Agenda
Public Policy Committee
January 19, 2023 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Public Policy Committee……Daniel D. Quick, Chairperson

A. Reports

1. Approval of November 9, 2022 minutes
2. Public Policy Report

B. Court Rule Amendments

1. ADM File No. 2021-50: Proposed Addition of MCR 2.421

The proposed addition of MCR 2.421 would address notice of a bankruptcy proceeding that affects a pending state court action.

Status:	02/01/23 Comment Period Expires.
Referrals:	10/31/22 Civil Procedure & Courts Committee.
Comments:	Civil Procedure & Courts Committee. Comments submitted to the Court are included in the materials.
Liaison:	Aaron V. Burrell

2. ADM File No. 2022-34: Proposed Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Proposed Addition of MCR 3.937

The proposed amendments of MCR 3.913 and 3.943 and proposed addition of MCR 3.937 would provide greater due process protections for juveniles in the justice system by ensuring that they are fully advised of their appellate rights at appropriate times and in a manner that is designed to ensure understanding of those rights. The proposed amendments of MCR 3.977 and 3.993 would extend the timeframe for requesting appointment of appellate counsel to 21 days, which mirrors the timeframe for filing a claim of appeal in cases subject to those rules.

Status:	03/01/23 Comment Period Expires.
Referrals:	11/15/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section.
Liaison:	Judge Cynthia D. Stephens (Ret.)

3. ADM File No. 2022-05: Proposed Amendments of MCR 3.977, 3.993, 7.311, and 7.316

The proposed amendments of MCR 3.977, 3.993, 7.311, and 7.316 would establish a procedure for assessing whether a respondent in a termination of parental rights case was denied the effective assistance of appellate counsel, and if so, provide relief.

Status:	02/01/23 Comment Period Expires.
Referrals:	10/31/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Appellate Practice Section; Children's Law Section; Family Law Section.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section.
Liaison:	Lori A. Buiteweg

4. ADM File No. 2022-32: Proposed Amendments of MCR 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219

The proposed amendments of subchapter 7.200 would make technical amendments of the COA rules in an effort to modernize them and ensure they reflect the COA's established practices.

Status: 02/01/23 Comment Period Expires.

Referrals: 10/31/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section. Comment submitted to the Court is included in the materials.

Liaison: Danielle Walton

C. Report and Recommendations of the Michigan Task Force on Juvenile Justice Reform

Referrals: 11/28/22 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

Liaison: Valerie R. Newman

D. Consent Agenda

To allow the Criminal Jurisprudence & Practice Committee to submit its positions on each of the following items:

1. M Crim JI 7.16 and 7.19

The Committee proposes amending and combining M Crim JI 7.16 and 7.19, which address conditions for the use of force or deadly force in self-defense or the defense of others in different contexts. The combination and amendments are an effort to reduce confusion in the use of the self-defense instructions involving the duty to retreat. Deletions are in strike-through, and new language is underlined.

2. M Crim JI 37.1b, 37.2b

The Committee proposes two new instructions, M Crim JI 37.1b and M Crim JI 37.2b, for the crimes of offering bribes to employees or agents or the acceptance of bribes by employees or agents in violation of MCL 750.125(1) and (2), respectively. These instructions are entirely new.

3. M Crim JI 37.3b, 37.4, 37.4a, 37.4b, 37.5b, 37.6, 37.8b, and 37.9a

The Committee proposes amending M Crim JI 37.3b, 37.4, 37.4a, 37.4b, 37.5b, 37.6, 37.8b and 37. 9a, which address bribery and intimidation of witnesses under MCL 750.122. The published Court of Appeals case of People v Arthur Johnson, Jr. (MCOA # 353825) held that "true threat" instructional language was required to avoid infringement of the First Amendment right to free speech where the crime is carried out by the use of threats. The amendments add that language to the current jury instructions for these offenses. Deletions are in strike-through, and new language is underlined.

4. M Crim JI 40.5

The Committee proposes a new jury instruction, M Crim JI 40.5, for the offense of public intoxication found at MCL 750.167(e). The instruction is entirely new.

5. M Crim JI 41.2

The Committee proposes a new jury instruction, M Crim JI 41.2, for the crime of eavesdropping on a private conversation found at MCL 750.539c. The instruction is entirely new.

Minutes
Public Policy Committee
November 9, 2022 – 12:00 p.m. to 1:30 p.m.
Via Zoom Meetings

Committee Members: David C. Anderson, Lori A. Buiteweg, Aaron V. Burrell, Kim Warren Eddie, Suzanne C. Larsen, Takura N. Nyamfukudza, Nicholas M. Ohanesian, Brian D. Shekell, Judge Cynthia D. Stephens (ret.), Danielle Walton
SBM Staff: Peter Cunningham, Carrie Sharlow, Nathan A. Triplett
GCSI Staff: Marcia Hune

A. Reports

1. Approval of September 15, 2022 minutes – The minutes were unanimously approved.
2. Public Policy Report – Nathan Triplett offered a verbal report.

