Agenda
Public Policy Committee
September 15, 2022 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……James W. Heath, Chairperson

A. Reports

1. Approval of July 21, 2022 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2022-09: Proposed Amendment of MCR 3.703

The proposed amendment of MCR 3.703 is necessary for design and implementation of the statewide electronic-filing system, will provide the court with necessary PPII in an appropriate format, and will reduce workload preparing personal protection orders. This particular amendment aligns with the Court's recent amendment of MCR 1.109(D)(9)(b)(iii), allowing proposed orders submitted to the court to contain protected personal identifying information (PPII), which the courts will continue to protect as if prepared or issued by the court under MCR 8.119(H)(5).

Status:	10/01/22 Comment Period Expires.
Referrals:	06/17/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee. Comment provided to the Court is included in the materials.
Liaison:	Thomas G. Sinas

2. ADM File No. 2020-08: Proposed Amendment of Administrative Order No. 2020-17 and MCR 4.201

The proposed amendments would permanently incorporate certain provisions from Administrative Order No. 2020-17 into court rule format under MCR 4.201 and would make a number of minor changes due to a relettering of the rule. The proposed amendments would also incorporate public comment received at the public hearing on March 16, 2022 and via email, as well as additional recommendations and input received from other stakeholders including the JFAC and the MDJA. Finally, the proposed amendments in this order reference MCR 2.407, which is amended effective September 9, 2022. Readers should refer to the amended version of that rule when reviewing the proposed amendments in this order.

Status:	11/01/22 Comment Period Expires.
Referrals:	09/01/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee.
Comments:	Access to Justice Policy Committee. Comments provided to the Court are included in the materials.
Liaison:	Thomas G. Sinas

3. ADM File No. 2021-20: Proposed Amendment of MCR 6.001 and Proposed Addition of MCR 6.009

The proposed addition of MCR 6.009 would establish a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the proposed amendment of MCR 6.001 would make the new rule applicable to felony, misdemeanor, and automatic waiver cases.

Status:	10/01/22 Comment Period Expires.
Referrals:	06/08/22 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 Court is included in the materials.
Liaison:	Lori A. Buiteweg

4. ADM File No. 2021-29: Proposed Amendment of MCR 6.201

The proposed amendment of MCR 6.201 would require redaction of certain information contained in a police report or interrogation record before providing it to the defendant.

Status:	10/01/22 Comment Period Expires.
Referrals:	06/17/22 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 Court is included in the materials.
Liaison:	Valerie R. Newman

5. ADM File No. 2021-48: Proposed Amendment of MCR 6.502

The proposed amendment of MCR 6.502 would allow a third exception to the "one and only one motion" rule based on a final court order vacating one or more of a defendant's convictions either described in the judgment or upon which the judgment was based.

Status:	10/01/22 Comment Period Expires.
Referrals:	06/17/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Judge Cynthia D. Stephens (Ret'd)

6. ADM File No. 2021-35: Proposed Amendment of MCR 7.202

The proposed amendment of MCR 7.202 would provide a definition of governmental immunity to include the state's, a tribal government's, or a political subdivision's immunity from suit or liability.

Status:	10/01/22 Comment Period Expires.
Referrals:	06/24/22 American Indian Law Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; American Indian Law Section; Appellate Practice Section; Criminal Law Section.
Comments:	Civil Procedure & Courts Committee; Appellate Practice Section. Comments provided to the Court are included in the materials.
Liaison:	Mark A. Wisniewski

7. ADM File No. 2021-39: Proposed Amendment of MCR 7.215

The proposed amendment of MCR 7.215 would codify the Court of Appeals' practice for reissuing opinions and orders.

Status:	10/01/22 Comment Period Expires.
Referrals:	06/17/22 Civil Procedure & Courts Committee; Appellate Practice Section.
Comments:	Civil Procedure & Courts Committee. Comments provided to the Court are included in the materials.
Liaison:	Brian D. Shekell

C. Legislation

1. HB 6344 (Lightner) Courts: other; duties of the appellate defender; include definition of youth. Amends title & secs. 2, 4, 6 & 7 of 1978 PA 620 (MCL 780.712 et seq.) & adds sec. 1a.

HB 6345 (Lightner) Criminal procedure: defenses; Michigan indigent defense commission act; expand definitions. Amends title & secs. 3, 5, 7, 9, 11, 13, 15, 17, 21 & 23 of 2013 PA 93 (MCL 780.983 et seq.).

Status:	07/20/22 Referred to House Committee on Judiciary.
Referrals:	07/25/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Takura N. Nyamfukudza

2. HB 6356 (Johnson) Criminal procedure: other; certain requirements for the use of informants in criminal proceedings; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 36a, 36b, 36c, 36d, 36e, 36f, 36g & 36h to ch. VIII.

Status:	08/17/22 Referred to House Committee on Judiciary.
Referrals:	08/19/22 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments:	Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
Liaison:	Valerie R. Newman

MINUTES
Public Policy Committee
July 21, 2022 – 12:00 p.m. to 1:30 p.m.

Committee Members: Lori A. Buiteweg, Kim Warren Eddie, James W. Heath, Suzanne C. Larsen, Valerie R. Newman, Takura N. Nyamfukudza, Thomas G. Sinas, Judge Cynthia D. Stephens (Ret.)
SBM Staff: Peter Cunningham, Carrie Sharlow, Nathan Triplett
GCSI Staff: Marcia Hune

A. Reports

1. Approval of June 8, 2022 minutes

The minutes were unanimously approved.

2. Public Policy Report

A written report was provided.

B. Court Rule Amendments

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

The amendment of MCR 1.109 provides an e-filing court with the authority to determine the most appropriate means of sending notices and other court-issued documents that are generated from its case management or local document management system.

The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

The committee voted unanimously (8) to support ADM File No. 2002-37 and the amendment to MCR 1.109 as drafted.

2. ADM File No. 2002-37/2017-28: Amendments of MCR 1.109 and 8.119

The amendments of MCR 1.109 and MCR 8.119 aid in protecting personal identifying information included in Uniform Law Citations, proposed orders, and public documents filed with or submitted to the court.

The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practices Committee; Criminal Law Section.

The committee voted unanimously (8) to support ADM File No. 2002-37/2017-28 and the amendments to MCR 1.109 and 8.119 as drafted.

3. ADM File No. 2021-17: Proposed Rescission of Administrative Order No. 1998-1 and Proposed Amendment of MCR 2.227

The proposed rescission of Administrative Order No. 1998-1 and proposed amendment of MCR 2.227 would move the relevant portion of the administrative order into court rule format and make the rule consistent with the holding in *Krolczyk v Hyundai Motor America*, 507 Mich 966 (2021).

The committee reviewed recommendations from the following group: Civil Procedure & Courts Committee.

The committee voted unanimously (8) to support ADM File No. 2021-17 and to recommend that the Court give consideration to the potential conflict in the Rules regarding jury demands in transferred cases.

4. ADM File No. 2022-06: Proposed Amendment of MCR 3.101

The proposed amendment of MCR 3.101 would allow writs of garnishment to be served electronically on the Department of Treasury, subject to current e-filing requirements and guidelines established by the Department of Treasury.

The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee.

The committee voted unanimously (7) to support ADM File No. 2022-06 and the proposed amendment to MCR 3.101 as drafted.

5. ADM File No. 2021-21: Proposed Amendment of MCR 3.613

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

The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee.

The committee voted unanimously (8) to support the amendment to MCR 3.613 and further to recommend that the Court make good cause required by the proposed amendment presumptive for persons whose name change is sought for affirmation of gender identity, and for victims of human trafficking and domestic violence.

The committee voted unanimously (8) to recommend that language be added to the rule to provide for Court-approved alternative service for the notice of a hearing to noncustodial parents, rather than requiring publication of such notice in a newspaper, and to further recommend that such notice not include a minor child's name.

6. ADM File No. 2020-33: Proposed Amendment of MCR 3.903

The proposed amendment of MCR 3.903 would clarify the definition of a party in child protective proceedings.

The committee reviewed recommendations from the following groups: Civil Procedure & Courts Committee; Children's Law Section.

The committee voted unanimously (7) to support ADM File No. 2020-33 and the proposed amendment to MCR 3.903.

7. ADM File No. 2021-18: Proposed Amendment of MCR 3.943

The proposed amendment of MCR 3.943 would update the definition of "firearm" in juvenile proceedings to be consistent with MCL 8.3t, which contains the definition referenced in the court rule's companion statute, MCL 712A.18g.

The committee reviewed recommendations from the following group: Criminal Jurisprudence & Practice Committee.

The committee voted unanimously (7) to support ADM File No. 2021-18 and the proposed amendment to MCR 3.943.

8. ADM File No. 2021-16: Proposed Amendment of MCR 7.305

The proposed amendment of MCR 7.305 would clarify that the 28- day timeframe for filing an application for leave to appeal applies to cases where the respondent's parental rights have been terminated.

The committee reviewed recommendations from the following groups: Civil Procedure & Courts Committee; Family Law Section.

The committee voted unanimously (7) to support the clarification of MCR 7.305 but recommend that the timeframe for filing an application for leave to appeal be made consistent for all civil appeals, including appeals from orders terminating parental rights, at 42 days.

9. ADM File No. 2021-13: Proposed Amendment of MCR 8.119

The proposed amendment of MCR 8.119 would clarify that a request for a fee waiver must be filed in accordance with MCR 2.002(B), which requires the request to be made on a form approved by the State Court Administrative Office.

The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Civil Procedure & Courts Committee.

The committee voted unanimously (7) to support ADM File No. 2021-13 and the proposed amendment to MCR 8.119.

C. <u>Legislation</u>

1. HB 4795 Substitute H-2 (Berman) Courts: judges; hearings on emergency motions by defendant in criminal cases; provide for. Amends sec. 1, ch. I of 1927 PA 175 (MCL 761.1) & adds sec. 12 to ch. III.

The committee reviewed recommendations from the following groups: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.

The committee agreed that HB 4795 is *Keller*-Permissible is affecting the functioning of the courts.

The committee voted unanimously (8) that the Bar's position opposing HB 4795, as introduced, should continue to apply to the (H-2) substitute. As such, no Board action is required at this time.

D. <u>Section Inconsistent Advocacy Request</u>

1. HJR Q (Allor) Courts: judges; age limit for election of or appointment to a judicial office; amend. Amends sec.19, art. VI of the state constitution.

The committee reviewed recommendations from the following group: Family Law Section.

The committee voted 5 to 3 to recommend that the Board authorize the Section to advocate its inconsistent position.

Order

Michigan Supreme Court
Lansing, Michigan

June 15, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2022-09

Proposed Amendment of
Rule 3.703 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.703 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.703 Commencing a Personal Protection Action.

(A) Filing. A personal protection action is an independent action commenced by filing a petition and submitting a proposed order with a court. The proposed order shall be prepared on a form approved by the State Court Administrative Office. The petitioner shall complete in the proposed order only the case caption and the fields with identifying information, including protected personal identifying information, that are required for LEIN entry. The personal identifying information form required by MCR 1.109(D)(9)(b)(iii) shall not be filed under this rule. There are no fees for filing a personal protection action and no summons is issued. A personal protection action may not be commenced by filing a motion in an existing case or by joining a claim to an action.

(B)-(G) [Unchanged.]

Staff comment: The proposed amendment of MCR 3.703 is necessary for design and implementation of the statewide electronic-filing system, will provide the court with necessary PPII in an appropriate format, and will reduce workload preparing personal protection orders. This particular amendment aligns with the Court's recent amendment of MCR 1.109(D)(9)(b)(iii), allowing proposed orders submitted to the court to contain protected personal identifying information (PPII), which the courts will continue to protect as if prepared or issued by the court under MCR 8.119(H)(5).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2022-09. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

June 15, 2022

Clerk

Public Policy Position
ADM File No. 2022-09: Proposed Amendment of MCR 3.703

Support with Recommended Amendment

Explanation

The Committee voted to support the proposed amendment with a further revision that clarifies that a petitioner's failure to provide the identifying information required for LEIN entry is not a reason for the court to deny the PPO request. The proposed revision is presented below in red:

> (A) Filing. A personal protection action is an independent action commenced by filing a petition and submitting a proposed order with a court. The proposed order shall be prepared on a form approved by the State Court Administrative Office. The petitioner shall complete in the proposed order only the case caption and, if known, the fields with identifying information, including protected personal identifying information, that are required for LEIN entry. Failure to provide the identifying information is not a basis to reject the petition. The personal identifying information form required by MCR 1.109(D)(9)(b)(iii) shall not be filed under this rule. There are no fees for filing a personal protection action and no summons is issued. A personal protection action may not be commenced by filing a motion in an existing case or by joining a claim to an action.

Position Vote:

Voted For position: 20
Voted against position: 1
Abstained from vote: 0
Did not vote (absent): 6

Contact Persons:

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

ELIZABETH HUNDLEY
LIVINGSTON COUNTY CLERK

COUNTY CLERK
200 East Grand River
Howell, Michigan 48843-2399
517-546-0500
countyclerk@livgov.com

CIRCUIT COURT CLERK
204 S. Highlander Way, Suite 4
Howell, Michigan 48843-1953
517-546-9816
wclerks@livgov.com

July 5, 2022

Michigan Supreme Court
Administrative Matters Division
PO Box 30052
Lansing, MI 48909

Re: Proposed amendment to MCR 3.703

Dear Sir/Madam:

We write in support of the proposed amendment to MCR 3.703. If adopted, this would allow the Clerk's office to efficiently process PPO's, thereby providing improved service to the public.

Cordially,

Elizabeth Hundley
Livingston County Clerk.

Kristi Cox

Kristi Cox, CCM, CCE, (Fellow pending)
Chief Deputy County Clerk
44th Circuit Court
Livingston County, Michigan

Order

Michigan Supreme Court
Lansing, Michigan

August 10, 2022

ADM File No. 2020-08

Proposed Amendments of
Administrative Order No.
2020-17 and Rule 4.201
of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Administrative Order No. 2020-17 and Rule 4.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Administrative Order No. 2020-17 – Continuation of Alternative Procedures for Landlord/Tenant Cases

[Entered June 9, 2020; language as amended by orders entered June 24, 2020, October 22, 2020, December 29, 2020, January 30, 2021, March 22, 2021, April 9, 2021, July 2, 2021, July 26, 2021, ~~and~~ August 10, 2022, and [Date TBD].]

~~The number of new COVID-19 cases in Michigan has dropped dramatically in recent weeks and m~~Many people believe that our state is finally at the end of the pandemic. Still, the court system will long be dealing with the effects brought about by the greatest health crisis in our generation. ~~One of those effects is a prolonged period of housing insecurity experienced by those most affected by the pandemic's nearly instantaneous and extensive job reductions – the 30 to 40 million people nationally who rent their housing.~~

Throughout the pandemic, f~~F~~ederal response to this problem has taken two forms: eviction moratoria and direct state aid. Several eviction moratoria were~~have been~~ imposed, both by Congress (Pub L. 116-136) and by the CDC (published at 85 FR 55292 and extended by Order dated March 28, 2021), prohibiting evictions for tenants in certain types

of government-supported housing or who meet certain income restrictions. Those moratoria have since been lifted.~~The most recently-extended CDC order is slated to expire July 31, 2021 unless extended further. In addition, challenges to these CDC orders have been working their way through the courts, with conflicting opinions as a result.~~

~~However, t~~The second type of federal response~~- continues to be relevant regardless of the status of the CDC order~~—direct aid to states to provide for rental assistance programs is also coming to an end. ~~In 2021 PA 2, the Michigan Legislature appropriated $220 million (of the total of $600 million in federal money designated for Michigan) to provide rental assistance to tenants and landlords. Section 301(2) states that "[t]he department of labor and economic opportunity shall collaborate with the department of health and human services, the judiciary, local community action agencies, local nonprofit agencies, and legal aid organizations to create a rental and utility assistance program." This Court has done so in previous iterations of Administrative Order No. 2020-17 by working with those agencies to establish a procedure that ensures landlords and tenants are able to benefit from those dollars.~~However, t~~T~~he need for that programming continues, even assuming the health risks associated with the typical manner of processing eviction proceedings has eased.

