked to resolve the difficulties and overcome communication impediments, but the process took several months.

The courts and jails have long used the Polycom® video conferencing system to conduct criminal arraignments and other appearances that do not require in-person hearings. Polycom® was used as much as possible in the early stages of the shut-down to accommodate more hearings. But the jails had limited space for inmates to connect to Polycom®, and the use of Polycom® extended the length of the hearings because defense counsel – who could not meet with the client in-person before the hearing – required access to the Polycom® system prior to and during the hearing to confidentially confer with the client.

Both the district and probate courts serve a large constituency that do not have ready access to technology necessary to access a website to learn about emergency procedures, or to print, scan, or e-mail pleadings, notices, and documents. The courts recognized early that they needed to provide walk-in service, but were hampered by other shared courts within the same courthouse shutting down or significantly reducing public services.

The nature of probate court hearings created issues regarding safety for the litigants. For example, a hearing to appoint a guardian and/or conservator for a developmentally disabled adult requires the adult ward to be present for the hearing. Often, these adults are subject to medical conditions that can increase the risk of the adult contracting a virus. While courts could conduct the hearing by Zoom®, the family and other caregivers were often limited in the use of the technology. The court was left with either adjourning hearings and/or developing training materials to assist the constituents to access the court's remote hearing technology.

Probate courts, like many other courts, that were not prepared for virtual hearings were more liberal in the use of telephone hearings for non-evidentiary hearings, motions, and scheduling conferences. While this permitted essential hearings to proceed in many instances, the judicial officer and staff had to be in court to conduct the telephone hearing. It was difficult to manage the proper staff ratio to maintain operations and safety.

Probate courts were required to coordinate with local hospitals, mental health facilities, DHHS, guardians, sheriffs, and banking institutions. Courts were using Polycom® for mental health hearings and other limited hearings, but it was difficult to expand the users of the Polycom® system without training and training of users was difficult because of limited access. Counties that created tutorial sheets for stakeholders and posted the tutorials to a website experienced fewer delays in coordinating hearing attendance.

Managing under the Michigan Supreme Court's Administrative Orders

The Michigan Supreme Court and the State Court Administrative Office were tasked with the nearly impossible: guide the trials courts through an immediate shutdown of operations while maintaining access to justice through remote proceedings.

As noted, the initial shut-down orders created uncertainty for the courts. Courts across the state immediately began to address questions and details such as how long the shutdown would last; how long hearings and trials should be adjourned; how the court should handle deadlines previously set in a proceeding but expiring during the shutdown; whether statutory filing deadlines would be extended; and whether court efforts to substantially comply with various mandated procedures under statute or Michigan Court Rules would be considered acceptable to SCAO and the Court as protecting procedural rights of parties during the shut-down.

The Court quickly ordered that in all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or motions raising a defense or objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor should not be included for purposes of calculating the time for filing in accordance with such deadlines.[12] Additionally, the Court extended the expiration of summonses and dates to file post-judgment motions filed in trials; allowed for litigants to seek a fee waiver by electronic process; and permitted all service of process under MCR 2.107(C) to be performed using electronic means.[13]

Jury trials in both civil and criminal cases were delayed until June 2020, subject to further order. While some courts have re-opened under a phase of operations that permits jury trials, many courts are not able to conduct jury trials because of the re-opening phase they are caught in due to county infection and hospitalization rates. The courts are keenly aware these delays create significant backlog of the criminal dockets, potentially affecting the rights of criminal defendants, and expand the back-up of the court's docket.[14] Section 5 of this report explores criminal procedure issues.

The district courts, primarily, and other civil courts were provided new case procedures for handling landlord-tenant disputes, including prioritizing of cases. These orders, in part, considered the impact on landlord-tenant responsibilities and payment under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Public Law No.116-136, that imposed

[12] MSC Administrative Order No. 2020-3, March 18, 2020; amended by MSC Administrative Order No. 2020-08, May 1, 2020.

[13] Id.

[14] This report does not attempt to address the issues regarding conducting remote jury trials. The Supreme Court and SCAO issued a report in July 2020 entitled Michigan Trial Courts Remote Jury Trial Standards and Recommendations.

a moratorium on the filing of summary proceeding actions to recover possession of premises for nonpayment of rent that meet certain parameters. The procedures created questions and docket management issues, but many of the courts worked together to share insights and practices.

The expiration dates for personal protection orders were extended to July 2020. Respondents were permitted to object to the extension by a motion to modify or terminate. Although many courts posted the extension rules on their website under COVID-19 protocols and others mailed notices to respondents if there were valid addresses, the effort to uniformly advise the respondents outside of general news reports was inconsistent.[15] Courts questioned whether they could provide leniency to a respondent who believed a personal protection order had expired, had not received notice of the extension, and contacted the protected party to discuss relationship or family matters – in violation of the extended order – but without threat or violence. With this particular issue not specifically addressed in the administrative orders, courts were left to their discretion, consistent with managing a personal protection hearing prior to COVID-19.

The extension of deadlines created a burden on court staff to manage the deadline schedule to avoid unnecessary notices to dismiss cases for non-service, management of electronic requests for fee waivers and status of summons, and management of files once the executive orders would be lifted. This all done while court staff was reduced and/or working remotely.

Beginning in April 2020, and continuing to present, the Court and SCAO have provided sample order templates and responses to frequently asked questions to assist courts in fashioning local administrative orders or policies to manage the local courts consistent with the Court's administrative orders. Many courts found these helpful and, importantly, they provided guidance to local funding units to understand the need to maintain access to the courts even though court staff and judicial officers were working remotely. Some courts believed the Court's administrative orders were a "one size fits all" approach without engaging sufficient feedback from the various trial courts. Nevertheless, the courts also acknowledge that SCAO regional administrators and staff were extremely helpful in responding to specific questions and needs.

Most courts issued local administrative orders or policies within the first two months following the Governor's Executive Orders and the Michigan Supreme Court's administrative orders in March and early April 2020. The courts that were most successful in informing users of the orders and policies posted them on the court's website, social media, and e-mailed to local bar associations, stakeholder groups and local media. These courts routinely updated the orders/policies after substantive updates from the Court and SCAO; the courts averaged between three to six updated local administrative orders and polices over an eight-month period, when many years a court might issue one, at most. However, many courts did not initially communicate these orders and policies in a proactive manner and did not coordinate with stakeholder groups resulting in confusion and uncertainty.