B. Court Rule Amendments

1. ADM File No. 2016-10: Proposed Amendments of MCR 2.002 and 7.109

The proposed amendments of MCR 2.002 and 7.109 would allow for waiver of appellate transcript fees for indigent individuals.
The following entities offered recommendations: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Appellate Practice Section.
The committee voted unanimously (10) to support ADM File No. 2016-10 as drafted.

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

The amendment of MCR 1.109 provides SCAO the flexibility to determine, when appropriate, when certain documents filed on paper do not need to be imported into the MiFILE document management system until bulk e-filing capability is available.
The following entities offered recommendations: Civil Procedure & Courts Committee.
The committee voted unanimously (10) to support ADM File No. 2016-10 as drafted.

3. ADM File No. 2021-49: Proposed Amendment of MCR 2.002

The proposed amendment of MCR 2.002 would provide procedural direction to courts regarding prisoner requests for fee waivers in civil actions.
The following entities offered recommendations: Access to Justice Policy Committee; Civil Procedure & Courts Committee.
The committee voted unanimously (10) to support the proposed amendment to MCR 2.002 to the extent that it is intended to align statutory provisions and court rules, but express concerns over the practicality of indigent defendants complying with these rules, most notably strict timelines.

4. ADM File No. 2021-32: Proposed Amendment of MCR 6.112

The proposed amendment of MCR 6.112 would require that the notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement.
The following entities offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee.
The committee voted unanimously (10) to support ADM File No. 2021-32 as drafted.

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

The proposed amendment of Rule 5 of the Rules for the Board of Law Examiners would define the terms "full-time" and "instructor" to clarify that clinical instructors may be admitted to the bar without examination.

The following entities offered recommendations: Access to Justice Policy Committee; Civil Procedure & Courts Committee.

The committee voted unanimously (10) to support ADM File No. 2021-40 as drafted.

C. Legislation

1. HB 6399 (Whitsett) Criminal procedure: mental capacity; outpatient treatment for misdemeanor offenders with mental health issues; provide for. Amends sec. 461 of 1974 PA 258 (MCL 330.1461) & adds sec. 1021 & ch. 10A.

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

The committee deferred consideration of the legislation to the 2023-2024 legislative session.

2. HB 6437 (LaGrand) Criminal procedure: mental capacity; psychological evaluations for defendants ordered by judges; allow. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 1m to ch. IX.

The following entities offered recommendations: Criminal Jurisprudence & Practice Committee.

The committee deferred consideration of the legislation to the 2023-2024 legislative session.

3. SB 1162 (Wozniak) Courts: court of appeals; jurisdiction of the court of appeals to include admitting individuals to the state bar; expand.

The following entities offered recommendations: Civil Procedure & Courts Committee.

The committee agreed unanimously that the legislation is *Keller* permissible in affecting the functioning of the court.

The committee voted unanimously (10) to support SB 1162.

4. SB 1175 (Hollier) Courts: juries; local jury boards; eliminate, and create a centralized jury process. Amends secs. 1301a, 1304a, 1326, 1332, 1345 & 1346 of 1961 PA 236 (MCL 600.1301a et seq.); adds sec. 1306 & 1307 & repeals secs. 1301, 1301b, 1302, 1303, 1303a, 1304, 1305, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1327, 1330, 1331, 1338, 1339, 1341, 1342, 1353, 1375, & 1376 of 1961 PA 236 (MCL 600.1301 et seq.) & repeals 1929 PA 288 (MCL 730.251 - 730.271) & repeals 1951 PA 179 (MCL 730.401 - 730.419).

The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

The committee deferred consideration of the legislation to the 2023-2024 legislative session.

D. Proposed Amendments to Michigan Rules of Evidence

The following entities offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

The committee voted unanimously (9) to recommend that the SBM submit the Workgroup report and the comments submitted by the two SBM committees to the Court for its consideration, but not take a position on the Workgroup's recommendations at this time.

E. <u>Consent Agenda</u>

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

1. M Crim JI 5.10a

The Committee proposes to renumber, retitle, and amend M Crim JI 20.29 [Limiting Instruction on Expert Testimony (in Child Sexual Conduct Cases)] in order to broaden its scope to include other experts who may testify about victims' behaviors (such as victims of domestic abuse) and to add information that the jurors need not accept expert testimony, consistent with M Crim JI 5.10. The proposed instruction would renumber the instruction to M Crim JI 5.10a, and title it as Limiting Instruction on Behavioral Expert Testimony. The proposal would also add a Use Note for M Crim JI 5.10 [Expert Witness] directing the court to use M Crim JI 5.10a where an expert testifies regarding the behavioral characteristics of sexually abused children or victims of domestic violence. Deletions are in strike-through, and new language is underlined.