The~~In addition, the mandate for courts to continue to~~ use of remote technology to the greatest extent possible is as important~~fully in place~~ today as it was two~~a~~ years ago. Now is~~We anticipate this fall will be~~ the appropriate time to consider what changes in procedure, adopted with as much speed and thought as possible in the midst of a pandemic, should be retained or changed before becoming permanent practices in our state courts. This effort has been~~will be~~ based on input from state court stakeholders, but even ~~e~~early data showed us that expanded use of technology has improved rates of participation and been a boon to issues related to access to justice. We do not intend to squander the gains hard-won when all judges, court staff, attorneys, and individuals were forced to change their practices with little advance notice and training and in doing so, created a footprint for a new way to work that serves the needs of court users in novel and innovative ways.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing that ~~courts to process landlord/tenant cases following the procedures outlined in this order.~~

~~(A)~~ ~~A~~a~~a~~ll local administrative orders requiring a written answer pursuant to MCL 600.5735(4) be~~are~~ temporarily suspended.[1] Unless otherwise provided by this

[1] The local administrative orders include: 1st District Court (Monroe County); 2A District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95B District Court (Dickinson and Iron Counties).

order, a court must comply with MCR 4.201 with regard to summary proceedings.

~~(B) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:~~

~~(1) Defendant has the right to counsel. MCR 4.201(F)(2).~~

~~(2) The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), Housing Assessment and Resource Agency (HARA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.~~

~~(3) Defendants DO NOT need a judgment to receive assistance from MDHHS, the HARA, or the local CEA. The Summons and Complaint from the court case are sufficient for MDHHS.~~

~~(4) The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.~~

~~(5) The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.~~

~~(C) The pretrial required under subsection (B) may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer), or a CDRP mediator.~~

~~(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. The court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing, if applicable. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to~~

~~appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.~~

~~(E) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing in subsection (B) is conducted. Nothing in this order limits the statutory authority of a judge to adjourn for a longer period. MCL 600.5732. Any party who does not appear at the hearing scheduled for the adjourned date will be defaulted. Cases need not be adjourned for seven days if: the plaintiff dismisses the complaint, with or without prejudice, and without any conditions; if defendant was personally served under MCR 2.105(A) and fails to appear; if plaintiff pleads and proves, with notice, a complaint under MCL 600.5714(1)(b), (d), (e) or (f), sufficient to meet the statutory and court rule requirements and a judge is available to hear the proofs; or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing. Nothing in this subsection supersedes the right to an attorney pursuant to 4.201(F)(2).~~

~~(F) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner.~~

~~(G) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:~~

~~(1) An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;~~

~~(2) The defendant is eligible to receive rental assistance for all rent owed; and~~

~~(3) The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.~~

~~If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings. Nothing in this order limits~~

~~the statutory authority of a judge to adjourn a Summary Proceedings case. MCL 600.5732.~~

~~(H) In cases filed before this administrative order was amended to include procedure related to the CERA program (i.e., before March 22, 2021), if a party notifies the court that it has applied for CERA at any point prior to issuance of a writ, the court shall stay the proceeding as provided under subsection (G) of this order.~~

~~(I) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or after the expiration of the CDC order, whichever date is later. MCL 600.5744(5), which provides a 10 day minimum statutory period to pay or move, is tolled until expiration of the CDC order. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence on the first day after the expiration of the CDC order for those cases.~~

This order is effective immediately until further order of the Court.

Rule 4.201 Summary Proceedings to Recover Possession of Premises

(A) Applicable Rules; Forms. Except as provided by this rule and MCL 600.5701 *et seq.*, a summary proceeding to recover possession of premises from a person in possession as described in MCL 600.5714 is governed by the Michigan Court Rules. Forms available for public distribution at the court clerk's office and SCAO-approved forms located online may be used in the proceeding.

(B) Complaint.

(1)-(2) [Unchanged.]

(3) Specific Requirements.

(a)-(b) [Unchanged.]

(c) If the tenancy is of residential premises, the complaint must allege that the lessor or licensor has performed his or her covenants to keep the premises fit for the use intended, ~~and~~ in reasonable repair during the term of the lease or license, and in compliance with applicable state and local health and safety laws, unless the parties to the lease or license have modified those obligations, as provided for by statute.

(d)-(e) [Unchanged.]

(C) Summons.

(1)-(2) [Unchanged.]

(3) The summons must also include the following advice to the defendant:

(a)-(e) [Unchanged.]

(f) Pursuant to SCAO guidelines, written information attached to the summons regarding the availability of rental and other housing assistance provided by legal aid or local funding agencies.

(D) [Unchanged.]

(E) Recording. All landlord-tenant summary proceedings conducted in open court, including the pretrial hearing held under subrule (K), must be recorded by stenographic or mechanical means, and only a reporter or recorder certified under MCR 8.108(G) may file a transcript of the record in a Michigan court.

(F) Use of Videoconferencing Technology. For any hearing held under this subchapter, the court must allow the use of videoconferencing technology in accordance with MCR 2.407.

(1) The use of videoconferencing technology shall be presumed for all pretrial hearings, subject to MCR 2.407(B)(5).

(2) Unless the court determines that the use of videoconferencing technology is inappropriate for a particular case under MCR 2.407(C), the use of videoconferencing technology may be used in bench trials and other proceedings if the court has consulted with the parties and counsel.

(3) The use of videoconferencing technology shall not be used in jury trials, except in the discretion of the court after all parties have had notice and opportunity to be heard on the use of videoconferencing technology.

(G~~F~~) Appearance and Answer; Default.

(1)-(3) [Unchanged.]

(4) Jury Demand. If the defendant wants a jury trial, he or she must demand it

at least two days before the adjourned trial is scheduled to begin or at the defendant's first appearance, whichever is later~~in the first response, written or oral~~. If the trial is adjourned under subrule (K) and no jury demand has been made, the defendant must demand it at least two days before the rescheduled date. The jury trial fee must be paid when the demand is made.

(5) Default.

(a) If the defendant fails to appear on the date and time noticed by the summons, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment if~~. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (K). The default judgment must be mailed to the defendant by the court clerk and must inform the defendant that (if applicable)~~

(i) the defendant fails to appear on the date and time noticed by the summons and on the date and time in which trial was adjourned under subrule (K)(1)~~he or she may be evicted from the premises~~;

(ii) personal service of process was made on the defendant under MCR 2.105(A); or~~he or she may be liable for a money judgment.~~

(iii) the plaintiff pleads and proves, with notice, a complaint under MCL 600.5714(1)(b), (d), (e), or (f) sufficient to meet the statutory and court rule requirements.

(b) If satisfied that the complaint has met pleading and proof requirements and a default may enter, the court may enter a default judgment under MCL 600.5741 and in accordance with subrule (L). The default judgment must be mailed to the defendant by the court clerk and must inform the defendant that (if applicable)

(i) he or she may be evicted from the premises;

(ii) he or she may be liable for a money judgment.

(b) [Relettered (c) but otherwise unchanged.]

(d~~c~~) If a default is not entered~~party fails to appear~~, the court must~~may~~ adjourn the trial~~hearing~~ for at least~~up to~~ 7 days. If the trial~~hearing~~ is

adjourned, the court must mail notice of the new date to the party who failed to appear.

~~(6) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).~~

(H~~G~~) Claims and Counterclaims.

(1) Joinder.

(a)-(b) [Unchanged.]

(c) A court with a territorial jurisdiction which has a population of more than 1,000,000 may provide, by local rule, that a money claim or counterclaim must be tried separately from a claim for possession unless joinder is allowed by leave of the court pursuant to subrule (H~~G~~)(1)(e).

(d) [Unchanged.]

(e) If adjudication of a money counterclaim will affect the amount the defendant must pay to prevent issuance of an order of eviction, that counterclaim must be tried at the same time as the claim for possession, subrules (H~~G~~)(1)(c) and (d) notwithstanding, unless it appears to the court that the counterclaim is without merit.

(2) [Unchanged.]

(I~~H~~) Interim Orders. On motion of either party, or by stipulation, for good cause, a court may issue such interim orders as are necessary, including, but not limited to the following:

(1)-(2) [Unchanged.]

(3) Stay of Proceedings. In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, the court must stay further proceedings after conducting the pretrial hearing under subrule (K) and not proceed to judgment if, as described in SCAO guidelines, a defendant applies for rental assistance from a designated funding source or rental assistance agency and notifies the court of that application not later than five days after the defendant is verbally informed as provided in subrule (K)(2). The court may require reasonable

verification of the application. The initial stay is lifted after 14 days unless the defendant demonstrates to the court that the application has been approved and rental assistance will be received. The total stay period under this subrule must not exceed 30 days and is automatically lifted 30 days from the date that the initial stay of the proceedings began.

(I) [Relettered (J) but otherwise unchanged.]

(K~~J~~) Trial.

(1) Time.

(a) If after conducting the pretrial hearing under subrule (K)(2)(a) the court adjourns the trial, it must be scheduled at least 7 days after the pretrial hearing.

(b) When trial begins, the court must first decide pretrial motions and determine if there is a triable issue. If there is no triable issue, the court must enter judgment.

(c) ~~When the defendant appears, t~~The court may try the action pursuant to this subrule, or, if good cause is shown, may adjourn trial up to 56 days. If the court adjourns trial for more than 7 days, an escrow order may be entered pursuant to subrule (I~~H~~)(2). The parties may adjourn trial by stipulation in writing or on the record, subject to the approval of the court.

(2) Conducting the Trial.

(a) At the initial date and time set for trial noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial the parties must be verbally informed of all of the following:

(i) The right to counsel under subrule (G)(2).

(ii) The right to proper venue under subrule (G)(3).

(iii) The Michigan Department of Health and Human Services, local Coordinated Entry Agency, Housing Assessment and Resource Agency, or federal Help for Homeless Veterans program may be able to assist with payment of some or all of the rent due.

(iv) Defendants do not need a judgment to receive assistance from the Michigan Department of Health and Human Services, local Coordinated Entry Agency, or Housing Assessment and Resource Agency. The summons and complaint from the court case are sufficient for help from the state.

(v) The availability of the Michigan and local community dispute resolution program office as a possible source of case resolution.

(vi) The possibility of a conditional dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such conditional dismissal.

If the defendant does not appear for trial on the date and time noticed by the summons and a default was not entered, the court must verbally inform the defendant of the information in this subrule at his or her first appearance before trial begins and allow, upon request, adequate time to retain counsel.

(b) Unless otherwise provided in this rule, after conducting the pretrial, the court may adjourn the trial as provided in subrule (K)(1).

(c) Immediately following the pretrial hearing, the court may resolve the case without adjourning the trial, if

(i) the plaintiff dismisses the complaint, with or without prejudice, and without any conditions;

(ii) the defendant is personally served under MCR 2.105(A) and fails to appear at the date and time set for trial noticed by the summons under subrule (K)(2)(a);

(iii) both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court;

(iv) the defendant has been advised of his or her rights under subrule (K)(2)(a), has knowingly waived the option of having the trial adjourned, and upon judicial review of the terms after adequate inquiry determines the terms fair and enters into a consent judgment or conditional dismissal on the record; or

(v) any of the circumstances listed in subrule (G)(5)(a)(iii) is pleaded and proved, with notice, sufficient to meet the statutory requirements.

~~(2) Pretrial Action. At trial, the court must first decide pretrial motions and determine if there is a triable issue. If there is no triable issue, the court must enter judgment.~~

(3)-(4) [Unchanged.]

(K) [Relettered (L) but otherwise unchanged.]

(M~~L~~) Order of Eviction.

(1) [Unchanged.]

(2) Issuance of Order of Eviction and Delivery of Order. Subject to the provisions of subrule (M~~L~~)(4), the order of eviction shall be delivered to the person serving the order for service within 7 days after the order is filed.

(3)-(5) [Unchanged.]

(N~~M~~) Postjudgment Motions. Except as provided in MCR 2.612, any postjudgment motion must be filed no later than 10 days after judgment enters.

(1) Except as otherwise provided in this subrule, i~~I~~f the motion challenges a judgment for possession, the court may not grant a stay.~~unless~~ The court shall grant a stay if

(a)-(b) [Unchanged.]

If a stay is granted, a hearing shall be held within 14 days after it is issued.

(2) If the judgment does not include an award of possession, the filing of the motion stays proceedings, but the plaintiff may move for an order requiring a bond to secure the stay. If the initial escrow deposit is believed inadequate, the plaintiff may apply for continuing adequate escrow payments in accord with subrule (I~~H~~)(2). The filing of a postjudgment motion together with a bond, bond order, or escrow deposit stays all proceedings, including an order of eviction issued but not executed.

(3) [Unchanged.]

(O~~N~~) Appeals From Possessory Judgments.

(1)-(2) [Unchanged.]

(3) Stay of Order of Eviction.

(a) Unless a stay is ordered by the trial court, an order of eviction must issue as provided in subrule (M~~L~~).

(b) [Unchanged.]

(4) Appeal Bond; Escrow.

(a) [Unchanged.]

(b) A defendant who appeals must file a bond providing that if the defendant loses, he or she will pay

(i)-(iii) [Unchanged.]

The court may waive the bond requirement of subrule (O~~N~~)(4)(b)(i) on the grounds stated in MCR 2.002(C) or (D).

(c) If the plaintiff won a possession judgment, the court shall enter an escrow order under subrule (I~~H~~)(2) and require the defendant to make payments while the appeal is pending. This escrow order may not be retroactive as to arrearages preceding the date of the post-trial escrow order unless there was a pretrial escrow order entered under subrule (I~~H~~)(2), in which case the total escrow amount may include the amount accrued between the time of the original escrow order and the filing of the appeal.

(d) [Unchanged.]

(O) [Relettered (P) but otherwise unchanged.]

Staff Comment (ADM File No. 2020-08): The proposed amendments would permanently incorporate certain provisions from Administrative Order No. 2020-17 into court rule format under MCR 4.201 and would make a number of minor changes due to a relettering of the rule. The proposed amendments would also incorporate public comment received at the public hearing on March 16, 2022 and via email, as well as additional recommendations and input received from other stakeholders including the JFAC and the

MDJA. Finally, the proposed amendments in this order reference MCR 2.407, which is amended effective September 9, 2022. Readers should refer to the amended version of that rule when reviewing the proposed amendments in this order.

Note that the comment period for this proposal is slightly shorter than the typical three-month period so that this issue can be considered by the Court at its November 2022 public hearing.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by November 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-08. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J. (*dissenting*).