Impact of Budget Issues on Trial Courts Responding to COVID-19

The trial courts and their funding units immediately faced the challenging prospect of budgeting for the costs associated with purchasing personal protection equipment (PPE); sanitation

[15] Some courts considered mailing notices of the extensions, but long term this was an additional cost that was not justified given the rising budget constraints caused by other COVID-19 expenses.

materials, and overtime to maintain a clean courthouse during and after business hours; signage for directing traffic safely into and through the courts; plastic shield protection for personnel required to be exposed to the public; and technology and equipment to permit personnel to work remotely and for the court to conduct remote hearings. The Michigan Tribal Courts faced similar budget restraints following tribal decisions to suspend or cut budgets, and courts were closed or limited access to by appointment only to safely operate the courts.

SCAO had to become immediately familiar with laws regarding employee furloughs, the CARES Act, and government loans to assist funding payroll and purchase of personal protection equipment and other technology/equipment to manage remote operations under FEMA and other government programs. SCAO regional administrators provided courts updates and resources to review to address budget issues, and are commended for the break-neck speed of learning, assessing, and developing plans to manage the courts.

The courts could not predict the length of time the Governor's stay-at-home order would remain in place and when Michigan would "return to normal." At the beginning of the pandemic, many Michiganders hoped the shut-down would be no longer than one to three months, and some funding units were initially cautious to authorize expenditures for safety and technology, hoping to manage the shut-down on a limited budget. Those courts were caught flat-footed, but were quickly brought along by the assistance of SCAO and consultation with surrounding counties when it was clear the pandemic would be for the long haul.

The courts, particularly in small- to medium-sized counties, were required to expend a great deal of time educating their funding units regarding the need for the courts to remain open through remote hearings. The difficulty and delays this process caused the courts was a common refrain.

The greatest budgetary concerns expressed by the courts included costs for technology equipment (laptops, tablets, cameras, microphones, printers, etc.); software applications; personal protection equipment and cleaning supplies; overtime and staff expenses; increased postage and envelopes/paper; and declining revenue.

The courts must use this pandemic to advocate for their funding units to support the courts' efforts to adopt an electronic filing system and a more robust paperless system supported by online interaction for users of the court, and to maintain infrastructure and equipment to continue remote hearing access through Zoom®.

Managing the Filing of Pleadings and Communication to Stakeholders

The commencement of all actions in court and the procedures undertaken during the pendency of the action require a party to file a pleading in the court. The circuit court and district court clerks and the probate court registers manage the filing system. Typically, the pleadings are accepted by mail or in-person filing. In recent years, SCAO and the courts have begun a transition to online or e-mail filing, but only a minority of the courts use the system.

Courts using MiFILE or the OnBase Internet-based filing system could close the clerk's physical office and accept pleadings filed online. Approximately 95 percent of the court respondents to surveys indicated that court clerks or judges would accept pleadings filed by e-mail provided the original pleadings were mailed to the clerk's office. However, courts also noted that the practice was not consistent throughout the courthouse and that many judges opted not to accept e-mail pleadings. Many courts utilized a drop-box system outside of the court for those who could not

access the Internet. While closing of the clerk's office limited the number of people in the courthouse and enhanced safety protocols, it also increased delays with the filing system and preparing for remote hearings.

Most courts maintained a skeletal crew in the courthouse. As a result, there were severe delays in processing both in-person and electronic court filings.

The lack of uniformity in how courts accepted filings and the inability of many courts to accept electronic filing created confusion with the users of the court. The attorneys reported that the pandemic accentuated the lack of a reliable and uniform e-filing system like the PACER system used in the federal courts.

Courts in the northern Lower Peninsula and Upper Peninsula were able, for the most part, to keep their clerk and register offices open because of lower rates of the virus. However, the offices maintained social distancing, used personal protective equipment, and reduced the number of employees working in the office to "an essential level." The courts created work pods or teams of limited numbers that rotated or staggered the work days in the office; this helped coordination of work flow while maintaining social distancing.

Courts, like many private companies, could not easily secure personal protection equipment at the start of the pandemic. Smaller to mid-size courts were often without internal maintenance staff to post social distance markers and signs directing court visitors; these factors delayed opening the clerk's office and other public services. If the court did not have the personal protection equipment, it further delayed opening unless staff had secured their own masks.

Best Practices in Managing the Emergency Response to COVID-19

The courts that best managed the emergency response to COVID-19 had previously developed an emergency plan, identified and trained essential employees regarding the emergency plan, and had a positive working relationship with the court's funding source, together with a collaborative relationship with court stakeholders that permitted open communication and dialogue.

Courts equipped to use electronic filing or utilized e-mail/fax filing experienced an easier transition to limited in-person court access and remote hearings. Of the courts surveyed, 70 percent accommodated some form of e-mail or fax filing, 20 percent utilized e-filing such as OnBase, and 90 percent continued to use limited public access for filing, including a drop box, scheduled appointments, or limited hours. Once a court instituted electronic filing, the length of delays declined in managing the schedule for remote hearings.

Courts reported that the top three procedures that increased efficiency and/or were widely applauded by the court's stakeholders were accommodating electronic or e-mail filing (100 percent of survey responses), availability of drop-boxes outside the court or other public locations accessible to users of the court (90 percent), and creating detailed instructions sent with notices or other court mailings regarding procedures for remote hearings, contact information for each judicial office to address questions, and training for staff to respond to frequently asked questions including Zoom® hearings (64 percent).

Kent and Wayne counties conducted Zoom® bench-bar conferences to review court policies and Zoom® procedures.

The demands of coordinating the shut-down of the courts required cooperation between the courts and the stakeholders. The courts that managed these relationships well undertook the following common steps:

(1) Immediately scheduled a meeting with stakeholders, including court administrators, chief judges, presiding judges, magistrates, referees, clerks, registers, staff, IT, ADR clerks, prosecutors, public defenders, city/county operations, sheriffs, jails, FOC, local bar associations, DHHS, and local health department representatives.