2. M Crim JI 7.16

The Committee proposes to amend M Crim JI 7.16 [Duty to Retreat to Avoid Using Force or Deadly Force] to correct an error in requiring fear of imminent death or serious harm for use of non-deadly force per a published Court of Appeals decision, People v Ogilvie (MCOA #354355), citing MCL 780.972(2). Deletions are in strike-through, and new language is underlined.

3. M Crim JI 17.25

The Committee proposes an amendment to M Crim JI 17.25 [Stalking] to correct it in accord with statutory language, to provide definitional language in the instruction for "unconsented contact, and to clarify the element for aggravated stalking. Deletions are in strike-through, and new language is underlined.

4. M Crim JI 20.1

The Committee proposes adding an alternative to M Crim JI 20.1 [Criminal Sexual Conduct in the First Degree] where the defendant is a woman who caused sexual penetration with a male under unlawful circumstances. The new language is underlined.

5. M Crim JI 20.2 and 20.13

The Committee proposes to add "allowed or caused" language to M Crim JI 20.2 [Criminal Sexual Conduct in the Second Degree] and M Crim JI 20.13 [Criminal Sexual Conduct in the Fourth Degree] to reflect an unpublished Court of Appeals decision, People v Zernec (MCOA #353490), interpreting MCL 750.520e. Deletions are in strike-through, and new language is underlined.

6. M Crim JI 36.1, 36.3, 36.4, 36.4a, and 36.6

The Committee proposes to amend M Crim JI 36.1, 36.3 36.4, 36.4a, and 36.6 [Human Trafficking] to add "coercion" language per a statutory amendment to MCL 750.462a. The new language is underlined. The Use Notes have not changed so they have not been included.

The consent agenda was approved.

SBM STATE BAR OF MICHIGAN

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November 30, 2022

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

RE: ADM File No. 2016-10 – Proposed Amendments of Rules 2.002 and 7.109 of the Michigan Court Rules

Dear Clerk Royster:

At its November 18, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2016-10. The Board considered recommendations from the Access to Justice Policy Committee, the Civil Procedure & Courts Committee, the Appellate Practice Section, and the Children's Law Section. The Board voted unanimously to support the proposed amendment.

The Board recognizes that all too often the cost of transcripts presents a significant and sometimes insurmountable barrier to indigent litigants, which impacts their ability to fully and effectively access the legal system. By providing courts with the authority to waive transcript fees in appropriate circumstances and establishing a specific procedure to govern such waivers, the proposed amendments will improve access to justice, while promoting clarity and consistency across courts and cases.

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

Sincerely,

Peter Cunningham
Executive Director

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

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November 30, 2022

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

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

Dear Clerk Royster:

At its November 18, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2002-37. In its review, the Board considered a recommendation from the Civil Procedure & Courts Committee.

Recognizing the need for flexibility as the Court and the State Court Administrative Office move toward fully implementing MiFILE, the Board voted unanimously to support the proposed amendment to Rule 1.109. The Board believes that the proposal will help reduce unnecessary and avoidable challenges that would otherwise be created by an overly prescriptive rule concerning the conversion of paper records to electronic formats.

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

Sincerely,

Peter Cunningham
Executive Director

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

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November 30, 2022

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

RE: ADM File No. 2021-49 – Proposed Amendment of Rule 2.002 of the Michigan Court Rules

Dear Clerk Royster:

At its November 18, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-49. In its review, the Board considered recommendations from the Access to Justice Policy Committee and the Civil Procedure & Courts Committee. The Board voted unanimously to support the proposed amendment to Rule 2.002, as the proposal will align the Michigan Court Rules with existing statutory provisions. While recognizing that such alignment promotes clarity for both bench and bar, the Board is concerned about the practicality of indigent defendants complying with the rules established by both the existing statute and the proposed court rule amendment, most notably strict timelines.

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

Sincerely,

Peter Cunningham
Executive Director

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

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November 30, 2022

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

RE: ADM File No. 2021-32 – Proposed Amendment of Rule 6.112 of the Michigan Court Rules

Dear Clerk Royster:

At its November 18, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-32. In its review, the Board reviewed recommendations from the Access to Justice Policy Committee and the Criminal Jurisprudence & Practice Committee. The Board voted unanimously to support the proposed amendment to Rule 6.112. The Board believes that requiring notice of applicable mandatory minimum sentences will assist defendants (especially *pro se* defendants) in making informed decisions about taking a plea, pursuing trial, etc. Additionally, the Board recognizes that transparency in both charging decisions and sentencing recommendations is critical to reducing disparities in sentencing.