Today the Court publishes for comment a proposal that would permanently incorporate some of the provisions of Administrative Order No. 2020-17, the emergency order initially issued in July 2021 to respond to the relatively early developments of the COVID-19 pandemic, into MCR 4.201, the court rule governing summary proceedings to recover possession of premises, and make other permanent changes to that court rule. I write to explain why I would rescind AO 2020-17 in its entirety and why I would not make significant changes to MCR 4.201.

Now that it has been well over two years since the beginning of the COVID-19 pandemic, there is no need to retain Administrative Order No. 2020-17.[1] Only one

[1] Although I initially voted to adopt AO 2020-17 at the beginning of the pandemic, I quickly changed course once it became clear to me that the order was being used to facilitate an eviction moratorium that appeared to me unconstitutional and indeed was later declared as such. See *Alabama Ass'n of Realtors v Dep't of Health & Human Servs*, 594 US ___; 141 S Ct 2485 (2021). In addition to its legal shortcomings, there are reasons to question the policy merits of the eviction moratorium as well, since it has likely caused (or significantly contributed to) major increases in rents, which are a key driver of inflation. See, e.g., Krafcik, *Rising Rents, Lack of Housing Still an Issue in West Michigan Despite Eviction Moratorium*, WWMT (August 16, 2021) <https://wwmt.com/news/i-team/rising-

provision would be retained under the proposal: the suspension of local court rules requiring a written answer pursuant to MCL 600.5735(4).[2] The order purports to justify this continued suspension on the fact that the court system is still dealing with the effects of the COVID-19 pandemic. It is not clear to me why suspension of local court rules otherwise allowed by MCL 600.5735(4) is necessary or beneficial. The proposed revision to AO 2020-17 would continue to characterize this suspension as "temporary." But the suspension has been in place for over two years now with no end in sight. If not now, when is the appropriate time to remove this provision?

I am also not convinced of the need for additional changes to MCR 4.201. To the extent that the COVID-19 pandemic has revealed ways in which we can improve landlord-tenant proceedings, I take no issue with considering such improvements. For example, I agree that it would be helpful to provide defendants with information about housing and rental assistance with the summons, which may obviate the need for a trial and save the parties and the court time and resources. But, as explained below, the proposal would go far beyond these types of common-sense reforms.

First, I would not create a presumption that videoconferencing technology be used for pretrial hearings in landlord-tenant proceedings. As I have expressed previously, there are numerous reasons why individual courts and judges should retain full discretion as to whether to use remote technology for a particular proceeding. See Rescission of Pandemic-Related Administrative Orders, 507 Mich ___ (2021) (VIVIANO and BERNSTEIN, JJ.,

---

rents-lack-of-housing-still-an-issue-in-west-michigan-despite-eviction-moratorium> (accessed August 1, 2022) [https://perma.cc/43R3-AT2L]; Rico, *Rents Reach 'Insane' Levels Across US as Eviction Moratorium Ends*, Detroit News (February 20, 2022) <https://www.detroitnews.com/story/news/nation/2022/02/20/apartment-rents-eviction-moratorium-pandemic/49839435/> (accessed August 1, 2022) [https://perma.cc/Y3LP-XDCK]. Unfortunately, this has had a detrimental effect on the very people the moratorium was intended to help. See Schanz, *As Rent Rises in Metro Detroit, Families are Forced to Cut Back in Other Ways*, WXYZ (March 4, 2022) <https://www.wxyz.com/news/as-rent-rises-in-metro-detroit-families-are-forced-to-cut-back-in-other-ways> (accessed August 1, 2022) [https://perma.cc/2PEX-DUGU].

[2] Since initially being issued, this provision in the administrative order has referred to local administrative orders, not local court rules. But the courts referenced in footnote 1 of the administrative order have all issued local court rules, not local administrative orders, governing landlord-tenant proceedings. Furthermore, MCL 600.5735(4) refers to local court rules, not local administrative orders. This makes sense, as a local administrative order can govern "only internal court management." MCR 8.112(B)(1). Mistakes such as this in an emergency order may be understandable, but the fact that this mistake has lingered for over two years underscores the importance of going through the normal notice and comment procedure before making changes to how our trial courts operate.

concurring in part and dissenting in part). Furthermore, proposed MCR 4.201(F)(2) would provide for a different standard for using videoconferencing technology in landlord-tenant bench trials than the general standard for bench trials in other civil proceedings found in MCR 2.408(A)(2). Applying a different standard only to landlord-tenant bench trials is likely to cause confusion.[3]

Second, although I do not necessarily oppose requiring district courts to conduct a pretrial hearing at the initial date and time set for trial, I have concerns about the specifics of the proposed changes.[4] It is true that, for landlord-tenant cases that proceed to an actual trial, proposed MCR 4.201(K)(2)(b) purports to give district court judges the option of adjourning the matter or immediately proceeding to trial. But I am concerned that the presumption for holding pretrials via videoconference will operate as a de facto adjournment requirement. Unless the district court wishes to hold the bench trial via videoconference, and I suspect that many district court judges will not, the court will be forced to adjourn the trial because the parties will not be physically present at the courthouse for the initial hearing.

Third, I see no reason to change the conditions under which a district court may enter a default judgment. Proposed MCR 4.201(G)(5) would no longer allow a default judgment to be entered in a case involving nonpayment of rent if the defendant fails to appear at the initial court date unless he or she was personally served. I fail to understand why a landlord or landlord's attorney should be forced to return to court a second time to secure a judgment of possession if the tenant was properly served by some method other than personal service yet fails to appear at the initial hearing.[5]

---

[3] It is also unclear to me what the practical difference is between "consult[ing] with the parties and counsel," which is the language used in proposed MCR 4.201(F)(2), and providing "all parties [with] notice and opportunity to be heard," which is the language used in the recently amended MCR 2.408(A)(2) and proposed MCR 4.201(F)(3).

[4] Holding a pretrial may lead to a resolution of the case without the necessity of a trial, which would benefit the parties and the court. Some of our district courts are undoubtedly already conducting pretrial hearings even though they are not currently required by the court rules.

[5] Additionally, proposed MCR 4.201(G)(5)(a)(i) is confusing in that it appears not to contemplate the possibility of the pretrial and trial both being held on the same date.

Finally, I question the constitutionality of adding a provision requiring a stay in nonpayment-of-rent cases if the defendant has applied for rental assistance from a designated funding source. This blanket-rule requirement would strip district court judges of their discretion over whether to adjourn landlord-tenant proceedings granted to them by MCL 600.5732. As I have noted previously, our Legislature established a scheme for summary proceedings to recover possession of premises that allows a landlord to recover possession quicker in nonpayment-of-rent cases than in certain other cases. See Amendment of Administrative Order No. 2020-17, 507 Mich ___, ___ (2021) (VIVIANO, J., dissenting). Automatic-stay requirements such as the one in the proposal published for comment do not respect the Legislature's choices and will force landlords wishing to exercise their statutory right to recover possession of their premises to wait until the stay is lifted. See *id.* at ___. There is arguably a "clear legislative policy reflecting considerations other than judicial dispatch of litigation"—allowing a property owner to quickly recover possession of his or her property. *McDougall v Schanz*, 461 Mich 15, 30 (1999) (quotation marks and citations omitted). Thus, I question whether proposed MCR 4.201(I)(3) is within our constitutional authority to regulate "practice and procedure" or whether it wades into the Legislature's authority to amend substantive law. *McDougall*, 461 Mich at 30-31.

I am glad that the Court has returned to its normal process of publishing proposed changes to the court rules for comment before it makes a decision whether to adopt the changes. See Amendment of Administrative Order No. 2020-17, 507 Mich at ___ (VIVIANO, J., dissenting) (lamenting the Court's continued departure from our normal, transparent amendment processes and use of emergency orders to make substantive changes to landlord-tenant procedures). However, I have serious concerns about the proposed amendments the Court is currently considering. For these reasons, I respectfully dissent.

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.

August 10, 2022

Clerk

Public Policy Position
ADM File No. 2020-08: Proposed Amendment of Administrative Order No. 2020-17 and MCR 4.201

Support with Exception

Explanation
The Committee voted to support the proposed amendment of Administrative Order No. 2020-17 and MCR 4.201, with the sole exception of the proposed amendment to MCR 4.201(F)(4) [new (G)(4)], on which the Committee takes no position.

The Committee believes that the proposal will improve access to justice by clarifying the procedures required in summary proceedings to recover possession of premises in a manner that promotes accessibility and greater transparency for litigants.

The Committee took no position on the proposed amendment to MCR 4.201(F)(4) [new (G)(4)] because, while this particular amendment may increase the defendant's access to a jury trial, it does not provide the plaintiff with this same option for a late demand and could diminish the plaintiff's ability to effectively prepare for trial.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 6

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

Comments Submitted to the Michigan Supreme Court on ADM File No. 2020-08 – Proposed Amendments of Administrative Order No. 2020-17 and MCR 4.201

08/12/2022 Aaron Cox

Name: Aaron Cox
Date: 08/12/2022
ADM File Number: 2020-08

Comment:
The proposed amendment to MCR 4.201 (B) (3) (c) will have unintended consequences.

Most local governments have enacted ordinances requiring landlords to obtain and maintain rental certificates of compliance. These ordinances are largely ministerial so governments can track rental properties. The proposed language in this subsection mandating that Plaintiff plead that the property is in compliance with the laws will likely be used by courts to bar the entirety of Plaintiff's claims where a Plaintiff cannot so represent its compliance.

Further, this provisions mandates ("must allege") this representation. This leads to the inescapable conclusion that either the court rule is mandating a representation even if untrue, or that absent that representation the Plaintiff lacks standing to proceed on its case.

What happens if a landlord simply omitted the local ordinance obligation? What happens if a landlord's compliance was not renewed due to the fault of the tenant? What happens if a landlord cannot financially comply with the requirements necessary for compliance? Are they barred access to the courts because of the mere lack of a ministerial certificate from a local unit of government? Wouldn't this incentivize unscrupulous tenants into precluding the landlord's compliance?

Further, MCL 600.5741 already accounts for the potential for this lack of compliance without barring a plaintiff from access to the court. That statute directs the trier of fact to take into account any lack of compliance with state and local health and safety laws when it issues a redemptive amount. Including this requirement in the court rule itself is unnecessary and problematic.

I strongly encourage this addition to be deleted.

08/16/2022 Jason Pool

From: Jason Pool
To: ADMcomment
Subject: comment to MCR proposed changes to 4.201
Date: Tuesday, August 16, 2022 4:23:27 PM

To whom it may concern,

As a mom and pop landlord we are very concerned about proposed changes that would greatly impact our means of living. We desire to, and always have, worked to keep our

properties in good condition and affordable. We work very closely and emphatically with tenants who experience difficulties.

But we cannot and SHOULD NOT be asked to stand by as government dictates/implements more and more stall tactics that absolutely will be exploited by individuals and groups who see all landlords as rich billionaires who shouldn't be allowed to profit from their PRIVATELY owned properties. It's not fair. Covid practically killed off small landlords. Housing is not "free". We have to pay to buy it, pay to maintain it, pay property taxes and income taxes. We are not a straight up charity. If the government wants to provide housing that people can stay in for months free then that's great. But we can't afford someone using loopholes and delays to stay in our properties rent free for several months or more. If these proposed changes occur it will slowly drive small landlords to get out and sell off rentals. Bigger players will likely take over, resulting in less desirable units in many cases and large corporations that operate solely on the need for profit and shareholder sentiment. Rents and deposits will be driven upwards in anticipation of abuses of time frames from tenants.

Everything we have we worked for. No one gave us anything. Something is wrong when public government wants to give private property away a day or days or months at a time.. in the name of covid and myriad of other sentiments. If they really care, create more vouchers for those who are sincerely in need, and not for those who are radical and just want to demonize landlords while getting a free ride and posting their misguided thoughts on social media. Please do not keep the current covid style delays long term or heaven forbid add more delays to the court system.

Respectfully,
J. Pool Optimum Properties LLC

08/16/2022 Ethan LaVigne

Name: Ethan LaVigne
Date: 08/16/2022
ADM File Number: 2020-08

Comment:
I am opposed to these amendments. Making it easy for tenants NOT to pay their rent and making it harder for good landlords and businesspeople to collect on monies owed them is ludicrous. It lends itself to the eventual collapse of fair housing as we know it. Why do we empower people to think they can live in a world where they don't have to pay their bills? Is the government also considering empowering people not to pay their taxes for the services and infrastructure they provide? Is that sustainable?

08/16/2022 MaryBeth Bowers

Name: MaryBeth Bowers
Date: 08/16/2022
ADM File Number: 2020-08

Comment:

Absolutely Not. As Landlord we provide Excellent living conditions that residents like to live in. We pay for everydones safety in our communities. Service is a must and taken care of on our (landlord Expense) what we ask in return is there monthly rent. We have been more than workable thru the pandemic and offered agencies for rental assistance. We pay for our building and residents should to. We dont have a choice to prolong our bills or ask for any second time delays. Totally unfair to landlords

08/16/2022 Steven Bentley

Name: Steven Bentley
Date: 08/16/2022
ADM File Number: 2020-08

Comment:
Continuing to violate the property rights of owners and landlords under the guise of protecting tenants will only lead to greater issues. In our city the landlords are the ones fixing and maintaining and providing cost effective housing for tenants. Continuing to work to reduce profitability or increase costs of being a landlord will lead to a decrease in affordable housing through increased rent and decreased rentals. These homes will be sold at the highest possible value or rent greatly increased. No one wins by making the process of eviction more costly through delays and processes increasing the work to evict. The previous processes already favor the tenants greatly and they are well protected by the courts.

08/17/2022 Lorine Montgomery

From: Kings Lane
To: ADMcomment
Subject: comment to MCR proposed changes to 4.201
Date: Wednesday, August 17, 2022 10:02:30 AM

I am a small business owner and can not afford the loss of income from the long drawn out eviction process. There is nothing wrong with the original eviction process. The government has not fairly compensated landlords for the loss of income during the pandemic. Residents were able to stay longer for free and just move out when they felt like it and the landlord loss months of revenue. There needs to be a law that the state will pay the losses the landlords have to settle for.
Please vote to leave the law as is and not to make any changes to it.
Lorine Montgomery

08/17/2022 Ann Fotenakes

Name: Ann Fotenakes
Date: 08/17/2022
ADM File Number: 2020-08

Comment:
I feel this is very unfair to all landlords. We were already hurt through this pandemic and now it will continue. Most landlords are just "Ma & Pa" with an extra home they can't afford so they rent it out. If you truly have an issue with landlords you need to go after the corporations that are nationwide.

08/18/2022 Gina Loera

Name: Gina Loera
Date: 08/18/2022
ADM File Number: 2020-08

Comment:
As a Realtor I know how hard it is for people to find rentals. The pandemic rules for eviction made it so hard on landlords that they sold their rentals and got out of the business altogether. If this legislation continues, we will huge rental shortage (even more than we do now) and many more homeless out on the street because they can't find a rental.

08/19/2022 Nadeem Gebrael

Name: Nadeem Gebrael
Date: 08/19/2022
ADM File Number: 2020-08

Comment:
This is BS. The fact that you are going to allow grown adults to not take responsibility of their own actions in not paying rent and shifting it to hard working landlords. I understand that situations differ for people. However to make this a change across the board for everyone is ridiculous. You are just creating more abuse of the system and people are not going to do anything to help themselves anymore. I am saddened to see this is even an option. Hopefully you will see this is not a smart proposal and keep it how it is. This is going to create a lot of illegal evictions and messes across the board.