(2) Developed an emergency plan or updated the existing emergency plan. Posted on the website the contact information of key personnel to answer questions on the operations of the court.

(3) Communicated the court's emergency procedures through local administrative order or policy on the court's website and distributed the policies to key users of the court, including prosecutors, public defenders, FOC, sheriff/jails, and local bar associations, including specified practice sections of the bar. Any updates were immediately posted to the website and distributed to the stakeholders. The counties of Kent, Berrien, Cass, Jackson, and Van Buren all have followed some form of this practice.

(4) Developed training protocols for staff on new emergency procedures.

(5) Developed a tutorial or guidance for attorneys and parties to access and use the remote hearing procedures. Berrien and Van Buren counties produced a video on how to enter the court, safety protocols, and what to expect inside the court. The video was posted to the court's website and released to news media. These two counties also posted their essential operations plan and guidelines for virtual hearings.

(6) Maintained consistent and uniform application of the procedures by all judges. The most common complaint by users of the court has been the inconsistency of judges within a county to follow the county's posted policies on remote hearings, e-mail filing, Zoom® procedures, and adjournments.

(7) Utilized visiting judges or virtual judges.

Recommendations:

(1) Emergency Plan Court Rule: The Committee recommends that the Michigan Supreme Court adopt a court rule under Michigan Court Rules, Subchapter 8, and General Administrative Orders, requiring each court to develop an emergency operations and continuity of operations plan within one year of adoption of the rule. The courts should review and update the plan, as necessary, every three years. Each court should be encouraged to work with their stakeholders to develop the plan and conduct the three-year review. The plan would be based, in part, on the lessons learned during the 2020-2021 pandemic.

(2) Unified Case Management and Electronic Filing System: The Committee recommends that the Michigan judicial system modernize and further develop a unified case management and electronic filing system that is accessible to all courts.

(3) Infrastructure Advocacy: The Committee recommends that SCAO and the judges' associations coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. The users of the court will expect seamless access to the courts by remote connection, and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

(4) SCAO Training to Strengthen and Enhance the Relationship between the County Court System and the County Funding Unit: The Committee recommends that SCAO and MJI develop a training program that shares the methods and means to develop a strong, mutually collaborative working relationship between the county courts and their funding units.

Continuity of Operations and Planning for Return to Full Capacity

The Michigan trial courts transitioned from emergency shut-down to managing remote hearings and/or limited in-person hearings over a period of two months. Certainly, the courts did not master or fully adapt pre-pandemic procedures during this period, but they delivered essential services and slowly began to expand the operations of the courts. The magnitude of the changes necessary to remotely manage court operations became clearer in the first two months, but the courts, while at times overwhelmed, remained focused on delivery of services.

During implementation of virtual courtrooms, the courts also maintained safety for essential personnel and the limited public allowed access to the courthouse, accommodated staff child care needs, managed quarantines, facilitated expansion of online or remote alternative dispute resolution ("ADR"), worked with IT to address technology needs, and continued to manage the docket.

Coordinating Personnel Schedules and Training

In May 2020, SCAO developed guidelines for return to full capacity.[16] Courts have continued to use these guidelines to manage safety precautions within the court, including sanitation, protective equipment and social distancing, notification, isolation and contract tracing procedures, and coordination with local health department officials and SCAO regional administrators to open safely to the next approved phase of court access. Again, more urban and densely populated areas of the state have struggled to maintain open phases, while rural areas have been able to safely open through various phases of the guidelines.

Before considering return to some measure of full capacity, courts had to develop a plan to provide coordination between essential workers at the court and those non-essential workers working remotely. Most courts allowed workers to work in pods and rotate time between the

[16] Return to Full Capacity: COVID-19 Guidelines for Michigan Judiciary (updated May 2021) issued following MSC Administrative Order No. 2020-08 dated May 6, 2020, expanding the use of remote proceedings. The Return to Full Capacity Guidelines have been consistently updated since being issued.

court and home. When possible, this eased the ability of employees to schedule child care and virtual school for children, and increased work-share and knowledge of procedures at the court.

Ability to Manage Court Staff Working Remotely

Courts reported that in the early months of the pandemic 38 percent of non-essential workers were not able to work from home. This negatively impacted the courts' ability to coordinate work distribution, schedules, and training. Issues cited for the difficulty included lack of equipment, poor equipment and/or connectivity at the court and/or the employees home, inadequate IT support for remote work, inadequate training, and childcare/school obligations.

The courts were more negatively impacted because they had limited personnel to spare and rotate schedules. This created a domino effect, resulting in delays in scheduling and hearing management. Probate and district courts that needed to keep the court open for constituents who could not otherwise communicate online or remotely had a difficult time managing staffing needs. Fortunately, the courts that could be open through each phase did not experience the level of traffic that was common prior to the pandemic; people limited their trips to the courts and this continued until the fall of 2020. This gave courts more time to work through procedures without significant negative consequences, even when delays were experienced in scheduling hearings and managing the docket.

Three months after the shut-down, 75 percent of the courts reported having sufficient equipment for all employees to work remotely, 58 percent had strong connectivity through the Internet or VPN, and 42 percent had been able to fully train all employees on remote work.

It was not unusual to have employees using their own equipment (laptops, home computers, tablets, and smartphones) to access the court systems before the court provided compatible equipment. Additionally, courts without a paperless system had to rely on file sharing and copying pertinent documents to allow for key work from home. This delayed procedures and communications with parties, lawyers, probation, prosecutors and defenders, agencies, and other third parties.

The more dedicated a court staff was to identifying needs and solutions consistent with the operation plan, the more quickly the obstacles to remote work were resolved. As noted in the section on emergency operation, the more quickly courts identified stakeholder groups to identify needs and plan how best to address those needs, the more efficient was the expansion to remote work.

Some courts had not been using electronic signature software to permit judicial officers to sign orders and other necessary documents prior to the pandemic, but most implemented this software after the shut-down. The courts also provided tablets to judicial officers and staff to allow review electronic documents for signature if they did not otherwise have a laptop. The electronic signature process allowed for swift issuance of orders and notices necessary to maintain the docket.