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

Sincerely,

Peter Cunningham
Executive Director

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

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November 30, 2022

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

RE: ADM File No. 2021-40 – Proposed Amendment of Rule 5 of the Rules for the Board of Law Examiners

Dear Clerk Royster:

At its November 18, 2022 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2021-40. The Board considered recommendations from the Access to Justice Policy Committee and the Civil Procedure & Courts Committee. The Board voted to support the proposed amendment.

The Board believes that clinical instructors, as attorneys who regularly practice as part of their teaching, are often highly qualified to practice law in Michigan. Furthermore, law school clinics provide important legal aid services to low-income Michiganders who would otherwise be left unrepresented in far too many cases. The Board anticipates that the proposed amendment will result in a needed increase the number of attorneys providing free legal services in Michigan and expand access to quality legal representation for those most in need of assistance in this state.

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

Sincerely,

Peter Cunningham
Executive Director

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

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December 6, 2022

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

RE: Proposed Amendments of Rule 702 and 703 of the Michigan Rules of Evidence

Dear Clerk Royster:

Please find attached the report and recommendations of the State Bar of Michigan's ("SBM") Michigan Rules of Evidence ("MRE") 702/703 Workgroup.

In 1999, the Court appointed an Advisory Committee on the Rules of Evidence in anticipation of then-pending amendments to the Federal Rules of Evidence ("FRE"). The work of that committee ultimately led to the adoption of various amendments to Michigan's rules, including MRE 702 and 703, which address expert witness testimony. Those particular rules have not been updated since that time. Having noted the Court's decision to form a Michigan Rules of Evidence Review Committee in December 2021, and that amendments to the federal rules are once again pending, the State Bar of Michigan's Standing Committee on Civil Procedure & Courts established a workgroup to examine whether to recommend amendments MRE 702 and 703 to the Court.

The workgroup prepared the attached report, which was subsequently reviewed by both the full Civil Procedure & Courts Committee, and SBM's Criminal Jurisprudence & Practice Committee. Having reviewed the recommendations and committee comments at its November 18, 2022 meeting, the Board voted unanimously to take no position on the workgroup's recommendations, but to authorize the submission of the full report and recommendations of the workgroup, as well as the recommendations of the two Bar committees to the Court for its review and consideration.

Thank you for the opportunity to share these recommendations on behalf of the workgroup. I hope that the Court will find them to be an informative addition to the work of the Rules of Evidence Review Committee.

Sincerely,

Peter Cunningham
Executive Director

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

M E M O R A N D U M

To: State Bar of Michigan Board of Commissioners

From: Daniel D. Quick, Chair
MRE 702/703 Review Workgroup

Date: November 5, 2022

Re: Final Report

In 1999, the Michigan Supreme Court ("MSC") appointed the Advisory Committee on the Rules of Evidence in light of the pending 2000 amendments to the Federal Rules of Evidence ("FRE"). Ultimately, the MSC adopted various changes, including to the rules applicable to expert witness testimony: Michigan Rule of Evidence ("MRE") 702 (which addresses when expert testimony is permitted) and MRE 703 (which addresses the bases of opinion testimony by experts). Neither rule has been updated since then.

Effective January 1, 2004, the MSC amended MRE 702, choosing to model it after the then-current version of FRE 702.[1] FRE 702 was amended in 2000 as a response to the U.S. Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals*, which affirmed the trial judge's role as gatekeeper of expert testimony.[2] FRE 702 was amended again in 2011, but the Michigan rule was not updated. FRE 702 is (most likely) due for further amendment effective in 2023.

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[1] See, e.g., *Gilbert v DaimlerChrysler*, 470 Mich 749, 781; 685 NW2d 391 (2004) ("MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability.").
[2] 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

MRE 703 was last amended effective September 1, 2003. FRE 703 allows experts to base opinions on facts or data without admission of same in to evidence. MRE 703, on the other hand, mandates all underlying facts or data particular to the case to "be in evidence." Michigan is one of only two states with this sort of provision.

In December 2021, the Michigan Supreme Court appointed a new "Michigan Rules of Evidence Review Committee" to evaluate the "restyling" of the Federal Rules since 2011 and to review the Michigan Rules "for potential amendments similar to those adopted" for the Federal Rules.[3] The Chair of that Committee, Timothy Baughman, has confirmed that the Committee's work is limited to stylistic edits; the Committee is not evaluating the substantive law inherent in the Rules. He further confirmed that his Committee will not take in to consideration, as it pertains to MRE 702, the additional potential changes to FRE 702 set for 2023.

This Workgroup was charged with examining whether we should recommend any changes to MRE 702 or 703. During the course of our work, the Workgroup also reviewed whether FRE 704(b) ought to be adopted in Michigan.