08/22/2022 Bill Connell

From: Bill Connell
To: ADMcomment
Subject: changes to landlord/tenant eviction proceedings
Date: Monday, August 22, 2022 7:45:27 AM

To whom it may concern,

Making the proposed changes will unfairly extend the evictions proceedings for all eviction cases which will add expenses to the process. There are people waiting to move into apartments while tenants that should move out are dragging out the procedures even though they have no intent to staying in their apartment.

Many times the reason tenants are not getting help from agencies is because they refuse to turn in the information required to process their request and they do not cooperate with the process. Giving them more time only delays the inevitable and causes the landlord to lose more rent. As landlords have higher costs and lose more rent due to the slower process they are then forced to raise the rent higher to cover these losses.

Thank you,
Bill Connell

08/24/2022 Amber Venema

Name: Amber Venema
Date: 08/24/2022
ADM File Number: 2020-08
Comment:
My husband and I became landlords to spruce up a few of the houses in our small town and be a part of making the town a beautiful place that people want to raise their families in. We provide nice, safe homes at an affordable cost to those who cannot buy or who do not want to buy a home. We should not have to stand by while tenants live in our houses that we worked our butts off to buy and maintain for months or more not paying rent. SO many people took advantage of the eviction memorandum during Covid which made many small landlords have to sell their rentals. I even met a landlord that had to sell her own personal home because her rentals were paying her home mortgage and all of her tenants were not paying. Her bank didn't care that her tenants weren't paying… she was going to lose her home! Not many people can afford to pay multiple mortgages, taxes, insurance, etc.

If the government wants to allow people to live in houses for free, they should start building more government housing and not put that on small time landlords, who are normal people who have worked their hands to the bones to buy one house at a time to help their future. Whether it be buying a house so your college age student can live somewhere "cheap" while the roommates pay the mortgage on that house for you. Or like us, we purchased some duplex's as a package deal so we can put that money away for our children's college.. then hopefully have some "play" money when the time comes for us to retire. We are not going to "get rich" as landlords because we provide our homes at a very affordable rate and we put a LOT of the money back into these houses to keep them looking nice.

We are normal, every day people who are trying to better our lives, and allowing tenants to live in our homes for FREE is absolutely ridiculous. NO ONE should have to allow someone to live in their home for free. Please do not keep these delays in the court system. Allow landlords to evict and evict quickly if needed.

08/25/2022 John P. Lynch

Name: John P. Lynch
Date: 08/25/2022
ADM File Number: 2020-08

Comment:
TO: SCAO

Proposed Changes 2020-17 (amend 2020-08) and MCR 4.201

My law firm specializes in landlord tenant law and greatly concerned with some of the proposed changes and applauded others:

1. I would reiterate the comments from Arron Cox on 08/12/22, with regards to MCR 4.201 (B) (3)(c). Many of the evictions we do are because of failed safety inspection by a local municipality, where the Tenant has cause such damage to the premises as to render it uninhabitable. Forcing a landlord allege that they are in "compliance with applicable state

and local health and safety laws" would asking them to either "lie" signed pleading just to have a trier of fact determine what or who was at fault.

2. MCR 4.201(f)(1) is currently causing issues at the SCAO 2020-08(C), and will cause issue with proposed MCR 4.201 (K)(2)(a). Many Courts are using mediators to conduct this pretrial hearing under the guidance of the SCAO Orders. NONE have taken an answer on the record, however, (f)(1) states "The defendant or the defendant's attorney must appear and answer the complaint by the date on the summons." If the defendants appears at the pretrial, yet does not speak or file and answer, under the proposed court rule and current (f)(1), a plaintiff would be able to default defendant for failure to answer the complaint at the pretrial. Does the pretrial count as the first hearing? Can a mediator take an answer on the record?

3. The proposed MCR 4.201(F)(5)(d) "for at least 7 days", will lead to absurd results. Currently the scheduling for an adjournment after the pretrial is taking closer to 3 to 4 weeks since Courts are unbound in this timeline SCAO 2020-08. Thankfully, most landlords do not file a complaint on the first month a tenant is behind in rent. However, even if they did consider the timeline from a start to finish standpoint:

Month 1, day 1, tenant fails to pay rent and has the standard 5 day grace period in their lease.
Month1 day 5 landlord sends a 7 day demand.
Month 1 day 13, landlord files the complaint.
Month1, day 29, pretrial hearing, assuming pretrial hearings are 2 weeks out.
Month 2, day 15 hearing date, assuming trail hearings are 2 weeks.
Month 2, day 26, request for an Order of eviction can be filed. Assumes 10 day judgment.
Month 3, day 1, Judge signs Order; sent to process server for eviction.

Currently this process takes 3 months with even no contest from the defendants, at best. It does not even include the mail box rule, weekend, or holidays. 3 months of no rent is 25% of the income for the landlord for the year. Now, because of the pretrial hearings landlords cannot even file a request for an escrow order, until month 2 of not being paid rent. If we are continuing with pretrials, there should be some definitive timeline for the plaintiff.

4. For the same reasons stated in 3, above, proposed MCR 4.201(I)(3) will lead to absurd results. There is zero verification other than the defendant stating "I put in an application" with the Court Clerk. Further, most Court Clerks would overburdened to verify every application stated in every proceeding.

5. For the same reasons stated in 3, above, proposed MCR 4.201(K)(1)(a) and (b) will lead to absurd results.

6. The proposed MCR 4.201(K)(2)(a)- 100% of this pretrial is really an advice of rights of the materials already provided and served on the defendant. Plaintiff should be excused from having to attend.

7. Under proposed MCR 4.201(K)(2)(c), the original option for Court to exercise its authority as the trier of fact and make a judgment, without there having to be compromise. This rule strips Judges from the power of determining judgment. I have faith that the trial

courts normally make the right call. I would suggest adding as an option (vi) "At trial, the court must first decide pretrial motions and determine if there is a triable issue. If there is

09/06/2022 Adham Habbas

Name: Adham Habbas
Date: 09/06/2022
ADM File Number: 2020-08

Comment:
I am against these proposed changes. As a small landlord with only a handful of properties I can't afford to let a tenant sit in my house for free while I still pay the mortgage, property tax, insurance, and the upkeep. Currently it's taking about 3-4 months to get the judgement and writ. Ruling on MRC 4.201(K)(2)(c) where the tenant can demand a jury trial would only delay the eviction process. I believe the judges should be able to make a judgement without a Jury, which would take months longer.

Ruling on and MRC 4.201(I)(3) where a tenant can just say "I put in an application" should not be enough. There needs to be language at minimum that shows they've applied and likely to be approved or else this will lead to further delays, which could cause me to foreclose.

I take great care of my properties since they are mine. I put my hard-earned cash purchasing, fixing, and maintaining these properties with the goal they will appreciate in value and generate cash flow. I provide a safe place for people to live in, the only thing I ask for return is for rent to be paid on time; When it's not, as a last resort I'm forced to file for eviction if I can't come to a resolution with tenants. Additionally, regarding MCR 4.201(B)(3)(c) most of the evictions I've been through come when tenants stop responding. How am I supposed to certify the home is in compliance with state and local health and safety laws when I don't have access? Before moving in, I have the tenant's go through a checklist to make sure everything is in good working order. Currently the law makes me certify the property was "fit for the use intended" shouldn't that be enough? Once the tenant moves I shouldn't be responsible for damage they cause.

The government should not be empowering people to live for free. These changes are not sustainable for small landlords. It easily allows tenants with bad intentions to take advantage of good landlords. I've lost a considerable amount during covid, I've worked with the government, and I've been accommodating. Please leave the law as is to provide us a fair market to operate in. We are humans too and this will destroy us.

Order

Michigan Supreme Court
Lansing, Michigan

June 1, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2021-20

Proposed Amendment of Rule 6.001 and Proposed Addition of Rule 6.009 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.001 and an addition of Rule 6.009 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 each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.009, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters in criminal cases cognizable in the district courts.

(C) Juvenile Cases. MCR 6.009 and t~~T~~he rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.

(D)-(E) [Unchanged.]

[NEW] Rule 6.009 Use of Restraints on a Defendant

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the defendant or another person.

(2) The defendant has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the defendant presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a defendant in the courtroom shall allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be restrained using fixed restraints to a wall, floor, or furniture.

Staff comment: The proposed addition of MCR 6.009 would establish a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the proposed amendment of MCR 6.001 would make the new rule applicable to felony, misdemeanor, and automatic waiver cases.

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 submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-20. Your comments and the comments of others will be posted under the chapter affected by this proposal.

CAVANAGH, J. (*concurring*). I concur with this Court's order publishing for comment the proposed addition of MCR 6.009 regarding the use of restraints on adult criminal defendants. As an initial matter, I'm not sure the constitutional floor set by *Deck v Missouri*, 544 US 622, 629 (2005), is as low as Justice ZAHRA claims. *Deck* reviewed American decisions dating back to 1871 and concluded that, while there was disagreement about the degree of discretion that trial judges possess, those cases "settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so." *Deck*, 544 US at 627. Courts sometimes analyze whether violations of *Deck* are harmless by inquiring whether jurors saw a defendant's shackles. See *Brown v Davenport*, 596 US ___; 142 S Ct 1510 (2022). But that speaks to at most one of the three "fundamental legal principles" supporting the prohibition on routine shackling: the presumption of innocence, the right to counsel, and "a judicial process that is a dignified process." *Deck*, 544 US at 630-631. Even if the inquiry into whether the shackles were visible to jurors effectively analyzes the question of prejudice from unconstitutional shackling, we should strive to avoid the error in the first place, rather than knowingly commit the error while rendering it unreviewable. But, regardless of where the constitutional floor lies, we are not prohibited from considering more than the constitutional minimum, and at this point we are only publishing the proposed rule for comment. Because I would not deprive the public of the opportunity to comment on this proposal, I concur in the order publishing for comment.

ZAHRA, J. (*dissenting*). I dissent from this Court's order publishing for comment the proposed addition of MCR 6.009 regarding the use of restraints on adult criminal defendants. I would only publish for comment a rule that conforms to the constitutional requirements set by the Supreme Court of the United States' decision in *Deck v Missouri*, 544 US 622, 629 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.") (emphasis added). See also *People v Arthur*, 495 Mich 861, 862 (2013) (concluding that, under *Deck*, no constitutional violation occurred where "the court sought to shield the defendant's leg restraints from the jury's view" and "the record on remand ma[de] clear that no juror actually saw the defendant in shackles"). Contrary to Justice CAVANAGH's suggestion, the holding of *Deck* only applies when the jury sees and is made aware of the restraints; otherwise, the " 'inherent[] prejudic[e]' " the Court described in *Deck* would not exist. *Deck*, 544 US at 635 (citation omitted); see also *id*. at 633 ("The appearance of the offender . . . in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community[.]"); *id*. at 635 ("[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation."). Indeed, the published rule would extend *Deck* even to bench trials held before the very judge who would have earlier made the decision on

whether to shackle the defendant. Because this Court's order, as written, goes well beyond the constitutional floor set by *Deck*, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

Public Policy Position
ADM File No. 2021-20: Proposed Amendment of MCR 6.001 and Proposed Addition of MCR 6.009

Support with Recommended Amendments

Explanation
The Committee voted to support the amendment of Rule 6.001 and the addition of Rule 6.009 with additional recommended amendments detailed below.

The Committee supported significant amendments to the proposal, as published, because the proposal—while providing a general presumption against the use of restraints on defendants—did not fully protect the rights of defendants from the significant harms associated with restraint use. The Committee recommends that the rule be revised to strengthen the presumption against the use of restraints by adding language that supports the following principles:

- the use of restraints on defendants in court must be limited to a narrowly circumscribed set of reasons;
- the use of restraints on defendants must be subject to a strong evidentiary standard;
- the explicit consideration of less restrictive means is necessary to protect individuals from the risk of significant physical and psychological harm resulting from the use of restraints; and
- the court should weigh specific, enumerated factors when it determines the risk an offender poses.

The Committee's recommended amendments to the proposed rule are set forth below:

> **[NEW] Rule 6.009 Use of Restraints on a Defendant**
>
> *(amendments are in bold, underlined, and strike-through)*
>
> (A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, ~~may~~ **shall** not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds **by clear and convincing evidence that** ~~that the use of restraints is necessary due to one of the following factors~~:
>
> **(1) The use of restraints is necessary for the following reasons:**
>
> **(i)**~~(1) Instruments of restraint are necessary to prevent~~ **The prevention of** physical harm to the defendant or another person**;**
>
> **(ii)**~~(2)~~ The defendant's ~~has a~~ **recent** history of disruptive courtroom behavior ~~that~~ has **either** placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others ~~as evidenced by recent behavior.~~**; or**

(iii)~~(3) There is a founded belief that the~~**The defendant's recent behavior** presents a substantial risk of flight from the courtroom~~.~~**; and**

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the defendant or another person, including, but not limited to, participation by video or other electronic means, the presence of court personnel, law enforcement officers, or bailiffs, or the use of a support person or support animal. In determining alternatives to restraints, the court shall consider the defendant's present mental health.

(3) When making a determination under subsection (1), the court shall consider the following factors:

(i) Any past escapes or attempted escapes by the defendant;

(ii) Evidence of a present plan of escape by the defendant;

(iii) Any believable threats by the defendant to harm others during court;

(iv) Any believable threats by the defendant to harm himself or herself during court;

(v) Evidence of any self-injurious behavior on the part of the defendant;

(vi) The possibility of rescue attempts by other offenders still at large.

(B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall **make written** ~~state on the record or in writing its~~ findings of fact in support of the order.

(C) Any restraints used on a defendant in the courtroom shall allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be restrained using fixed restraints to a wall, floor, or furniture.

(D) If the only risk found by the court is that listed in (A)(1)(iii), the court shall only authorize the use of leg restraints.

Position Vote:
Voted For position: 20
Voted against position: 1
Abstained from vote: 0
Did not vote (absent): 6

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

Public Policy Position
ADM File No. 2021-20: Proposed Amendment of MCR 6.001 and Proposed Addition of MCR 6.009

Oppose as Drafted, But Support a Rule Limited to *Deck*

Explanation:
The Committee voted to oppose ADM File No. 2021-20 as drafted. The Committee would support, as an alternative, a rule regarding the use of restraints on criminal defendants in court proceedings that is limited to the constitutional requirements set forth by the U.S. Supreme Court in *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005).

Position Vote:
Voted For position: 13
Voted against position: 3
Abstained from vote: 1
Did not vote (absent): 7

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

Name: Charles T. LaSata

The proposed new rule 6.009 is a threat to the safety of the public, court staff and judges. On July 11, 2016 my court recorder, court clerk and I survived the worst courthouse shooting in the history of Michigan. My bailiff and a responding court officer were both murdered by a defendant who was not adequately restrained. Several other people were seriously injured and not a week goes by that I do not think about some aspect of that tragic day. Safety conditions are worsening in our Courts and this proposed rule would be a disastrous step in the wrong direction. Justice Zahra is correct in his dissent. Please do not adopt this proposed rule.

Order

Michigan Supreme Court
Lansing, Michigan

June 15, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2021-29

Proposed Amendment of
Rule 6.201 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 6.201 Discovery

(A) [Unchanged.]

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) [Unchanged.]

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation or contains the address, telephone or cell phone number, or any personal identifying information protected by MCR 1.109(9)(a), which may be redacted;

(3)-(5) [Unchanged.]