Courts that struggled in dedicating a plan to expand remote work often reported that the judges within the county were inconsistent in following proposed solutions or, in the early months, conducted very few remote hearings. Lack of consistency by a court in developing and implementing an operation plan remains the most consistent complaint of users and stakeholders of the courts.

Procedures Established to Maintain Essential Functions and Expand Remote Proceedings

Most courts established procedures to coordinate work for those on site and those working remotely to identify the most important matters to be addressed and prioritize actions to be taken to move the docket. The procedures listed here were generally utilized by the courts in a manner and style best suited for each court.

Courts process mail each day that includes pleadings, reports, recommendations, warrants, notices, and general correspondence. The clerk's and register's office prioritized the most important mail and how to route the mail to ensure further action. The offices worked with various departments within the court system to identify priorities, including court administrators, chief judges, magistrates, referees, mediation clerks, prosecutors, public defenders, probation, and FOC.

Pursuant to MSC Administrative Order No. 2020-1, courts that did not have an electronic filing system were encouraged to use fax or e-mail for electronic filing. Under MCR 2.406, courts had the authority to permit court filings by fax. Courts that established e-mail filing after the shut-down have either established a designated e-mail address within the clerk's or register's office, or individual judges decided whether to accept e-mail filings through a judicial clerk. Most courts posted the procedure for fax or e-mail filing on their website and through the local bar associations.

Various courts have assigned a dedicated individual from the clerk's office, register's office, or administrator's office, or a judicial law clerk to monitor and report on all new Michigan Supreme Court administrative orders or amendments and SCAO guidelines or communications regarding managing the courts. The court's stakeholder planning team or leadership team would determine what, if any, action was required and how to communicate the update or new action.

Courts utilized docket-run reports to identify cases requiring a "next action date" to begin rescheduling adjournments. Various courts have utilized visiting judges or virtual judges from other counties under assignment from SCAO to relieve docket delays.

Remote access has expanded opportunities for judges, referees, and magistrates to conduct proceedings from locations outside of the courthouse and maintain high standards of public service. Judicial officers have been able to remotely preside over emergency hearings or address critical issues within the courthouse even when on vacation or on leave. Some officers have been able to conduct full-day hearings while at a cottage or visiting family, combining work and vacation. Remote access has been used to provide different options to address time-sensitive issues even when court leadership is not in the courthouse; these options should be explored further by the judiciary to create efficiencies and benefits.

RECOMMENDATIONS

(1) Creation of a Judicial Council Planning Committee: The Committee recommends amendment of the Chief Judge Rule under MCR 8.110 to permit the chief judge to appoint a judicial council planning committee to meet at least one time per year to review court operations, technology, and recommend revised procedures to enhance the efficiency and consistency of court operations. The

judicial council would work with designated court stakeholder groups to solicit feedback regarding court operations and proposed improvements.

(2) **Best Practices Technology Symposium:** The Committee recommends that SCAO and MJI develop a symposium for all county IT departments and court administrators to share best practices regarding court technology, software applications, and operations. The symposium would be held at least once per year and would be coordinated with the Michigan Judicial Council's proposed strategic plan for technology.

(3) **Use of Virtual Visiting Judges:** The Committee recommends that the Michigan Supreme Court adopt a rule that permits a visiting judge to appear by Zoom®. SCAO is testing the efficacy of allowing a judge experiencing a lighter docket to be assigned to hear cases by Zoom® as a visiting judge for a county experiencing a backlog of specified case matter. Retired judges, even those no longer living in Michigan, would be permitted to serve as a visiting judge by Zoom®. The courts have become proficient with Zoom® and this proficiency should be leveraged to benefit the entire court system.

(4) **Self-Care of Judicial Officers and Court Staff:** While this report does not specifically address the issues of stress and self-care in the court system, the Committee recommends that SCAO and MJI commit to a five-year plan to address self-care in the courts. The pandemic has taught us that management of court operations is demanding and generates stress. Moreover, the nature of the work performed by trial courts creates potential for judicial officers and staff to be exposed to secondary trauma. The committee is aware that self-care breakout sessions have been offered in the past, but believes a dedicated five-year program to address self-care within the courts would benefit the delivery of justice. The judges' associations could collaborate in formation of the program and share material.

(5) **Remote Site Judicial Service:** The Committee recommends that the Michigan Supreme Court amend MSC Administrative Order 2012-7 (currently suspended by MSC Administrative Order No. 2020-19) and applicable statutory provisions to permit judicial officers to conduct court hearings and business from a site outside of the courthouse. The judicial officer would be required to manage their regular docket and judicial meetings by Zoom®. Standards and guidelines would be developed to govern remote-site judicial service. The courts have become proficient with Zoom® and this proficiency should be leveraged to enhance the method and means of public service.

The Virtual Courtroom and Remote Proceedings

Michigan Supreme Court Chief Justice Bridget M. McCormack has said the pandemic "is not the disruption courts wanted, but it is the disruption courts needed." Prior to the pandemic, with few exceptions, anyone involved in a civil or criminal case had to physically "go to court" to be

heard. The pandemic required trial courts to embrace technology and improvise to maintain access to justice.

Before the pandemic, a minority of trial courts had initiated use of online formats such as electronic filing, dispute resolution, and video and teleconference hearings. In 2019, SCAO secured licenses to use Zoom® videoconferencing and planned to slowly integrate the technology statewide beginning with trial courts receptive to adopting technology solutions. Neither SCAO nor the most revered fortune teller could have predicted the true value of this fortuitous decision because Zoom® allowed trial courts to continue operations remotely during the pandemic. Trial courts cannot reflexively return to pre-pandemic procedures established prior to the Internet, e-mail, laptops, and videoconferencing, but must use this opportunity to adapt to technology, in the same manner as the marketplace, to create long-term improvements to access to justice.

Interview any trial court judicial officer or staff about their experience conducting Zoom® hearings and you will not want for material. There are countless stories of frustration over technology and connectivity, disbelief regarding the lack of decorum shown by some participants (even lawyers), and humorous anecdotes. But universally, if not begrudgingly by some, the trial courts acknowledge Zoom® provides for efficient and effective access to the courts for most hearings except extended evidentiary hearings and trials. This section will explore the difficulties experienced using Zoom®, best practices to maximize the Zoom® experience, and recommendations for the ongoing use of Zoom®.