The Workgroup consisted of the following members:

- Daniel D. Quick (chair) (Dickinson Wright PLLC; Troy)
- Hon. Chris Yates (Court of Appeals)
- Susan McKeever (Bush Seyferth PLLC; Troy)
- Beth A. Wittmann (Kitch; Detroit)
- Steven Stawski (Stawski Law, PLC; Traverse City)

[3] Michigan Supreme Court, Administrative Order No. 2021-8 (Adopted December 22, 2021) ("In an effort to remain as consistent as possible with the federal rules, the Michigan Supreme Court is forming a committee to review the Michigan Rules of Evidence for potential amendments similar to those adopted for the Federal Rules of Evidence.").

- Richard Friedman (Univ. of Michigan Law School)
- Eli Savit (Prosecutor, Washtenaw County)

The Workgroup convened remotely multiple times between July and September 2022 and reviewed substantial materials as to the origin of the applicable rules (including materials from 1999-2003 from the Advisory Committee on the Rules of Evidence), academic literature, and materials concerning the evolution of the Federal Rules.

After due consideration, the Workgroup proposes that the Board of Commissioners advance this report to the Michigan Supreme Court for consideration. Since the Michigan Rules of Evidence Review Committee will also be suggesting various proposed changes to the MRE in a final report to be submitted in short order, it is important that the MSC receive this report timely so that it may holistically consider any proposed changes to the Rules.

The Workgroup proposes only one change: an updating of MRE 702 to capture the changes made to FRE 702 over the last 20 years. Two options are presented for consideration, as discussed below and included in Attachment A. The Workgroup, after review, did not have a consensus as to whether MRE 703 should be revised; some description of that deliberation is provided below. Lastly, the Workgroup rejected the adoption of FRE 704(b) in to MRE 704 for reasons discussed below.

Beyond these specific recommendations, the Workgroup also urges the MSC to reconvene a standing committee regarding the MRE. A body like this existed for some number of years but was disbanded. While (as this Report demonstrates) the State Bar of Michigan is an excellent conduit for recommendations concerning the MRE, a standing committee has its unique benefits, including the development of rule-making expertise, the imprimatur of the MSC, the ability to

receive input directly from the MSC (and ability to work with other arms of the judiciary, such as the MJI), and greater ease of inclusion of both civil and criminal practitioners.

Should the Court elect to make any substantive changes to MRE 702 and 703, the Workgroup further recommends coordinating with the State Bar of Michigan to aid in education of the bench and bar concerning the rule, the changes, and the underlying policy considerations.

MRE 702

A. FRE 702 Amendments

1. The 2011 amendments

In 2011, the federal Advisory Committee on Evidence Rules (the "Federal Rules Committee") approved stylistic updates to FRE 101–1103.[4] As part of this update, the Committee reworded FRE 702 and enumerated the factors for consideration more clearly. The Committee's goal was to "make [the rules] more easily understood and to make style and terminology consistent throughout the rules."[5] The Committee made clear: "[t]here is no intent to change any result in any ruling on evidence admissibility."[6]

2. The 2023 amendments

[4] May 6, 2009 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 2, https://www.uscourts.gov/Advisory_Committee_Rules Evidence May 2009. The update was approved in December 2008. December 1, 2008 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 1, https://www.uscourts.gov/Advisory Committee Rules Evidence December 2008.
[5] FRE 702 advisory committee's note to 2011 amendment.
[6] *Id.* See also Michigan Supreme Court, Administrative Order No. 2021-8 (Adopted December 22, 2021) ("[The federal] 'restyling' only included stylistic changes such as reformatting, reducing the use of inconsistent terms, minimizing the use of ambiguous words, and removing outdated or redundant words and concepts; no substantive changes were made.").

The Committee on Rules of Practice and Procedure unanimously approved changes to FRE 702 on June 7, 2022.[7] The Judicial Conference of the United States adopted the proposal with a small language change and recommended adoption to the Supreme Court via October 18, 2022 memorandum.[8] Assuming the rule is adopted by the Supreme Court (and unless Congress then intervenes), the amendments will take effect on December 1, 2023. If adopted, FRE 702 will read as follows (presented here with redlining against the rule's current text):

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

a) Statement of the burden of proof

[7] https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (pp. 870-873, 891-1009). See also *The Phillip D Reed Lecture Series,* 88 Fordham L Rev 1216 (2020) (transcribing comments from members of the federal advisory committee in October 2019 with regard to the "best practices for managing *Daubert* questions" and addressing proposed and potential rule changes).

[8] https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf

The proposed amendment will incorporate the standard of decision-making directly into FRE 702.[9] This requires the proponent of an expert witness to demonstrate by a preponderance of evidence that the enumerated factors are satisfied.