(C)-(K) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.201 would require redaction of certain information contained in a police report or interrogation record before providing it to the defendant.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-29. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

June 15, 2022

Clerk

Public Policy Position
ADM File No. 2021-29: Proposed Amendment of MCR 6.201

Support with Recommended Amendment

Explanation

The Committee voted to support the proposed amendment of Rule 6.201 with the additional amendments recommended by the Criminal Jurisprudence & Practice Committee striking "the address, telephone or cell phone number, or" from the proposed language and correcting the citation of MCR 1.109.

The Access to Justice Policy Committee agrees with the Criminal Jurisprudence & Practice Committee that this alternative:

> would limit the required redaction to the following personal identifying information: date of birth, social security number or national identification number, driver's license number or state-issued personal identification number, passport number, and financial account numbers. The proposed amendment should also be corrected read "MCR 1.109(D)(9)(a)." The Committee believes that this approach strikes a more appropriate balance between the need to protect personal identifying information and a defendant's need to be able to contact witnesses, etc. to prepare their case.

Position Vote:

Voted For position: 17
Voted against position: 1
Abstained from vote: 3
Did not vote (absent): 6

Contact Persons:

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

Public Policy Position
ADM File No. 2021-29: Proposed Amendment of MCR 6.201

Support with Amendment

Explanation:
The Committee voted to support ADM File No. 2021-29 with an additional amendment striking "the address, telephone or cell phone number, or" from the proposed language. The Committee's alternative would limit the required redaction to the following personal identifying information: date of birth, social security number or national identification number, driver's license number or state-issued personal identification number, passport number, and financial account numbers. The proposed amendment should also be corrected read "MCR 1.109(D)(9)(a)." The Committee believes that this approach strikes a more appropriate balance between the need to protect personal identifying information and a defendant's need to be able to contact witnesses, etc. to prepare their case.

Position Vote:
Voted For position: 11
Voted against position: 6
Abstained from vote: 1
Did not vote (absent): 6

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

Name: Amy L. Husted

I am an assistant public defender in Shiawassee County, Michigan. Prior to People v Jack, 366 Mich App 316, 970 NW 2d 433 (2021), our office had great difficulty getting the contact information for witnesses from the prosecutor. We often had to make two or three request for the witness contact information, and would only get the information a few weeks before trial. I would urge the court to deny this amendment and keep the spirit of People v Jacks alive. As an alternative, a requirement that the defense attorney redact the discovery before releasing it to his or her client or a third party. This would protect the privacy of the witnesses while making it easy for the defense attorney to contact the witnesses for investigation and trial preparation. Thank you for your time.

Order

Michigan Supreme Court
Lansing, Michigan

June 15, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2021-48

Proposed Amendment of
Rule 6.502 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.502 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 6.502 Motion for Relief from Judgment

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) [Unchanged.]

(2) A defendant may file a second or subsequent motion based on any of the following:

(a) ~~based on~~ a retroactive change in law that occurred after the first motion for relief from judgment was filed,

(b) ~~or~~ a claim of new evidence that was not discovered before the first such motion was filed, or~~.~~

(c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment was based.

The clerk shall refer a successive motion to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime. For motions filed under both (G)(1) and (G)(2), the court shall enter an appropriate order disposing of the motion.

(3) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.502 would allow a third exception to the "one and only one motion" rule based on a final court order vacating one or more of a defendant's convictions either described in the judgment or upon which the judgment was based.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-48. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

June 15, 2022

Clerk

Public Policy Position
ADM File No. 2021-48: Proposed Amendment of MCR 6.502

Support

Explanation

The Committee voted to support the proposed amendment to Rule 6.502 to allow a third exception to the "one and only one motion" rule based on a final court order vacating one or more of a defendant's convictions either described in the judgment or upon which the judgment was based.

The proposed amendment appears to provide the opportunity for a defendant to file a second motion for relief from judgment based on having obtained a final order that vacates the defendant's conviction(s) in a case where previous convictions that have been considered in the present case have now been vacated pursuant to a final court order that vacates one or more of the defendant's convictions.

There are potential concerns regarding the actual decision-making process as it relates to the protection of victims, especially the payment of restitution, an issue largely ignored in the criminal justice reform process, and the impact of cases involving habitual offenders. However, with the proposed amendment to the Court Rule appearing to apply only to the presiding judge reviewing a second motion for relief from judgment, the Committee does not think the concerns relating to the actual decision-making process of the presiding judge is included.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 4
Did not vote (absent): 6

Contact Persons:

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

Public Policy Position
ADM File No. 2021-48: Proposed Amendment of MCR 6.502

Support with Additional Amendment

Explanation:
The Committee voted unanimously to support ADM File No. 2021-48 with an additional amendment specifying that proposed MCR 6.502(G)(2)(c) applies to a final FEDERAL court order.

Position Vote:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

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

Order

Michigan Supreme Court
Lansing, Michigan

June 22, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2021-35

Proposed Amendment of
Rule 7.202 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.202 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 7.202 Definitions

For purposes of this subchapter:

(1)-(6) [Unchanged.]

(7) "governmental immunity" includes immunity of the state, a tribal government, or a political subdivision from suit or liability.

Staff Comment: The proposed amendment of MCR 7.202 would provide a definition of governmental immunity to include the state's, a tribal government's, or a political subdivision's immunity from suit or liability.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-35. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

June 22, 2022

Clerk

Public Policy Position
ADM File No. 2021-35: Proposed Amendment of MCR 7.202

Oppose

Explanation
The Committee voted unanimously to oppose the amendment of MCR 7.202 proposed in ADM File No. 2021-35. The Committee believes that the proposal is unnecessary, confusing, and ripe for abuse.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 15

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

Public Policy Position
ADM File No. 2021-35 – Proposed Amendment of MCR 7.202

Oppose

Explanation
The Appellate Practice Section opposes the proposed rule change presented by ADM File No. 2021-35 because it provides an incomplete recitation of the entities and persons that can claim governmental immunity (including judges under MCL 691.1407(5)), and it is inconsistent with the recitation of entities and persons to which governmental immunity applies as stated in MCR 7.202(6)(a)(v) and in MCL 691.1407.

Position Vote:
Voted for position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

Contact Person: Stephanie Morita
Email: smorita@rsjalaw.com

Comments Submitted to the Michigan Supreme Court on ADM File No. 2021-35 – Proposed Amendment of MCR 7.202

07/28/2022 Ilsa Minor

Name: Ilsa Minor
Date: 07/28/2022
ADM File Number: 2021-35
Comment:
Modifying governmental immunity from suit or liability to include state, tribal governments and political subdivisions opens the doors to corruption and the willful neglect of individual's rights when municipalities and other governmental units behave badly.

While there are arguments that the political process exists to remove bad actors, not all bad actors are elected or appointed officials. Moreover, by the time a tort occurs, eliminating an official through any process may not be sufficient to right the wrong or even mitigate its damage. Since individuals acting as officials are already protected under most circumstances, extending that protection to the governmental unit itself is eliminating the only remaining avenue a private citizen may have.

Even in cases where individuals may want to seek damages (or other corrective action) from a governmental unit, the American Rule typically makes pursuing justice through the courts cost prohibitive, as municipalities are both heavily insured and well-funded through tax dollars. It is not a decision taken lightly by citizens or their counsel.

Frankly, this rule is nothing but picking on the little guy, and I implore the Court to reconsider.

Respectfully,
Ilsa Minor

09/02/2022 Valerie Brader

From: Valerie Brader
To: ADMcomment
Subject: ADM File No. 2021-35
Date: Friday, September 2, 2022 5:11:43 PM
As someone who practices in the area of governmental law, I think this clarification would be helpful and support it.

This is a personal statement and not a statement on behalf of any client.
—Valerie Brader
--
Valerie Brader
Rivenoak Law Group
valerie@rivenoaklaw.com
Cell: 734-478-0165

Order

Michigan Supreme Court
Lansing, Michigan

June 15, 2022

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2021-39

Proposed Amendment of
Rule 7.215 of the Michigan
Court Rules

_____

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.215 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 7.215 Opinions, Orders, Judgments, and Final Process for Court of Appeals

(A)-(E) [Unchanged.]

(F) Execution and Enforcement.

(1)-(2) [Unchanged.]

(3) Reissuance of Judgment or Order. Any party may request that an opinion or order be reissued with a new entry date by filing a letter with the Court of Appeals setting forth facts showing that the clerk or attorney failed to send the judgment or order as provided in subrule (E)(2). The Court of Appeals will not reissue the opinion or order unless persuaded that it was not promptly sent as required and that the failure resulted in the party being precluded from timely filing a motion for reconsideration or an application for leave to appeal with the Supreme Court. Such request will be submitted to the Chief Judge for administrative decision, and the decision will be communicated by letter from the clerk.

(G)-(J) [Unchanged.]

Staff Comment: The proposed amendment of MCR 7.215 would codify the Court of Appeals' practice for reissuing opinions and orders.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-39. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

June 15, 2022

Clerk

Public Policy Position
ADM File No. 2021-39: Proposed Amendment of MCR 7.215

Support

Explanation

The Committee voted unanimously to support the amendment of MCR 7.215 proposed in ADM File No. 2021-39. The Committee believes that the codification of the reissuing process will promote clarity and make this process more accessible, especially for those attorneys who practice less frequently before the Court of Appeals.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 15

Contact Person:

Lori J. Frank lori@markofflaw.com

Name: Gregg Knight

Date: 08/28/2022

ADM File Number: 2021-39

Comment:
Although you will refuse because of corruption I would like the ("correct decision") in court of appeals 346554 reissued. Every word of that decision is wrong and I have 23 cases ranging from the court of appeals to the United States Supreme Court proving that. If the court of appeals had followed court ruled 7.215 and not made a personal and political opinion I would have prevailed even though I should have never been taken to the court of appeals because the prosecutor never had standing under MCL 49.153 and he already knew that from a previous case he himself prosecuted. Pages 6-9 are also incorrect. In Michigan probation and parole are the same thing (community supervision) but the prosecutor and the panel already knew that. I ("successfully") completed parole. Probation never existed/revoke/MCL 771.4. Successfully completed probation ("OR") parole/MCL 28.424. People vs Sessions Michigan Supreme Court 2006. Prosecutor Jerrold Schrotenboer and judge Jonathan Tukel were friends. Both were U.S. Attorney's for the Eastern District of Michigan in the past. A little ex parte communication and the prosecutor gets his way. Poor people like me cannot afford to appeal to the Supreme Court but I shouldn't have had to. Both state and federal case law prove the prosecutor never had standing to even attend my civil petition hearing in Jackson county circuit court. Corruption always prevails.

Name: Scott Bassett

Date: 09/08/2022

ADM File Number: 2021-39

Comment:
There should be a companion rule proposal for the trial courts where this problem is more likely to occur.

MCR 7.204(A)(3) addresses this issue, but not as elegantly as simply reissuing the order or judgment with a new date. Doing that would preserve the full 21-day appeal period instead of the 14 days provided for in MCR 7.204(A)(3).

The additional 7 days is more necessary in the trial court than in the Court of Appeals. When this happens in the Court of Appeals, the aggrieved party already has appellate counsel. When this happens in the trial court, few trial attorneys also do appeals, so the aggrieved party must find and retain appellate counsel within a short 14-day period instead of the usual 21 days. That can be a significant burden, particularly for individuals with family law and similar cases.

Also, it isn't clear the remedy in MCR 7.204 does anything to preserve the time to file a reconsideration or new trial motion in the trial court. Reissuance of the order or judgment with a new date as is proposed for the Court of Appeals rule would restore those rights if a trial court order or judgment is not timely served. However, in the case of a divorce judgment and perhaps some other types of orders, a nunc pro tunc provision is needed if a divorce judgment is reissued with a new date because it was not timely served and a party remarries shortly after the original judgment date but before the reissue date.

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: September 12, 2022

Re: HB 6344 and HB 6345 – Indigent Juvenile Defense and Appellate Defense Services

---

Background

In June 2021, Governor Whitmer issued Executive Order 2021-6, which created the Task Force on Juvenile Justice Reform ("Task Force"). The purpose of the Task Force was to "lead a data-driven analysis of (Michigan's) juvenile justice system and recommend proven practices and strategies for reform grounded in data, research, and fundamental constitutional principles." In July 2022, the Task Force released its Report and Recommendations. The Task Force recommended that the charge of the Michigan Indigent Defense Commission ("MIDC") be expanded to include "development, oversight, and compliance with youth defense standards in local county defense systems." Specifically, the Task Force unanimously recommended that:

a. MIDC shall align current and/or develop new standards with specific considerations for the representation of youth in the juvenile justice system, including requirements for specialized training for juvenile defenders on trauma, youth development, and cultural considerations, scope of representation and role of counsel, and other key standards.
b. Commissioners knowledgeable about indigent youth defense shall be included on the MIDC.
c. Standards should address the scope of representation including appointment at the first stage of consent/formal proceedings, and at every stage until the case is terminated. Youth shall have counsel at the first stage of juvenile proceedings.
d. Restrictions on the waiver of counsel in delinquency cases should be built into the statute/ and or court rule and include consultation with an attorney prior to waiving the right.
e. Expand the State Appellate Defender Office to include appellate services for juveniles, which will include post-dispositional services.
f. Training on juvenile justice is critical for prosecutors. It is encouraged that a juvenile justice resource attorney position be created and funded at the Prosecuting Attorneys Coordinating Council.

House Bills 6344 and 6345, introduced by State Representative Sarah Lightner, aim to provide statutory authorization for the implementation of these Task Force recommendations by amending

the Appellate Defender Act, 1978 PA 620, and the Michigan Indigent Defense Commission Act, 2013 PA 93, respectively.

Generally speaking, HB 6344 would authorize the State Appellate Defender Office ("SADO") to appeal an order of disposition in a juvenile delinquency case. The bill would restructure the Appellate Defender Act to differentiate between adult and juvenile appeals and add new provisions regarding juveniles that mirror those currently in law for adult criminal defendants. Similarly, HB 6345 would amend the Michigan Indigent Defense Commission Act to add juvenile delinquencies to the mandate of MIDC, while restructuring the act to law to differentiate between indigent criminal defense services and indigent juvenile defense services.

It is understood that both of these bills, as introduced, are intended as placeholders with substitutes expected to be introduced if and when the legislation is taken up in the House Judiciary Committee. One need look no further than the fact that the definition of local share in Sec. 3(k) of HB 6445 (p 4) is left entirely blank. Having said that, with the Legislature presently on a reduced session schedule over the summer months and due to the approaching general election, committee meetings are few and far between. There are, however, substantial discussions on this legislation occurring between the sponsor, SADO, MIDC, and other stakeholders, which will help inform the final substitute bills.

Finally, it should be noted that the SBM has historically been a strong supporter of Michigan's indigent defense system—including significant contributions to the establishment of the Michigan Indigent Defense Commission and advocacy for full funding of the Commission's budget recommendations over the years. The Board of Commissioners voted earlier this year to support in principle another piece of legislation introduced by Rep. Lightner (2021 HB 4620), which would have created a Michigan Indigent Juvenile Defense Department.

Keller Considerations

SBM has a long, consistent history of supporting improvements to, and investments in, Michigan's indigent defense system. As noted above, this includes supporting the establishment of the Michigan Indigent Defense Commission in 2013 and in every executive budget recommendation proposing funding for the Commission since that time. In each such case, the Board has determined that legislation related to the provision of indigent defense services is necessarily related to both the availability of legal services to society and the improvement in the functioning of the courts. The expansion of indigent defense and indigent appellate defense services to juveniles would ensure that these individuals have access to competent legal representation and, in doing so, reducing the inefficiencies and other burdens placed on the court system by unrepresented individuals, especially youth, attempting to navigate legal processes.