Videoconferencing Equipment and Remote Proceedings

Participants in a videoconference must have adequate equipment to transmit and receive audio and video, and maintain a stable connection to Wi-Fi/Internet.[17] The most common complaint about Zoom® proceedings, depositions, or mediations is the instability of a participant's connection to the meeting, resulting in frozen screens or garbled sound. In recorded proceedings, these issues can seriously delay or require adjournment of a hearing.

Proceedings experiencing the highest level of interruption involve participants located in rural or urban areas with inadequate broadband and Wi-Fi connection, and participants using a mobile telephone or tablet connected by a mobile device data plan rather than a Wi-Fi link. Trial courts estimated that in the first six months of the pandemic more than 60 percent of remote hearings experienced some connectivity interruption. The connectivity issue has improved as more users of the remote systems have incorporated better equipment or improved Wi-Fi or broadband strength.

Various communities and courts offer free access to high-speed Wi-Fi to allow participants to join Zoom® proceedings. The city of Holland provides access from its civic center parking lot. Although some judges have denied litigants or attorneys to participate in a hearing from their car, often the car provides the quietest environment for the participant; judges should not quickly dismiss a participant from participating while in a car until it is determined the car is sufficiently

[17] This report does not consider the requirements and standards for recording court proceedings. Audio and video recording standards are addressed under MCR 8.109(B) and the operating standards published by SCAO in Michigan Trial Court Standards for Courtroom Technology (4/20).

quiet and without likely disruption like an office or conference room.[18] The Washtenaw County Circuit Court offers a Zoom® hearing room for participants to access a device and hearing. The judicial clerk contacts the participant by e-mail or text and directs the participant to enter the building; this limits the number of persons in the building and provides those without access to Internet or a device the means to participate in the remote hearing.

Inadequate camera and microphone equipment can diminish the quality of the video and audio. While laptops and tablets can provide for mobile access, the cameras and microphones often only meet minimal standards. This can cause video to blur and the volume to decrease if the participant turns their head away from the microphone. Some courts encourage participants, especially lawyers and witnesses involved in lengthy remote evidentiary hearings, to use a headset or a standing microphone that has a higher standard of reception.

RECOMMENDATIONS

(1) Development of Minimum Equipment Standards: The Committee recommends that SCAO consult with Zoom® to develop minimum equipment standards to maximize the connection to Zoom® and performance of the audio and video equipment, including recommended microphone and camera standards. Any standards should be used as guidelines and attorneys should be encouraged to comply. However, many litigants, and in particular self-represented litigants, may not have the means to meet the guidelines. The guidelines should not become a means to deny access to justice.

(2) Modernization of Broadband: The Committee recommends that SCAO, the judges' associations, and the State Bar of Michigan coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Users of the court will expect seamless access to the courts by remote connection and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

Remote Hearings and Proceedings

The use of videoconference hearings by Zoom® or Polycom® was necessary to continue the operations of the justice system. While Zoom® is practical for the pandemic environment, it is an application the courts should continue long after we "return to normal." Of nearly 1,500 attorneys surveyed, 82 percent stated they want Zoom® hearings to continue after the pandemic. The attorneys ranked, in order of preference, the hearings they believed were best suited for Zoom® as follows: non-evidentiary hearings (status and scheduling conferences, pretrials, motions); traffic violations; civil infractions; summary proceedings; guardianships/ conservatorships; criminal pleas and sentencing; and, short domestic relations evidentiary

[18] It need not be said that participants should not participate in a hearing while driving. If a participant is logging into a hearing from a moving vehicle, the judge should consider allowing the participant a brief period to safely park the car or adjourn the hearing. And, yes, the trial courts have reported incidents of attorneys and litigants entering a Zoom® hearing while operating a moving vehicle.

hearings including *pro confesso* hearings. Moreover, these attorneys reported their clients appreciated Zoom® for the convenience and time savings from not having to travel to the court, park, and personally attend a hearing. Clients also expressed they were less intimidated by the process on Zoom® without losing respect for the procedure and decorum. The attorneys were less enthusiastic about evidentiary hearings involving multiple days, witnesses, and exhibits.[19]

The attorneys expressed appreciation for the courts' willingness to use Zoom® for motions, settlement conferences, scheduling conferences, status conferences, and limited evidentiary hearings. Incorporating Zoom® into the court process minimizes travel time, expense, and scheduling conflicts. The attorneys stated their clients anticipate Zoom® will be continued in the court system because it is a cost effective and efficient tool.

Trial courts reported Zoom® preferences similar to the attorneys. Circuit courts considered the following hearings the most beneficial for the Zoom® format: status and scheduling conferences, pretrials, motions, pleas and sentencing (provided the defendant consents to the hearing), PPO hearings (excluding those hearings where the respondent could be sentenced to jail), child protective and juvenile delinquency hearings (excluding removal hearings, parental termination, and juvenile trials), *pro confesso* hearings, and most domestic relations hearings that do not involve multiple days, witnesses, and exhibits.

District courts reported that Zoom® was preferred for pretrial and status conferences, traffic violations, civil infractions, probable cause hearings, landlord-tenant and summary proceedings, and pleas. Probate courts reported a broader acceptance of Zoom® because many hearings can be conducted within a day, such as estate petition and motion hearings, mental health hearings (except jury trials), and guardianship and conservatorship. At least one probate court reported conducting a jury trial by Zoom®.