This amendment reflects an attempt to correct judicial missteps, rather than to substantively change the law. Judges must make Rule 702 determinations under FRE 104(a).[10] FRE 104(a), in turn, mandates the court to actively decide whether the evidence is admissible. While the "preponderance" standard is the appropriate standard for those decisions, this fact is not readily apparent. Instead courts must search case law to find it.[11]

The Committee also felt that FRE 702 has been widely misinterpreted by treating factors (b) and (d) as questions of weight, rather than admissibility.[12] Questions of weight are decided by the jury, whereas questions of admissibility are questions for the court. This leaves jurors to weigh

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[9] Committee on Rules of Practice and Procedure, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence 308 (August 2021).

[10] FRE 104(a) states: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."

[11] December 1, 2020 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules December 2020 ("Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard … requiring a resort to case law.").

[12] See Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM & Mary L Rev 1 (2015); May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 818, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021; Advisory Comm. on Rules of Evidence, Agenda of May 3, 2019, at 62 (2019), https://www.uscourts.gov/Evidence Agenda Book May 2019 [https://perma.cc/99JE-PUTQ] ("The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence."). See also Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702,* 57 William & Mary L Rev 1 (2015).

up flawed testimony that should not have reached the courtroom, and leaves practitioners with cross-examination as their only recourse. Nonetheless, many courts misinterpret the requirement so greatly as to presume that expert testimony is admissible.[13] In fact, a study on 2020 federal court decisions found that 13% of judicial decisions on expert testimony incorrectly noted a presumption of admissibility under FRE 702.[14] The Committee believes that embedding the standard directly into the rule will help judges take notice, and follow through, on actively making Rule 702 determinations.[15]

The advisory committee notes to this amendment provide further guidance. They explain which types of decisions go to weight, and reiterate the types of decisions that require a Rule 702 admissibility determination.[16] The amendment intends to make compliance with Rule 702 difficult to ignore.[17]

The goals of the "preponderance standard" amendment to FRE 702 are to correct judicial misapplications and clarify how these decisions should be made. Several criticisms and alternative suggestions for achieving those goals were considered. For example, some commenters are

[13] May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 823, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021 .
[14] Jackson et al., Lawyers For Civil Justice, *Federal Rule Of Evidence 702: A One-Year Review And Study Of Decisions In 2020*, pp. 3-4 (2021).
[15] FRE 702 advisory committee's note to 2023 amendment.
[16] *Id.*
[17] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 41, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

skeptical that this amendment will change judicial behavior. Courts have ignored the plain rule on a wide scale, and some fear an amendment will not affect judicial behavior in the manner hoped.[18]

Further, the Federal Rules Committee was concerned that inserting the "preponderance" standard into this rule and not others—even though it applies to most evidentiary determinations—might "raise negative inferences" about the other rules.[19] Despite that concern, the pervasive disregard of the applicable standard warranted its explicit mention in the text of the rule.[20]

The Federal Rules Committee also considered, and rejected, three alternatives to this amendment:

- Amending only sub-section (d) and appending a committee note to communicate the preponderance standard instead of adding the language.[21]
- Educating the judiciary by way of a practice manual or otherwise. It was suggested that this could be effective in soliciting adherence to the rule. Ultimately, the Committee decided against that avenue due to questions about its authority to author practical guidance outside of the Rules.[22]

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[18] Nov. 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[19] December 1, 2020 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules December 2020. Ultimately, the Committee felt that including the standard would be a "substantial improvement." May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021.

[20] After the amendments were approved, the William and Mary Law Review published an article critiquing the Federal Rules Advisory Committee's solutions as being only part of the answer. Imwinkelried, *(Partial) Clarity: Eliminating the Confusion about the Regulation of the "Fact"ual Bases for Expert Testimony under the Federal Rules of Evidence*, 63 WM & Mary L Rev 719 (2022).

[21] Minutes of the Meeting on October 19, 2018, in November 15, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 4, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2018.

[22] Minutes of the Meeting on April 26-27, 2018, in May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 8, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

- Amending FRE 702 to refer directly to FRE 104(a), rather than stating the standard. The Committee concluded that explicitly stating the standard would be more effective.[23]

b) The Subsection (d) change

A recent national critique of conventional forensic evidence techniques by two leading scientific advisory groups spurred the initial discussion of a FRE 702 amendment.[24] The bodies criticized courts for failing to exclude questionable forensic evidence testimony[25] and failing to limit expert testimony that overstates the reliability of forensic techniques such as ballistics and handwriting analysis.[26] For example, DNA analysis in the 1990s exonerated many inmates who had been falsely convicted, often due to faulty forensic evidence allowed into trials.[27] Other national studies found similarly disturbing results: frequent use of forensic evidence "without any meaningful scientific validation, determination or error rates, or reliability testing."[28] Many forensic techniques have a long history at trial, and courts are hesitant to disrupt historically-permitted types of expert testimony. However, based on these and other reports, many believe that FRE 702 has failed to accomplish its goal of ensuring that expert testimony is reliable.[29] A study by the President's Council of Advisors on Science and Technology ("PCAST") recommended

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[23] November 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[24] The National Academy of Sciences ("NAS"), and the President's Council of Advisors on Science and Technology ("PCAST"). See Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 Fordham L Rev 1661, 1676 (2018).