***Keller* Quick Guide**

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

Staff Recommendation

HB 6344 and HB 6345 would expand access to indigent defense and indigent appellate defense services to juveniles. As such, these bills are necessarily related to both the availability of legal services to society and the improvement in functioning of the courts. They are therefore *Keller*-permissible and may be considered on their merits.

HOUSE BILL NO. 6344

July 20, 2022, Introduced by Rep. Lightner and referred to the Committee on Judiciary.

A bill to amend 1978 PA 620, entitled

"Appellate defender act,"

by amending the title and sections 2, 4, 6, and 7 (MCL 780.712, 780.714, 780.716, and 780.717) and by adding section 1a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

TITLE

An act relating to ~~criminal procedure;~~ **indigent appellate defense**; to provide for the defense of ~~persons accused or convicted of criminal offenses;~~ **certain indigent individuals**; to create the appellate defender commission; to provide for an appellate

defender; to prescribe powers and duties; to provide facilities, personnel, and related assistance and services for the appellate defender and the commission; and to provide for the financing of the administration of this act.

Sec. 1a. As used in this act:

(a) "Adult" means an individual who is eligible to appeal a criminal conviction or exercise any other post-conviction remedy.

(b) "Juvenile" means an individual who is the subject of an order of disposition.

(c) "Order of disposition" means an order of disposition made under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

Sec. 2. (1) An appellate defender commission is created within the office of the state court administrator. The appellate defender commission consists of 7 members appointed by the governor for terms of 4 years. Of the 7 members, 2 members shall be recommended by the supreme court of this state, 1 member shall be recommended by the court of appeals of this state, 1 member shall be recommended by the Michigan judges association, 2 members shall be recommended by the state bar of Michigan, and 1 member, who shall not be an attorney, shall be selected from the general public by the governor. A member of the commission shall not be, at the time of appointment, a sitting judge, a prosecuting attorney, or a law enforcement officer.

(2) Initially 4 members of the commission shall be appointed for terms of 4 years and 1 member each for terms of 1, 2, and 3 years respectively.

(3) Members of the commission shall not receive a salary in that capacity but shall be reimbursed for their reasonable actual

and necessary expenses by the state treasurer upon the warrant of the state treasurer.

(4) The commission shall be responsible for the development of ~~a~~ **both of the following:**

(a) A system of ~~indigent~~ appellate defense services ~~which shall~~ **for indigent adults.**

(b) A system of appellate defense services for indigent juveniles.

(5) Both of the systems described in subsection (4) must include services provided by ~~the~~ **both of the following:**

(a) The office of the state appellate defender ~~, provided for under~~ **created in** section 3. ~~, and locally~~

(b) Locally appointed private counsel.

(6) ~~(5)~~ The commission shall be responsible for the development of minimum standards to which all indigent ~~criminal defense~~ appellate **defense** services ~~shall~~ **for adults and juveniles must** conform. ~~Within 180 days after appointment of the commission and whenever~~ **Whenever** the commission deems it advisable, ~~after that period,~~ the commission shall submit proposed standards to the supreme court. Upon approval of the proposed standards by the supreme court, the commission shall adopt the standards.

(7) ~~(6)~~ The commission shall compile and keep current ~~a~~ **both of the following:**

(a) A statewide roster of attorneys eligible for, and willing to accept appointment by, an appropriate court to serve as ~~criminal~~ appellate defense counsel for ~~indigents.~~ **indigent adults.**

(b) A statewide roster of attorneys eligible for, and willing to accept appointment by, an appropriate court to serve as appellate defense counsel for indigent juveniles.

(8) The appointment of ~~criminal~~ appellate defense services for ~~indigents shall~~ **indigent adults and juveniles must** be made by the trial court from the **applicable** roster ~~provided by the commission or shall be~~ **described in subsection (7), or** referred to the office of the state appellate defender.

(9) ~~(7)~~ The commission shall provide a continuing legal education training program for its staff and the private attorneys who appear on the ~~roster for purposes of appointment for indigent criminal defense appellate service.~~**rosters described in subsection (7).**

Sec. 4. (1) ~~The~~ **An individual shall not serve as an** appellate defender, deputy appellate defender, ~~and each~~ **or** assistant appellate defender ~~shall:~~

~~(a) Be~~ **unless the individual is** an attorney licensed to practice law in this state.

(2) ~~(b)~~ **The appellate defender, the deputy appellate defender, and each assistant appellate defender shall do all of the following:**

(a) Take and subscribe to the oath required by the constitution before taking office.

(b) ~~(c)~~ Perform duties as may be provided by law.

(c) ~~(d)~~ Represent the **following individuals:**

(*i*) An indigent ~~defendant~~ **adult** only subsequent to a conviction or entry of a guilty plea or plea of nolo contendere at the trial court level.

(*ii*) An indigent juvenile only subsequent to an order of disposition.

(3) ~~(c) Not~~ **The appellate defender and the deputy appellate defender shall not** engage in the practice of law or as an attorney

or counselor in a court of this state except in the exercise of ~~his~~ **the** duties ~~under this~~ **prescribed by this** act.

(4) ~~(2)~~ For purposes of this act, the appellate defender, the deputy appellate defender, ~~the~~ **each** assistant appellate defender, and support personnel ~~shall be~~ **are** considered ~~as~~ court employees and **are** not ~~as~~ classified civil service employees.

Sec. 6. The appellate defender shall **do all of the following**:

(a) Conduct an appeal of a felony conviction or conduct other ~~post conviction~~ **post-conviction** remedies on behalf of ~~a person~~ **an indigent adult** for whom the appellate defender is assigned as attorney by a court of a record.

(b) Conduct an appeal of an order of disposition on behalf of an indigent juvenile for whom the appellate defender is assigned as attorney by a court of record.

(c) ~~(b)~~ Provide investigatory and other services necessary for a complete appellate review or appropriate ~~post conviction~~ **post-conviction** remedy.

(d) ~~(c)~~ Accept only that number of assignments and maintain a caseload which will ~~insure~~ **ensure** quality ~~criminal defense~~ appellate **defense** services **for indigent adults and juveniles** consistent with the funds appropriated by the state. However, the number of cases assigned to the appellate defender office ~~shall~~ **must** not be less than 25% of the total ~~criminal defense~~ appellate **defense** cases for ~~indigents~~ **indigent adults and juveniles** pending before the appellate courts of this state.

(e) ~~(d)~~ Maintain a repository of briefs prepared by the appellate defender and make those briefs available to private attorneys providing ~~criminal defense~~ appellate **defense** services for ~~indigents.~~**indigent adults and juveniles.**

(f) ~~(e)~~ Perform other duties required by law as directed by the commission.

Sec. 7. **(1)** The appellate defender may appoint special assistant appellate defenders to ~~represent~~ **do any of the following:**

(a) Represent indigent ~~persons~~ **adults** or ~~to~~ **otherwise** assist in the representation of ~~an~~ indigent ~~person~~ **adults** at any stage of appellate or ~~post conviction~~ **post-conviction** proceedings, upon rules adopted by the commission. ~~Special~~

(b) Represent indigent juveniles or otherwise assist in the representation of indigent juveniles at any stage of appellate proceedings, upon rules adopted by the commission.

(2) The special assistant appellate defenders shall be paid on a contract basis approved by the commission within funds available to the commission. ~~and shall not be subject to the restrictions on the practice of law contained in section 4.~~

HOUSE BILL NO. 6345

July 20, 2022, Introduced by Rep. Lightner and referred to the Committee on Judiciary.

A bill to amend 2013 PA 93, entitled

"Michigan indigent defense commission act,"

by amending the title and sections 3, 5, 7, 9, 11, 13, 15, 17, 21, and 23 (MCL 780.983, 780.985, 780.987, 780.989, 780.991, 780.993, 780.995, 780.997, 780.1001, and 780.1003), section 3 as amended by 2019 PA 108, sections 5, 9, 11, 13, 15, and 17 as amended by 2018 PA 214, and section 7 as amended by 2018 PA 443.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

TITLE

An act to create the Michigan indigent defense commission and

to provide for its powers and duties; to provide **certain** indigent ~~defendants in criminal cases~~ **individuals** with effective assistance of counsel; to provide standards for the appointment of legal counsel; to provide for and limit certain causes of action; and to provide for certain appropriations and grants.

Sec. 3. As used in this act:

(a) "Adult" means either of the following:

(*i*) An individual 18 years of age or older.

(*ii*) An individual less than 18 years of age at the time of the commission of a felony if any of the following conditions apply:

(A) During consideration of a petition filed under section 4 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.4, to waive jurisdiction to try the individual as an adult and upon granting a waiver of jurisdiction.

(B) The prosecuting attorney designates the case under section 2d(1) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2d, as a case in which the juvenile is to be tried in the same manner as an adult.

(C) During consideration of a request by the prosecuting attorney under section 2d(2) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2d, that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult.

(D) The prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under section 1f of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.1f.

(b) "Consumer Price Index" means the annual United States Consumer Price Index for all urban consumers as defined and

reported by the United States Department of Labor, Bureau of Labor Statistics.

(c) "Department" means the department of licensing and regulatory affairs.

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

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

(f) "Indigent criminal defense services" means local legal defense services provided to ~~a defendant~~ **an adult** and to which both of the following conditions apply:

(*i*) The ~~defendant~~ **adult** is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the ~~defendant's~~ **adult's** initial appearance in court to answer to the ~~criminal~~ charge.

(*ii*) The ~~defendant~~ **adult** is determined to be indigent under section ~~11(3).~~**11.**

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

(g) "Indigent defense services" means indigent criminal defense services or indigent juvenile defense services, or both. Indigent defense services do not include services authorized to be provided under the appellate defender act, 1978 PA 620, MCL 780.711 to 780.719.

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

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

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

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

(*i*) The juvenile is the subject of delinquency proceedings.

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

(j) "Juvenile" means, except as otherwise provided in subdivision (a), an individual who is less than 18 years of age who is the subject of a delinquency petition.

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

(*l*) ~~(j)~~ "MIDC" or "commission" means the Michigan indigent defense commission ~~created~~ **established** under section 5.

(m) ~~(k)~~ "Partially indigent" means ~~a criminal defendant~~ **an adult or juvenile** who is unable to afford the complete cost of legal representation, but is able to contribute a monetary amount

toward ~~his or her~~ **legal** representation.

Sec. 5. (1) The Michigan indigent defense commission is established within the department.

(2) The MIDC is an autonomous entity within the department. Except as otherwise provided by law, the MIDC shall exercise its statutory powers, duties, functions, and responsibilities independently of the department. The department shall provide support and coordinated services as requested by the MIDC including providing personnel, budgeting, procurement, and other administrative support to the MIDC sufficient to carry out its duties, powers, and responsibilities.

(3) The MIDC shall propose minimum standards for the local delivery of indigent ~~criminal~~ defense services providing effective assistance of counsel to adults **and juveniles** throughout this state. ~~These~~

(4) The minimum standards **described in subsection (3)** must be designed to ensure the provision of indigent ~~criminal~~ defense services that meet constitutional requirements for effective assistance of counsel. However, these minimum standards must not infringe on the supreme court's authority over practice and procedure in the courts of this state as set forth in section 5 of article VI of the state constitution of 1963.

(5) ~~(4)~~ The commission shall convene a public hearing before a proposed **minimum** standard is recommended to the department.

(6) A **proposed** minimum standard ~~proposed under this subsection~~ must be submitted to the department for approval or rejection. ~~Opposition~~

(7) Any opposition to a proposed minimum standard may be submitted to the department in a manner prescribed by the

department.

(8) An indigent ~~criminal~~ defense system that objects to a recommended minimum standard on the ground that the recommended minimum standard would exceed the MIDC's statutory authority shall state specifically how the recommended minimum standard would exceed the MIDC's statutory authority.

(9) A proposed minimum standard is final when it is approved by the department.

(10) A **proposed** minimum standard that is approved by the department is not subject to challenge through the appellate procedures in section 15.

(11) An approved minimum standard for the local delivery of indigent ~~criminal~~ defense services ~~within an indigent criminal defense system~~ is not a rule as that term is defined in section 7 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.207.

(12) ~~(5) Approval~~ **An approval** of a minimum standard proposed by the MIDC is considered a final department action subject to judicial review under section 28 of article VI of the state constitution of 1963 to determine whether the approved minimum standard is authorized by law. ~~Jurisdiction~~

(13) The jurisdiction and venue for **the** judicial review **of an approved minimum standard** are vested in the court of claims.

(14) An indigent ~~criminal~~ defense system may file a petition for **the** review **of an approved minimum standard** in the court of claims within 60 days after the date of mailing notice of the department's final decision on the ~~recommended~~ **proposed** minimum standard.

(15) The filing of a petition for review **under subsection (14)**

does not stay enforcement of an approved minimum standard, but the department may grant, or the court of claims may order, a stay upon appropriate terms.

(16) ~~(6)~~ The MIDC shall identify and encourage best practices for delivering the effective assistance of counsel to indigent ~~defendants charged with crimes.~~**adults and juveniles.**

(17) ~~(7)~~ The MIDC shall identify and implement a system of performance metrics to assess the provision of indigent defense services in this state relative to national standards and benchmarks.

(18) The MIDC shall provide an annual report to the governor, **the** legislature, **the** supreme court, and the state budget director on the performance metrics not later than December 15 of each year.

Sec. 7. (1) The MIDC includes 18 voting members and the ex officio member described in subsection ~~(2).~~**(4).**

(2) ~~The~~ **Except as provided in subsections (10) and (11), the** 18 voting members shall be appointed by the governor for terms of 4 years. ~~, except as provided in subsection (4).~~

(3) Subject to subsection ~~(3),~~ **(5) to (9),** the governor shall appoint members under ~~this~~ subsection **(2)** as follows:

(a) Two members submitted by the speaker of the house of representatives.

(b) Two members submitted by the senate majority leader.

(c) One member from a list of 3 names submitted by the supreme court chief justice.

(d) Three members from a list of 9 names submitted by the Criminal Defense Attorneys of Michigan.

(e) One member from a list of 3 names submitted by the Michigan Judges Association.

(f) One member from a list of 3 names submitted by the Michigan District Judges Association.

(g) One member from a list of 3 names submitted by the State Bar of Michigan.

(h) One member from a list of names submitted by bar associations whose primary mission or purpose is to advocate for minority interests. Each bar association described in this subdivision may submit 1 name.

(i) One member from a list of 3 names submitted by the Prosecuting Attorneys Association of Michigan who is a former county prosecuting attorney or former assistant county prosecuting attorney.

(j) One member selected to represent the general public.

(k) Two members representing the funding unit of a circuit court from a list of 6 names submitted by the Michigan Association of Counties.

(*l*) One member representing the funding unit of a district court from a list of 3 names submitted by the Michigan Townships Association or the Michigan Municipal League. The Michigan Townships Association and the Michigan Municipal League shall alternate in submitting a list as described under this subdivision. For the first appointment after ~~the effective date of the amendatory act that amended this subdivision,~~ **March 21, 2019,** the Michigan Municipal League shall submit a list as described under this subdivision for consideration for the appointment. For the second appointment after ~~the effective date of the amendatory act that amended this subdivision,~~ **March 21, 2019,** the Michigan Townships Association shall submit a list as described under this subdivision for consideration for the appointment. **The Michigan**

Townships Association and the Michigan Municipal League shall alternate in submitting a list for subsequent appointments.