Friends of the court also reported a general acceptance and efficiency associated with remote hearings and meetings. The majority of FOC offices expressed the convenience for parents to engage in meetings with the FOC investigator by Zoom®, reducing travel time and time from work without reducing the effectiveness of the meetings compared to in-person meetings. FOC has had to prepare instructions for parents to share documents prior to the meeting. FOC reports that parents have generally been supportive of remote meetings and hearings, although acknowledged an initial learning curve. FOC has also utilized Zoom® for mediation and dispute resolution with positive results

An unexpected finding from the use of Zoom® is that minors appearing before the court are more receptive to the hearing and less intimidated or anxious. Family division judges reported that in interviews to determine the reasonable preference of a minor child in a custody matter under MCL 722.23(i) and in juvenile delinquency proceedings, the minor children appeared more relaxed and open in their discussion with the judge or referee. While this finding is anecdotal, a significant number of judges suggested the remote hearing eliminates the intimidation or fear of appearing in court in a predominately adult setting. The video nature of the Zoom® proceedings may provide an experience the minor children are more comfortable with given their familiarity with video games and other digital interactions. SCAO should consider collaborating with a state college or university to study this development.

[19] This Committee did not explore the use of virtual jury trials. SCAO has published the Michigan Trial Courts Remote Jury Trial Standards and Recommendations.

Understandably, in the initial months following the shut-down order the courts struggled to streamline procedures for communication with parties, attorneys, and other users of the court regarding scheduling remote hearings and procedures relating to those hearings. The courts had not clearly identified how or with whom users were to communicate within a judicial office. The courts were hampered by staff working from home and rotating shifts through the week.

Attorneys reported that, while some courts had provided training to staff regarding frequently asked questions such as on scheduling issues, adjournments, Zoom® protocol, and e-mail filing, other courts were less consistent in their responses to inquiries. The attorneys acknowledged that judicial staff and the clerk's and register's offices were conscientious, and trying to resolve questions and provide clarity. Ultimately, over time these communication issues were resolved by most courts.

Whether a motion was heard early in the pandemic differed from court to court. Attorneys reported that some courts adjourned all motion hearings and issued written opinions under MCR 2.119(E)(3), while others conducted the hearings by Zoom®. The reason for either choice was not clear and attorneys believed their clients' interests were best served through the Zoom® hearing.

As noted above, the most consistent complaint from court users, including attorneys, has been the inconsistency of the judicial offices within the same county when conducting remote hearings. Of the attorneys surveyed, 66 percent identified the lack of consistency between judicial offices as the second most significant difficulty they experienced in their practice during the pandemic. The most significant difficulty was the effort to remain current with the Court's updated administrative orders and other court directives (67 percent). These responses only underscore how difficult the legal landscape was in the first six months of the pandemic.

Examples of inconsistent management of the docket include:

(1) Some judges quickly adopted Zoom®, while other judges in the same county were slow to adopt the format and only used Zoom® for limited hearings;

(2) Some judges accepted pleadings by e-mail provided an original was filed with the clerk and the fee paid in accordance with the administrative orders, while others refused this convenience;

(3) Some judges used the "cattle call" approach to motion day, while other judges staggered the motion calendar by assigned times or grouped a limited number of motions in a scheduled block; and

(4) Some judicial offices provided notice of hearings with detailed Zoom® and other offices provided limited information.

Attorneys reported that participating in a "cattle call" Zoom® motion day is a terrible experience for both the attorney and the client. Parties can sit for an hour or more in a waiting room with little to no contact from the court, and attorneys often run into conflicts with other courts while waiting for the appearance. Attorneys and clients prefer a scheduled motion day by set motion times or block times of 60 to 90 minutes, with a limited number of motions assigned to the block. Attorneys reported that judges who follow these scheduling procedures routinely completed the hearings on time with limited waiting.

Settlement conferences conducted by Zoom® provide flexibility for the participants' schedules, elimination of travel, and cost savings. However, the courts must ensure the clients participating

and any third-party representatives, such as insurance carriers and trust fiduciaries, have full authority to settle the case in the same manner they would have had had they appeared in person.

Attorneys encouraged the courts to use Zoom® to manage high-conflict cases or for cases that are discovery intensive and suggested that courts can schedule periodic status conferences through Zoom® with limited impact on schedules and travel.

Zoom® hearings will reduce the cost of litigation by reducing the billable hours normally associated with travel, waiting in court for hearings or completing settlement conferences, etc. This cost saving will be a benefit to the public that pays for legal services, as well as to members of the public who otherwise could not afford legal services and would be forced to handle a matter in *pro per*. Moreover, Zoom® hearings (especially when scheduled for a specific time or window of time) have the additional benefit of allowing attorneys to more easily manage their calendar without the potential of being stuck in court all day.

Use of Zoom® in trials and lengthy evidentiary hearings creates greater flexibility to coordinate appearances by experts or other witnesses who would need to travel to court for an in-person hearing. This flexibility may avoid the need for adjournments or rescheduling.

Mediation clerks and FOCs reported that ADR has been successful on Zoom®. Courts should continue the use of ADR on Zoom® similar to court settlement conferences.

Best Practices for Zoom® Hearings

Best practices for Zoom® hearings include, but are not limited to, the following:

(1) Notice of the hearing should include Zoom® login information, a contact from the judicial office to answer questions or concerns, and instructions for the participants to login and identify themselves on the screen by name, case name and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

(2) The waiting room can be used as a staging area for motion day if the judicial staff provides e-mail communication with the participants. Oakland County places litigants and attorneys into the breakout room while the prior hearing is pending and the judicial staff can inquire of the participants if there are any agreements reached or issues to resolve, and confirm connectivity.

(3) Courts must make breakout rooms available for attorneys and clients to have confidential communications. This is essential in criminal proceedings, and confidentiality cannot be sacrificed simply because a defendant is appearing by Zoom® from inside a jail or prison.

(4) When the courts are closed to the public under the phased approach to return to full capacity, the courts must make the hearing available through the YouTube channel unless the proceeding is closed or access would otherwise be limited by statute or rule.

(5) Hearings where exhibits shall be introduced should be controlled by a scheduling order created based on a status conference with the attorneys/parties. The status

conference should outline the method of disclosing and exchanging exhibits, the schedule for motions *in limine*, and the requirement for parties to agree on the admissibility of exhibits, as possible, prior to the hearing to minimize time spent on foundational procedure. Exhibits shall be provided to the court and witnesses prior to the hearing in a format agreed upon.

(6) The court may also refer to the SCAO publication, Michigan Trial Courts Virtual Courtroom Standards and Guidelines, 2020.