[25] *Id.* at 1662.

[26] November 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[27] Lander, *supra* note 23, at 1662.

[28] *Id.* at 1663, citing Nat'l Research Council, *Strengthening Forensic Science in The United States: A Path Forward*, pp. 107-108 (2008).

[29] Lander, *supra* note 23, at 1676.

clarifying the meaning of "reliable methods" in FRE 702 as the most effective way to curb this failure.[30]

The Federal Rules Committee considered several proposals, and ultimately determined that amending sub-section (d) as approved will best accomplish two key goals. While sub-section (d) currently reads "the expert has reliably applied" the principles and methods, it will read "the expert's opinion reflects a reliable application of" the principles and methods. This amendment aims to refocus the court on the expert's opinion itself, ensuring that the opinion or conclusion is also a reliable application of the principles and methods.[31] Relatedly, it will empower the court to assert its gatekeeping authority and not shy away from excluding illogical or overstated opinions even when based on reliable principles and methods.

While the above amendment was ultimately approved, the following suggestions were considered as alternatives.

- The PCAST report suggested a clarifying advisory note or judicial education.[32] However, new advisory notes are issued only when rules themselves change. Similarly, education efforts via a best practices manual authored by the Advisory Committee might be challenged as being outside of the Federal Rules Committee's rulemaking authority.[33]

- The Federal Rules Committee considered adding a new subsection (e) to Rule 702: **"**if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results."[34] The Committee rejected

[30] *Id.* at 1677.
[31] Nov. 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.
[32] Lander, *supra* note 23, at 1667.
[33] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 32, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.
[34] November 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.

this amendment due to concern about unintended consequences for testimony on subjects other than forensic evidence. Further, subsection (d) already addresses the overstatement situation: "[i]f an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d)."[35]

- The Committee also considered drafting a freestanding rule that prohibits overstatements, but determined it would overlap problematically with Rule 702.[36]

- Further, prescribing more detailed guidance on forensic science via amendments to the committee notes or a best practices manual both suffer a key problem: they would need extensive, laborious input from the scientific community, and standards are controversial.[37]

- Another option was to distinguish separate rules for scientific and other types of expert opinion testimony, but the Committee decided this option may be "less viable."[38]

Many of the rejected suggestions risked adding unintended confusion. Instead, the Federal Rules Committee ultimately decided on a conservative change, emphasizing that the trial court must also find that the expert's opinion itself correctly applies the underlying principles and methods. This amendment has received only sparse criticism.

B. MRE 702[39]

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[35] *Id.* at 5.

[36] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 35, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

[37] November 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 4, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.

[38] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 37, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

[39] Two Michigan statutes also relate to expert testimony: MCL 600.2169 and MCL 600.2955. MCL 600.2169 further restricts expert testimony on appropriate standard of practice or care in medical malpractice actions. MCL 600.2955 lists factors the court must consider before admitting expert testimony in particular tort actions. The MSC has found these requirements to supplement, rather than conflict with, the Michigan Rules of Evidence. See, e.g., *Clerc v Chippewa Cnty War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007) (finding that the trial court should have ensured the expert was qualified under all three guidelines in order to fulfill its gatekeeping role).

1. MRE 702 in 2004

In 1999, the MSC appointed the Advisory Committee on the Rules of Evidence in light of the 2000 amendments to the Federal Rules of Evidence. The Committee's August 2000 report to the MSC recommended no change to the existing rule.[40] The Committee noted that the then-existing version of MRE 702 already recognized the trial court's gatekeeping function emphasized in *Daubert* (by virtue of the language "If the court determines that recognized…."). The Committee's minutes suggest that there was some debate as to whether *Daubert* really changed Michigan law under the so-called *Davis-Frye* "general acceptance" test, *People v Davis,* 343 Mich 348; 72 NW2d 649 (1955), as applied by Michigan courts, and this uncertainty can be seen in the Committee report's non-committal approach towards revising MRE 702.

Notwithstanding the Committee's suggestion, the MSC did in fact propose amendment of MRE 702 to conform to the 2000 version of FRE 702. Judge Dan Ryan wrote a law review article opposing the amendment, arguing that the MSC had not clearly adopted *Daubert* and that existing Michigan law provided an ample framework.[41] This objection was largely done away in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), wherein the Court stressed the gatekeeping role of the trial courts and noted that MRE 702 was designed to incorporate *Daubert.* See also *Elher v Misra*, 499 Mich 11, 878 NW2d 790 (2016).