(m) One member from a list of 3 names submitted by the state budget office.

(4) ~~(2)~~ The supreme court chief justice or ~~his or her~~ **the** designee **of the chief justice** shall serve as an ex officio member of the MIDC without vote.

(5) ~~(3) Individuals~~ **Every individual** nominated for service on the MIDC as provided in subsection ~~(1)~~ **(3)** must ~~have~~ **satisfy at least 1 of the following:**

(a) Have significant experience in the defense or prosecution of criminal proceedings. ~~or have~~

(b) Have significant experience in the defense or prosecution of juveniles in delinquency proceedings.

(c) Have demonstrated a strong commitment to providing effective representation in indigent ~~criminal~~ defense services.

(6) Of the members appointed under this section, the governor shall appoint no fewer than 2 individuals who are not licensed attorneys.

(7) Any individual who receives compensation from this state or an indigent ~~criminal~~ defense system for providing prosecution of or representation to indigent adults **or juveniles** in state courts is ineligible to serve as a member of the MIDC.

(8) Not more than 3 judges, whether they are former judges or sitting judges, shall serve on the MIDC at the same time.

(9) The governor may reject the names submitted under subsection ~~(1)~~ **(3)** and request additional names.

(10) ~~(4)~~ **An** MIDC ~~members~~ **member** shall hold office until ~~their successors are~~ **a successor is** appointed.

(11) The terms of the members must be staggered. Initially, 4 members must be appointed for a term of 4 years each, 4 members must be appointed for a term of 3 years each, 4 members must be appointed for a term of 2 years each, and 3 members must be appointed for a term of 1 year each.

(12) ~~(5)~~ The governor shall fill a vacancy occurring in the membership of the MIDC in the same manner as the original appointment, except if the vacancy is for an appointment described in subsection ~~(1)(d),~~ **(3)(d)**, the source of the nomination shall submit a list of 3 names for each vacancy. However, if the senate majority leader or the speaker of the house of representatives is the source of the nomination, 1 name must be submitted. If an MIDC member vacates the commission before the end of the member's term, the governor shall fill that vacancy for the unexpired term only.

(13) ~~(6)~~ The governor shall appoint 1 of the original MIDC members to serve as chairperson of the MIDC for a term of 1 year. At the expiration of that year, or upon the vacancy in the membership of the member appointed chairperson, the MIDC shall annually elect a chairperson from its membership to serve a 1-year term. An MIDC member shall not serve as chairperson of the MIDC for more than 3 consecutive terms.

(14) ~~(7)~~ MIDC members shall not receive compensation in that capacity but must be reimbursed for their reasonable actual and necessary expenses by the state treasurer.

(15) ~~(8)~~ The governor may remove an MIDC member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or for any other good cause.

(16) ~~(9)~~ A majority of the MIDC voting members constitute a quorum for the transaction of business at a meeting of the MIDC. A

majority of the MIDC voting members are required for official action of the commission.

(17) ~~(10) Confidential~~ **Any confidential** case information **of the MIDC**, including, but not limited to, client information and attorney work product, is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

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

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

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

(c) Hiring an executive director and determining the appropriate number of staff needed to accomplish the purpose of the MIDC consistent with annual appropriations.

(d) Assigning the executive director the following duties:

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

(*ii*) Assisting the MIDC in developing, implementing, and regularly reviewing the MIDC's standards, rules, and procedures,

including, but not limited to, recommending to the MIDC ~~suggested~~ **either of the following:**

(A) Suggested changes to the criteria for an indigent adult's eligibility for receiving criminal trial defense services under this act.

(B) Suggested changes to the criteria for an indigent juvenile's eligibility for receiving juvenile defense services in delinquency proceedings under this act.

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

(f) Establishing procedures for the mandatory collection of data concerning the operation of the MIDC, each indigent ~~criminal~~ defense system, and the operation of indigent ~~criminal~~ defense services.

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

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

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

under this section and appropriations by this state.

(3) In establishing and overseeing the minimum standards, rules, and procedures described in subsection (1), the MIDC shall emphasize the importance of ~~indigent criminal~~ **all of the following:**

(a) Indigent defense services provided to juveniles. ~~under the age of 17 who are tried in the same manner as adults or who may be sentenced in the same manner as adults and to~~

(b) Indigent defense services provided to adults **and juveniles** with mental impairments.

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

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

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

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

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

services.

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

(c) ~~Trial courts~~ **A trial court** shall assure that each ~~criminal defendant~~ **adult and juvenile** is advised of ~~his or her~~ **the adult or juvenile's** right to counsel. ~~All adults,~~ **Any adult or juvenile,** except those appearing with retained counsel, or those who have made an informed waiver of counsel, ~~must~~ **shall** be screened for eligibility under this act, and counsel must be assigned as soon as an indigent adult **or juvenile** is determined to be eligible for indigent ~~criminal~~ defense services.

(2) The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent ~~defendants~~ **adults and juveniles** to the assistance of counsel, as provided under amendment VI of the Constitution of the United States and section 20 of article I of the state constitution of 1963, **as applicable**. In establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles:

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

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

(c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which ~~he or she~~ **the defense counsel** is appointed.

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

(e) Indigent ~~criminal~~ defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.

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

(3) ~~The following requirements apply to the~~ **An** application for, and **the** appointment of, indigent ~~criminal~~ defense services under this act~~:~~ **must meet the requirements set forth in subsections (4) to (18).**

(4) ~~(a)~~ A preliminary inquiry regarding, and the determination of, the indigency of any ~~defendant,~~ **an adult or juvenile**, including a determination regarding whether ~~a defendant~~ **the adult or juvenile** is partially indigent, for ~~purposes~~ **the purpose** of this act, must be made ~~as determined~~ by the indigent ~~criminal~~ defense system not later than at the ~~defendant's~~ **adult's or juvenile's** first appearance in court. ~~The~~ **However, the** determination may be reviewed by the indigent ~~criminal~~ defense system at any other stage of the proceedings.

(5) In determining whether ~~a defendant~~ **an adult or juvenile** is entitled to the appointment of counsel, the indigent ~~criminal~~

defense system shall consider whether the defendant is indigent and the ~~extent of his or her~~ **adult's or juvenile's** ability to pay. ~~Factors~~ **The factors** to be considered **in this determination** include, but are not limited to, **any of the following:**

(a) The income or funds from employment or any other source, including personal public assistance, to which the ~~defendant~~ **adult, the juvenile, or a parent or legal guardian of the juvenile** is entitled. ~~,~~

(b) The property owned by the ~~defendant~~ **adult, the juvenile, or a parent or legal guardian of the juvenile,** or in which ~~he or she~~ **the adult, juvenile, parent, or legal guardian, as applicable,** has an economic interest. ~~,~~

(c) The outstanding obligations ~~, the~~ **of the adult, the juvenile, or a parent or legal guardian of the juvenile.**

(d) The number and ages of the ~~defendant's~~ dependents ~~,~~ **of the adult, the juvenile, or a parent or legal guardian of the juvenile.**

(e) The employment and job training history ~~, and his or her~~ **of the adult or juvenile.**

(f) The level of education **of the adult or juvenile.**

(6) A trial court may play a role in ~~this~~ **the** determination **described in subsection (5)** as part of any indigent ~~criminal~~ defense system's compliance plan under the direction and supervision of the supreme court, consistent with section 4 of article VI of the state constitution of 1963.

(7) If an indigent ~~criminal~~ defense system determines that ~~a defendant~~ **an adult or juvenile** is partially indigent, the indigent ~~criminal~~ defense system shall determine the amount of money the ~~defendant~~ **adult or juvenile** must contribute to ~~his or her~~ **the** defense.

(8) An indigent ~~criminal~~ defense system's determination regarding the amount of money a partially indigent ~~defendant~~ **adult or juvenile** must contribute to ~~his or her~~ **the adult's or juvenile's** defense is subject to judicial review.

(9) Nothing in this act prevents a court from making a determination of indigency for any purpose consistent with article VI of the state constitution of 1963.

(10) ~~(b) A defendant~~ **An adult or juvenile** is considered to be indigent if ~~he or she~~ **the adult, the juvenile, or a parent or legal guardian of the juvenile** is unable **to obtain competent, qualified legal representation for the adult or juvenile, as applicable,** without substantial financial hardship to ~~himself or herself or to his or her~~ **the adult, juvenile, parent, or legal guardian, as applicable, or substantial financial hardship to the** dependents ~~, to obtain competent, qualified legal representation on his or her own. Substantial~~ **of the adult, juvenile, parent, or legal guardian, as applicable.**

(11) The substantial financial hardship **described in subsection (10)** is rebuttably presumed if the ~~defendant~~ **adult, the juvenile, or a parent or legal guardian of the juvenile** receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance, resides in public housing, or earns an income less than 140% of the federal poverty guideline. ~~A defendant~~

(12) In addition to the rebuttable presumption described in subsection (11), an adult is ~~also~~ rebuttably presumed to have a substantial financial hardship **under subsection (10)** if ~~he or she~~ **the adult** is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental

health or substance abuse facility.

(13) ~~(c) A defendant~~ **An adult or juvenile** not falling below the presumptive thresholds described in ~~subdivision (b)~~ **subsections (10) to (12)** must be subjected to a more rigorous screening process to determine if ~~his or her~~ **the** particular circumstances **of the adult or juvenile,** including the seriousness of the charges being faced, ~~his or her~~ **the** monthly expenses ~~, and~~ **of the adult or juvenile, and** local private counsel rates, would result in a substantial hardship if ~~he or she~~ **the adult or juvenile** were required to retain private counsel.

(14) ~~(d)~~ A determination that ~~a defendant~~ **an adult or juvenile** is partially indigent may ~~only~~ be made **only** if the indigent ~~criminal~~ defense system determines that ~~a defendant~~ **the adult or juvenile** is not fully indigent. An indigent ~~criminal~~ defense system that determines ~~a defendant~~ **an adult or juvenile** is not fully indigent but may be partially indigent must utilize the screening process under ~~subdivision (c).~~ **subsection (13).** The provisions of ~~subdivision (c)~~ **subsection (15)** apply to a partially indigent ~~defendant.~~**adult or juvenile.**

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

(16) ~~(f)~~ The MIDC shall promulgate objective standards for indigent ~~criminal~~ defense systems to determine the amount a partially indigent ~~defendant~~ **adult or juvenile** must contribute to

~~his or her~~ **the** defense. The standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent ~~criminal~~ defense system is making the determination regarding how much a partially indigent ~~defendant~~ **adult or juvenile** must contribute to ~~his or her~~ **the adult's or juvenile's** defense.

(17) ~~(g) A defendant~~ **An adult or juvenile** is responsible for applying for indigent defense counsel and for establishing ~~his or her~~ **the adult's or juvenile's** indigency and eligibility for appointed counsel under this act.

(18) Any oral or written statements made by the ~~defendant~~ **adult or juvenile** in or for use in the criminal **or juvenile** proceeding, **as applicable**, and **that is** material to the issue of ~~his or her~~ **the adult's or juvenile's** indigency, must be made under oath or an equivalent affirmation.

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

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

Sec. 13. (1) All indigent ~~criminal~~ defense systems and, at the direction of the supreme court, attorneys engaged in providing

indigent ~~criminal~~ defense services shall cooperate and participate with the MIDC in the investigation, audit, and review of their indigent ~~criminal~~ defense services.

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

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

(4) The MIDC shall approve or disapprove all or any portion of a plan or cost analysis, or both a plan and cost analysis, submitted under subsection (3), and shall do so within 90 calendar days ~~of~~ **after** the submission of the plan and cost analysis. If the MIDC disapproves any part of the plan, the cost analysis, or both the plan and the cost analysis, the indigent ~~criminal~~ defense

system shall consult with the MIDC and, for any disapproved portion, submit a new plan, a new cost analysis, or both within 60 calendar days of the mailing date of the official notification of the MIDC's disapproval. If after 3 submissions a compromise is not reached, the dispute must be resolved as provided in section 15. ~~All approved~~ **Approved** provisions of an indigent ~~criminal~~ defense system's plan and cost analysis must not be delayed by any disapproved portion and must proceed as provided in this act. The MIDC shall not approve a cost analysis or portion of a cost analysis unless it is reasonably and directly related to an indigent defense function.

(5) The MIDC shall submit a report to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives requesting the appropriation of funds necessary to implement compliance plans after all the systems compliance plans are approved by the MIDC. For standards approved after January 1, 2018, the MIDC shall include a cost analysis for each minimum standard in the report and shall also provide a cost analysis for each minimum standard approved on or before January 1, 2018, if a cost analysis for each minimum standard approved was not provided, and shall do so not later than October 31, 2018. The amount requested under this subsection must be equal to the total amount required to achieve full compliance as agreed upon by the MIDC and the indigent ~~criminal~~ defense systems under the approval process provided in subsection (4). The information used to create this report must be made available to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of

representatives.

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

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

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

established by the MIDC.

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

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

(10) ~~(11)~~ Within 180 days after receiving funds from the MIDC under subsection ~~(8),~~ **(7)**, an indigent ~~criminal~~ defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIDC for effective assistance of counsel. The terms of a grant may allow an indigent ~~criminal~~ defense system to exceed 180 days for compliance with a specific item needed to meet minimum standards if necessity is demonstrated in the indigent ~~criminal~~ defense system's compliance plan. The MIDC has the authority to allow an indigent ~~criminal~~ defense system to exceed 180 days for implementation of items if an unforeseeable condition prohibits timely compliance.

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

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

provided by law.

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

(a) Requiring documentation of expenditures.

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

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

(14) ~~(15)~~ If an indigent ~~criminal~~ defense system does not fully expend a grant toward its costs of compliance, its grant in the second succeeding fiscal year must be reduced by the amount equal to the unexpended funds. Identified unexpended grant funds must be reported by indigent ~~criminal~~ defense systems on or before October 31 of each year. Funds subject to extension under subsection ~~(11)~~ **(10)** must be reported but not included in the reductions described in this subsection. Any grant money that is determined to have been used for a purpose outside of the compliance plan must be repaid to the MIDC, or if not repaid, must be deducted from future grant amounts.

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

(16) ~~(17)~~ The court shall collect contribution or reimbursement from individuals determined to be partially indigent under applicable court rules and statutes. ~~Reimbursement~~ **If the indigent defense system provides indigent criminal defense services, the reimbursement** under this subsection is subject to section 22 of chapter XV of the code of criminal procedure, 1927 PA 175, MCL 775.22. The court shall remit 100% of the funds it collects under this subsection to the indigent ~~criminal~~ defense system in which the court is sitting. Twenty percent of the funds received under this subsection by an indigent ~~criminal~~ defense system must be remitted to the department in a manner prescribed by the department and reported to the MIDC by October 31 of each year. The funds received by the department under this subsection must be expended by the MIDC in support of indigent ~~criminal~~ defense systems in this state. The remaining 80% of the funds collected under this subsection may be retained by the indigent ~~criminal~~ defense system for purposes of reimbursing the costs of collecting the funds under this subsection and funding indigent defense in the subsequent fiscal year. The funds collected under this subsection must not alter the calculation of the local share made ~~pursuant to~~ **under** section ~~3(i).~~**3.**

Sec. 15. (1) Except as provided in section 5, if a dispute arises between the MIDC and an indigent ~~criminal~~ defense system concerning the requirements of this act, including a dispute concerning the approval of an indigent ~~criminal~~ defense system's plan, cost analysis, or compliance with section 13 or 17, the parties shall attempt to resolve the dispute by mediation. The state court administrator, as authorized by the supreme court, shall appoint a mediator agreed to by the parties within 30

calendar days of the mailing date of the official notification of the third disapproval by the MIDC under section 13(4) to mediate the dispute and shall facilitate the mediation process. The MIDC shall immediately send the state court administrative office a copy of the official notice of that third disapproval. If the parties do not agree on the selection of the mediator, the state court administrator, as authorized by the supreme court, shall appoint a mediator of ~~his or her~~ **the state court administrator's** choosing. Mediation must commence within 30 calendar days after the mediator is appointed and terminate within 60 calendar days of its commencement. Mediation costs associated with mediation of the dispute must be paid equally by the parties.