(7) Both the courts and attorneys have expressed concerns about a witness appearing by Zoom® and the potential risk that someone is communicating with the witness from "the wings" or by text or other digital method. The Zoom® hearing is a court proceeding and the judge controls the courtroom. Judges may request a witness to use the videorecorder to show the court the entire room, and inquire about anyone located in the room and whether the witness has access to any documents involving the case. Courts should refer to SCAO's Remote Hearing Witness Instructions. Courts can supplement the standards and distribute the standards to interested parties and keep them posted on the website.

(8) Courts must also manage self-represented litigants on Zoom®. A good resource is SCAO Guidance on Conducting Remote Hearings with Self-Represented Litigants.

(9) Courts should use the Zoom® interpreter tool in all matters requiring an interpreter, except for criminal plea hearings. The interpreter tool allows for the interpreter to speak to the foreign language witness without the interpretation being heard by others on the Zoom® hearing. The tool allows for real-time interpretation as if in open court. However, the recording device cannot record the interpretation, which is required in criminal plea hearings. The Zoom® tutorial provides instructions on how to schedule a hearing using the interpreter tool.

Zoom® is a tool and not a means to replace in-person litigation. But used effectively, Zoom® can create flexibility for the court docket, increase access to the courts, and minimize legal costs.

RECOMMENDATIONS

(1) **Non-Evidentiary Civil and Criminal Hearings**: The Committee recommends amending the court rules to create a presumption that attorneys, parties, and participants will appear by Zoom® for non-evidentiary civil and criminal hearings, including warrant requests, arraignments, probable cause conferences, calendar conferences, final conferences, sentencings, probation violation hearings, status conferences, settlement conferences, ADR proceedings, FOC proceedings, and *pro confesso* hearings, unless good cause is shown why Zoom® should not be used, or in a criminal case where the defendant asserts the right to be physically present in the courtroom.

(2) **Proposed Amendment of MCR 2.407:** The Committee recommends that MCR 2.407, Videoconferencing be amended to specify the use of Zoom® and establish a preference for participants to appear by Zoom®. The preference may be overcome by reasonable factors including the nature of the proceeding, the evidence to be presented, and the availability of the participant support. It should remain within

the court's discretion to deny the application to appear by videoconferencing. This would apply to those court rules that permit the use of videoconferencing, including MCR 3.210(A)(4), 3.215(D)(3), 3.705, 3.708, 3.804, 3.904, 4.101, 4.202, 4.303, 4.401, 5.140, 6.006, and 6.901, subject to any statute or rules that would preclude the use of videoconferencing.

(3) Use of Zoom® for Meetings in NA Cases: The Committee recommends that a lawyer guardian ad litem in an NA case be permitted, upon written request, to use Zoom® for meetings with clients located outside of the county unless good cause is shown. However, the lawyer guardian ad litem must meet with the out-of-county clients in person prior to adjudication, permanency planning hearings, and termination hearings.

(4) Request to Appear via Zoom® to Ensure Access to Justice: The Committee recommends that litigants who obtain a waiver of fees under MCR 2.002 be given a preference when requesting to appear by Zoom® to ensure access to justice. The ability to appear through videoconferencing may save costs and provide flexibility to avoid lost time from work. However, if the litigant's videoconferencing technology and/or equipment is not able to provide proper connectivity and audio and/or video recording, the court may require the litigant to appear in person until a remedy can be found.

(5) Consistency among Courts within a County Judicial System: The Committee recommends that SCAO empanel a committee to study "best practices" of standard procedures courts should establish to provide fair and efficient justice. The findings of the committee would be submitted to each county to determine how best to implement the procedures. The Committee recognizes that Michigan's judicial system is not a unified court system. Nevertheless, the clear implication from the opinions expressed by attorneys and other stakeholders of the judicial system is that the lack of consistency among judges within a county judicial system to follow established or recommended procedures undermines confidence in the judicial system.

Additional Procedural Concerns Regarding Zoom® Hearings Involving Criminal Defendants

The pandemic has delayed a multitude of criminal jury trials and other proceedings because many courts are not able to conduct trials under the phased re-opening plans. Criminal defendants may have consented to adjournments, but there remain additional procedural issues that courts must consider for whether to proceed with a Zoom® trial. This report does not offer a solution, but raises the questions; the local courts must be the final arbiter based on the facts and circumstances.

Right to Public Proceedings

The First and Sixth Amendments to the United States Constitution guarantee public proceedings. When courts conduct hearings via videoconferencing technology like Zoom®, steps must be taken to ensure public access, including access to the court's YouTube channel. To the extent

that online proceedings are public, the Committee encourages courts to ensure the equipment used and connections to the Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public's ability to view the proceedings.

Right to be Present

Appearing via video does not satisfy the right to be present absent a valid waiver. And "[v]irtual appearance is not a suitable substitute for physical presence."[20] Courts must make every reasonable effort to ensure a defendant's agreement to waive personal appearance and appear remotely – often from jail – is voluntary.

Courts must maintain the primary responsibility for ensuring that out-of-custody defendants have notice of how to participate in upcoming court hearings. Courts may not shift the duty of ensuring a defendant's Zoom® appearance to defense counsel.

Right to Confrontation and Compulsory Process

Virtual courts present a danger to the right to confront and cross-examine witnesses under the Sixth Amendment. Virtual confrontation may have an impact on the witness, making it more likely that the witness will give false testimony. It may also impact the ability to cross-examine and the factfinder's ability to assess the testimony. See, *People v Jemison*, 505 Mich 352, 363-367 (2020) (allowing an expert witness to testify by two-way, interactive video violated the defendant's Confrontational Clause rights).

Important witnesses may be unavailable because they do not have access to the necessary technology or Internet services. What does compulsory process look like in an online court scenario?

Right to Counsel

Virtual courts can impede attorney-client communication, interfere with the attorney-client relationship, and jeopardize a defendant's right to participate and assist in his own defense. As noted earlier, the virtual courtroom must provide access to confidential communications such as the Zoom® breakout room. Moreover, the court must provide ample time for criminal hearings at every stage of the proceedings to allow for confidential communication between attorney and client. If an attorney informs the court that the virtual process is impeding the right to communicate because of inability to exchange documents or evidence during the attorney-client breakout sessions, the court must act to protect the right and seek compliance in a non-virtual setting.

The right to counsel includes the right to the *effective* assistance of counsel.[21] Virtual courts and the choice to proceed virtually under circumstances where in-person activity is limited raise

[20] *People v Heller*, 316 Mich App 314, 318 (2016).

21 *Strickland v Washington, 466 U.S. 668 (1984)*.

effective assistance of counsel concerns, including but not limited to, the duty to conduct an independent and adequate investigation and the duty to protect client confidentiality.

Equal Protection and Due Process: As noted above, virtual courts may create wealth-based hurdles – those who lack access to sufficient technology may have different and less meaningful access to justice than people with means.[22] The courts must assure meaningful access to the virtual courtroom, including dedicating a room in the courthouse to safely permit use of videoconferencing technology.

DUE PROCESS CONSIDERATIONS

Right to Impartial Jury: There is consensus among judges, prosecutors, and defense attorneys that criminal jury trials must take place in person. While this report did not address the issues of a virtual jury process, courts are reminded that in criminal proceedings the use of a virtual courtroom could result in the exclusion of distinctive groups of jurors (fair cross-section or systemic exclusion), violating the Sixth Amendment, as well as rights to due process and equal protection.

Right to Speedy Trial: There is tension between the Sixth Amendment right to speedy trial and other Constitutional rights implicated by online courts. Defendants should not be forced to waive guaranteed Constitutional rights to ensure a speedy trial. Moreover, as trial courts commence previously adjourned hearings, either virtually or in-person, courts must continue to prioritize adjudicating in-custody defendants before out-of-custody defendants. Both the courts and attorneys surveyed reported that 85 percent of the courts implemented plans to prioritize in-custody proceedings.

RECOMMENDATIONS

(1) Discourage Practice of "Cattle Call" Appearances: The Committee recommends that SCAO discourage judges from using the cattle call approach in criminal matters and instead rely on a staggered docket by using assigned times or a similar docket management mechanism. As is true in civil cases, parties can sit for several hours and attorneys often run into conflicts with other courts while waiting for a "cattle call" appearance on a particular docket.

(2) Require Prioritizing of Hearings for In-Custody Defendants: As criminal courts return to full capacity and resume previously adjourned hearings, either virtually or in-person, the Committee recommends that SCAO require courts to prioritize adjudicating in-custody defendants before out-of-custody defendants, and that preference be given to those defendants who have been in custody for the longest amount of time.

(3) Minimum Standards for Equipment and Internet Connection: To the extent that online proceedings are public, the Committee recommends that courts ensure the equipment used and connections to Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public's ability to view the proceedings.

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22 *Griffin v Illinois, 351 U.S. 12 (1956)*; *Ake v Oklahoma, 470 U.S. 68 (1985)*.

(4) **Mandate Notices in Criminal Matters**: Similar to the best practices for Zoom® hearings in civil cases, SCAO should mandate that in criminal matters, courts provide notice of the date, time, and purpose of the hearing, along with the following details:

a. Zoom® login information;

b. Contact information for a staff member to answer questions or concerns; and

c. Instructions for the participants to login and identify themselves on the screen by name, case name, and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

(5) **Provide an In-person Alternative for Jailed Defendants:** The Committee recommends that SCAO require courts to provide an in-person alternative for defendants who are in jail and do not agree to participate in the hearing by way of Zoom® technology.

(6) **Annual Zoom® and YouTube Training for Court Staff:** To protect the right to counsel, due process, and public access in criminal cases, the Committee recommends that SCAO require court staff to be trained annually on the best practices for operating by Zoom®, and Zoom® and YouTube technology; also that there be mandatory compliance with SCAO's current Recommendations on Using Zoom® & Public Access for Court Proceedings. This mandate should include a requirement that courts allow out-of-custody defendants or witnesses to participate by telephone or another reasonable alternative where they otherwise lack access to a stable Internet connection.

(7) **Amend Court Rules to Create a Presumption the Certain Parties Will Appear Remotely for Certain Hearings:** The Committee recommends amending the court rules to create a presumption that, except where the defendant asserts the right to be physically present in the courtroom, attorneys, parties, and participants in criminal cases will appear remotely using two-way interactive video technology or other remote participation tools for non-evidentiary criminal hearings, including warrant requests, arraignments on the information under MCR 6.113 (unless waived), probable cause conferences, emergency motions regarding bond, calendar conferences, final conferences, plea hearings, sentencings, extradition hearings, and probation violation hearings under MCR 6.445(B). With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

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

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PROPOSED

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

[NEW] M Crim JI 25.7 Trespassing

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

(2) First, that [*name complainant*] owned or legally occupied property located at [*provide property address or location*].

[*Select from the following three options according to the charge and the evidence*:]

(3) Second, that [*name complainant or agent*] told the defendant [he / she] could not come onto the property.

(4) Third, that the defendant entered on the property after being forbidden to do so.

[*or*]

(3) Second, that the defendant was on the property owned or occupied by [*name complainant*].

(4) Third, that [*name complainant or agent*] told the defendant [he / she] had to leave the property.

(5) Fourth, that the defendant remained on the property after being directed to depart.

(6) Fifth, that the defendant had no legal authority to remain on the property.[1]

[*or*]

(3) Second, that the property was farm property.

(4) Third, that the property was fenced or posted with signs that forbid entry on the property.

(5) Fourth, that the defendant entered on the property without having obtained permission from [*name complainant or agent*].

[*Provide the following element only when the defendant offers the defense of being a process server serving process and provides evidence in support of that defense. The paragraph numbers correspond to the respective options above*:]

(5 / 7 / 6) [Fourth / Sixth / Fifth], that the defendant was not a process server attempting to serve legal documents on an owner, occupant, or lessee of the property, or on an agent of an owner, occupant, or lessee.

Use Note

1. Read this only when the defendant presents some evidence that he or she had a legal right to remain on the premises.

Public Policy Position
M Crim JI 25.7

Support

Explanation:
The committee voted unanimously (19) to support the proposed Model Criminal Jury Instruction 25.7 as drafted.

Position Vote:
Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 4

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