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

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

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

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

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

(a) Within 60 days after the MIDC's issuance of an approved

plan and cost analysis under subsection (2)(b).

(b) Within 60 days after the system receives grant funds under section ~~13(8),~~ **13(7),** if the plan, cost analysis, or both, required a grant award for implementation of the plan.

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

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

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

(4) If the dispute involves the indigent ~~criminal~~ defense system's plan, cost analysis, or both, the court may approve, reject, or modify the submitted plan, cost analysis, or the terms of a grant awarded under section ~~13(8)~~ **13(7)** other than the amount of the grant, determine whether section 13 has been complied with, and issue any orders necessary to obtain compliance with this act. However, the system must not be required to expend more than its local share in complying with this act.

(5) If a party refuses or fails to comply with a previous order of the court, the court may enforce the previous order through the court's enforcement remedies, including, but not limited to, its contempt powers, and may order that the state

undertake the provision of indigent ~~criminal~~ defense services in lieu of the indigent ~~criminal~~ defense system.

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

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

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

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

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

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

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

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

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

(2) ~~A~~ **An indigent defense** system's duty of compliance with 1 or more standards within the plan under subsection (1) is

contingent upon receipt of a grant in the amount sufficient to cover that particular standard or standards contained in the plan and cost analysis approved by the MIDC.

(3) The MIDC may proceed under section 15 if ~~an indigent criminal defense system~~ **a local unit of government** breaches its duty of compliance under subsection (1).

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

(a) ~~The~~ **Except as provided in section 7, the** freedom of information act, 1976 PA 442, MCL 15.231 to 15.246. ~~, except as provided in section 7(10).~~

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

Sec. 23. (1) Nothing in this act shall be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States ~~supreme court~~ **Supreme Court** or the supreme court of this state regarding the effective assistance of counsel.

(2) Nothing in this act shall be construed to override section 29 or 30 of article IX of the state constitution of 1963.

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

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

(5) ~~Violations~~ **A violation** of **the** MIDC rules that ~~do~~ **does** not constitute ineffective assistance of counsel under the United

States ~~constitution~~ **Constitution** or the state constitution of 1963 ~~do~~ **does** not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel.

Public Policy Position
HB 6344 and HB 6345

Support HB 6344 and HB 6345 in Concept and Recommend Amendments

Explanation

The Committee voted to support the bills in concept and recommend that they be amended to: (1) provide a broader definition of the youth defense mandate; and (2) establish appellate attorney fee incentives consistent with the MIDC Act and a requirement for the state to reimburse local systems for these fees. This pair of bills aims to address an important access to justice issue and aligns with the recently-released recommendations of the Task Force on Juvenile Justice Reform, but further refinement along the lines suggested by the Committee would significantly improve the legislation and its ultimate effectiveness.

As to HB 6344, while the creation of a definitions section is helpful, the definitions used are problematic. "Juvenile" is limited to youth who are subject to an order of disposition, which does not account for youth being able to appeal detention orders and doesn't allow for any interlocutory appeals under the act. And "order of disposition" is broad enough to cover ALL dispositional orders under the Juvenile Code, including in child welfare cases. There is also no accounting for certain orders in waiver and designation proceedings, such as an order granting a motion to waive jurisdiction of the family division (for which there is a right to appeal). Other changes, such as eliminating "by a court of record" in sections 6(a) and 6(b), are also important, as those changes would take the assignment process out of the hands of the court.

As to HB 6345, there is an intentional blank space in section 3(k), as there has not yet been a determination on what the local share of costs will be going forward. That is a critical piece of this legislation and leaving it blank clearly indicates that this bill is a placeholder. The criteria for determining indigency under section 11(5) does not appear to consider situations in which a youth's parents can afford an attorney but refuse to hire one for the youth. The MIDC would like to see the bill expand their responsibility to create and enforce standards for defending indigent youth with the goal of bringing the bill into closer alignment with the Task Force on Juvenile Justice Reform's recommendations.

Position Vote:

Voted For position: 17
Voted against position: 1
Abstained from vote: 3
Did not vote (absent): 6

***Keller* Permissibility Explanation:**

Both bills are reasonably related to the availability of legal services to society. They control the appointment of counsel for youth in the justice system at both the trial and appellate levels. As such, both bills are *Keller*-permissible.

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

Public Policy Position
HB 6344 & HB 6345

Support in Concept

Explanation:
The Committee voted to support in concept legislation amending the Appellate Defender Act, 1978 PA 620, and the Michigan Indigent Defense Commission ("MIDC") Act, 2013 PA 93, to provide for indigent defense services and appellate defense services for juveniles, as recommended by the Michigan Task Force on Juvenile Justice Reform. The Committee further recommends that the bills, as introduced, be amended to: (1) provide a broader definition of the youth defense mandate; and (2) establish appellate attorney fee incentives consistent with the MIDC Act and a requirement for the state to reimburse local systems for these fees.

Position Vote:
Voted For position: 9
Voted against position: 3
Abstained from vote: 2
Did not vote (absent): 10

***Keller*-Permissible Explanation:**
The Committee agreed that HB 6344 and HB 6345 are *Keller*-permissible because the provision of defense and appellate services to juveniles is reasonably related to access to legal services and the functioning of the courts.

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

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Nathan A. Triplett, Director of Governmental Relations

Date: September 12, 2022

Re: HB 6356 – In-custody Informants in Criminal Proceedings

Background

House Bill 6356 would amend the Code of Criminal Procedure, 1927 PA 175, to prescribe certain procedures related to the use of in-custody informants—colloquially known as "jailhouse informants"—in criminal investigations and court proceedings. The bill would add eight new sections to the statute:

> Sec. 36a defines certain terms as used in the legislation. Notably, this includes the definition of an "in-custody informant" as "an individual, other than a codefendant, percipient witness, accomplice, or coconspirator, who provides testimony or information for use in the investigation or prosecution of a defendant based upon statements made by the defendant while the defendant and the in-custody information were housed in the same correctional facility, county jail, local lockup, or other custodial facility."
>
> Sec. 36b would mandate that each county prosecuting attorney's office track and maintain a record of both the use of testimony or information provided by in-custody informants and any benefit, as defined in Sec. 36a, offered or provided in exchange for such testimony or information. County prosecuting attorneys would be required to provide this information to the Attorney General who would be required, in turn, to maintain a confidential, statewide record of the information collected.
>
> Sec. 36c would require a county prosecuting attorney to disclose, in a "timely manner" before *any* evidentiary hearing or trial, *any* information in the possession, custody, or control of the prosecution that is "relevant to an in-custody informant's credibility." The section then provides a non-exhaustive list of such information (e.g., the complete criminal history of the in-custody informant).
>
> Sec. 36d would require a county prosecuting attorney to disclose the prosecution's intent to introduce the testimony of any in-custody informant.
>
> Sec. 36e would permit the elicitation of information related to the in-custody informant's credibility, as disclosed under Sec. 36c, by either the prosecution or defense. If a written

statement from an in-custody informant is admitted into evidence for any reason, the information disclosed under Sec. 36c must be included with the written statement.

Sec. 36f would require a county prosecuting attorney to notify any victim in the in-custody informant's case if the in-custody informant receives a benefit, as defined in Sec. 36a.

Sec. 36g would require the court to hold a hearing, unless waived by the defendant, to assess the reliability of an in-custody informant and to determine if the prosecuting attorney can introduce evidence "to corroborate the content of the in-custody informant's testimony." If the prosecution fails to show by a preponderance of the evidence that the in-custody informant's testimony is reliable, the court shall render the testimony inadmissible.

Sec. 36h would require the court to provide the jury with a cautionary instruction if an in-custody informant's testimony is admitted into evidence. The bill also outlines the required contents of the jury instruction.

The bill was introduced by State Representative Steve Johnson and referred to the House Judiciary Committee for consideration.

Keller Considerations

In-custody informants are a regular, widely utilized feature in criminal proceedings in Michigan. By prescribing a range of procedures that must be used in these proceedings—from mandated pretrial disclosures, to required hearings, to the content of jury instructions—House Bill 6356 has the potential to significantly impact the functioning of the courts. Only the confidential data collection required by Sec. 36b is arguably outside a strict reading of the scope of *Keller*'s requirement that the subject matter of legislation be at least reasonably related to a permissible subject area. Even this closer case, it could be argued, satisfies *Keller* if such data collection is necessary to inform policymaking by the Legislature, the Court, or another relevant actor regarding a permissible subject area. The balance of the bill's components are each not only reasonably, but necessarily related to the functioning of the courts and therefore *Keller*-permissible.

Keller Quick Guide

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

Staff Recommendation

Prescribing detailed procedures related to the use of in-custody informants in criminal proceedings is necessarily related to the functioning of the courts. Moreover, the impact of the proposed legislation

is potentially significant to those proceedings. As such, House Bill 6356 is *Keller*-permissible and made be considered on its merits.

HOUSE BILL NO. 6356

August 17, 2022, Introduced by Rep. Steven Johnson and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding sections 36a, 36b, 36c, 36d, 36e, 36f, 36g, and 36h to chapter VIII.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER VIII

Sec. 36a. As used in sections 36b to 36h of this chapter:

(a) "Benefit" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency,

immunity, financial payment, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, an in-custody informant's participation in any information-gathering activity, investigation, or operation, or in return for, or in connection with, the in-custody informant's testimony in a criminal proceeding in which the prosecuting attorney intends to call the in-custody informant as a witness.

(b) "In-custody informant" means an individual, other than a codefendant, percipient witness, accomplice, or co-conspirator, who provides testimony or information for use in the investigation or prosecution of a defendant based upon statements made by the defendant while the defendant and the in-custody informant were housed in the same correctional facility, county jail, local lockup, or other custodial facility.

Sec. 36b. (1) Each county prosecuting attorney's office shall track and maintain a record of the following information:

(a) The use of testimony or information provided to the prosecuting attorney's office by an in-custody informant against a defendant's interest.

(b) Any benefit offered or provided to an in-custody informant in exchange for testimony or information about a defendant.

(2) Each county prosecuting attorney's office shall provide the information described under subsection (1) to the department of the attorney general.

(3) The department of the attorney general shall maintain a statewide record of the information collected under subsection (1).

(4) The information collected under subsection (1) is confidential and is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 36c. A prosecuting attorney shall disclose to the defense in a timely manner before any evidentiary hearing or trial any information in the possession, custody, or control of the prosecution that is relevant to an in-custody informant's credibility, including, but not limited to, all of the following:

(a) Benefits that the prosecuting attorney has extended or will extend in the future to the in-custody informant.

(b) The substance, time, and place of any statement allegedly given by the defendant to the in-custody informant.

(c) The substance, time, and place of any statement given by the in-custody informant to law enforcement implicating the defendant in the crime charged.

(d) The complete criminal history of the in-custody informant.

(e) If the in-custody informant has previously testified or provided information in exchange for a benefit, the specific benefit previously offered or received.

(f) Whether or not the in-custody informant modified or recanted the in-custody informant's testimony at any time.

Sec. 36d. A prosecuting attorney shall timely disclose the prosecution's intent to introduce the testimony of an in-custody informant. The same procedure for introducing the testimony of other fact witnesses that are applicable in this state applies to an in-custody informant's testimony.

Sec. 36e. If an in-custody informant testifies, the prosecuting attorney or defense counsel may elicit the information described under section 36c of this chapter during direct or cross-examination, respectively. If a written statement from the in-custody informant is admitted for any reason, including, but not limited to, the unavailability of the in-custody informant, the

information described under section 36c of this chapter must be included with the written statement.

Sec. 36f. If an in-custody informant receives a benefit related to a pending charge, a conviction, or a sentence in connection with offering or providing testimony against a defendant, the prosecuting attorney shall notify any victim in the in-custody informant's case of the benefit.

Sec. 36g. (1) Unless the defendant waives the hearing required under this section, before a trial commences during which the prosecuting attorney intends to introduce the testimony of an in-custody informant, the court shall hold a hearing to assess the reliability of the informant and to determine if the prosecuting attorney can introduce evidence to corroborate the content of the in-custody informant's testimony relating to a crime.

(2) At a hearing conducted under this section, the court shall consider all of the information described under section 36c of this chapter.

(3) If the prosecution fails to show by a preponderance of the evidence that the in-custody informant's testimony is reliable, the court shall render the testimony inadmissible.

Sec. 36h. If the in-custody informant's testimony is admitted into evidence, a cautionary instruction must be provided to the jury. The jury instruction must include all of the following:

(a) The testimony of an in-custody informant who provides evidence against a defendant must be examined and weighed with greater care than the testimony of an ordinary witness.

(b) The in-custody informant may expect, and in practice often receive, a benefit that has not been formally promised to the in-custody informant before trial.

(c) The reliability factors enumerated in section 36c of this chapter must be considered when determining whether the testimony of the in-custody informant has been influenced by interest in a benefit or prejudice against the defendant.

Public Policy Position
HB 6356

Support HB 6356 in Concept

Explanation

The Committee voted to support HB 6356 in concept, as the use of "jailhouse informants" in Michigan's criminal legal system impacts a number of important access to justice issues.

However, the Committee also recommends that the Public Policy Committee defer action on this legislation at this time to allow members of the Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee to confer and provide more detailed feedback to the Public Policy Committee and the Board of Commissioners on this legislation at a future Committee/Board meeting prior to the adoption of a public policy position on the bill by the Bar.

Position Vote:

Voted For position: 16
Voted against position: 1
Abstained from vote: 4
Did not vote (absent): 6

***Keller* Permissibility Explanation:**

House Bill 6356 would significantly impact the procedures regarding the use of "jailhouse informants" in criminal proceedings, including the responsibility of courts and prosecutors in these settings, it is therefore reasonably related to the functioning of the courts and *Keller*-permissible.

Contact Persons:

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

Public Policy Position
HB 6356

Opposed as Introduced

Explanation:
The Committee voted to oppose House Bill 6356 as introduced citing concerns regarding the legislation's interaction with the Rules of Evidence, provisions of the legislation constituting an unfunded mandate on prosecutors, and adding unduly burdensome procedural requirements on the use of informants in criminal proceedings.

Position Vote:
Voted For position: 9
Voted against position: 5
Abstained from vote: 0
Did not vote (absent): 10

***Keller*-Permissible Explanation:**
The Committee agreed that House Bill 6356 is *Keller*-permissible as the procedures regarding the use of informants in criminal proceedings is reasonably related to the functioning of the courts.

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