2. Should Michigan adopt the changes?

The proposed 2023 changes would apply to the Michigan Rules in similar ways to the federal rule – they would state existing law, not change it.

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[40] August 2000 Report to the Michigan Supreme Court of the Advisory Committee on the Rules of Evidence, pp. 30-33.

[41] Ryan, *Michigan Rule of Evidence 702: Amend or Leave it to Schanz,* 19 TM Cooley L Rev 1 (2002).

As to the burden of proof, MRE 104(a) is essentially the same as FRE 104(a).[42] Case law similarly accepts the preponderance of evidence standard as that governing MRE 104(a).[43] As to the subsection (d) change, that too is already Michigan law, albeit (as noted below) sometimes misapplied.[44]

To the extent one purpose of the rule amendment is to prod courts to remember their gatekeeping functions, the salutary function of the rule is unobjectionable.

One might question whether Michigan courts have "drifted" from the intent of *Daubert* and their gatekeeping role as has been observed in the federal courts. A full review of all Michigan opinions since *Daubert* regarding the admission of expert witnesses is beyond the scope of this Report[45], and it may be that different elements of the bar (*e.g.,* plaintiff and defense medical malpractice attorneys) have different anecdotal perceptions of the issue. Several members of the Workgroup observed that busy trial courts often allow experts to testify without an exacting

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[42] MRE 104(a) initially mirrored FRE 104(a), but FRE 104(a) was amended in 2011 as part of the stylistic overhaul, and Michigan's remains the same as the prior version.

[43] *People v Hendrickson*, 459 Mich 229, 241–242, 586 NW2d 906 (BOYLE J., concurring) ("Under MRE 104(a), preliminary factual questions of admissibility are determined by the trial court utilizing a preponderance-of-the-evidence standard."), citing *Bourjaily v United States,* 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144 (1987); *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 790; 685 NW2d 391, 413 (2004).

[44] E.g., *Ketterman v City of Detroit*, unpublished opinion of the Court of Appeals, issued May 16, 2006 (Docket No. 258323), 2006 WL 1328846, p *5 ("Our Supreme Court in *Gilbert* spoke of "analytical gap[s]" between data and opinions given by experts, warning that insufficient inquiry into an expert's qualification to testify based on reliable application of reliable methods to the specific facts of a case might let in testimony that could "serve as a Trojan horse that facilitates the surreptitious advance of ... spurious, unreliable opinions." *Gilbert, supra,* p. 783. The trial court must vigilantly play the gatekeeper role to prevent just this from happening…").

[45] A study at the federal level by one public commentator on FRE 703 can be reviewed at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_public_comment_on_rule_702_amendment_sept_1_2021.pdf .

Daubert analysis (and often without a hearing as sometimes occurs in federal court[46]) and courts will often justify their decisions by claiming that the challenge goes to "weight" rather than admissibility and thus for the jury to sort out. In the appellate courts, there are cases that arguably get the Rule wrong.[47] But whether this evidences a broader trend or problem is unclear; there does not appear to have been any recent law review articles or academic study of these issues in Michigan courts.[48] On the other hand, there is no reason to believe the same problems affecting federal courts would not also affect state courts; arguably, given less resources, busier dockets and many cases involving lesser financial stakes, one might hypothesize that the problem would be worse in state courts.

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[46] This seems to occur somewhat more frequently in the business courts; see, e.g., https://www.courts.michigan.gov/4a47f4/siteassets/business-court-opinions/c20-2017-4997-cb-(april-6,-2020)2-of-2.pdf (which also contains a particularly thorough analysis of the *Daubert* standard).

[47] A particularly interesting opinion is *B&L Dev LLC v City of Norton Shores*, unpublished Court of Appeals opinion Case No. 311183, 2014 WL 3973296 (2014), where a party questioned the trial court's admission of an expert opinion regarding valuation by challenging the methods (or lack thereof) of the expert. Appellant's key argument was that, while the expert was qualified and relied upon acceptable facts, his method of applying those facts was "junk" and could not satisfy the rule. The trial court and the Court of Appeals both rejected the challenge, but without taking on its gatekeeping function as to methodology, essentially finding that since he was qualified as an expert, everything else went to weight. In so doing, the Court of Appeals cited to and misapplied *Surman v Surman*, 277 Mich App 287; 745 NW2d 802 (2007), and *Lenawee Co v Wagley*, 301 Mich App 134; 836 NW2d 193 (2013). *Surman* dealt only with the qualifications of the expert, yet the Court of Appeals cited it to apply to the methodology argument which was not at issue in *Surman*. *Wagley* contained no substantive analysis and simply cited to *Surman*. There are also examples of the Court of Appeals reversing a trial court which neglected its gatekeeping obligation where a party raised issues as to both qualifications as an expert and the methodology but the trial court only addressed the former. *MacKenzie v Koziarski*, unpublished Court of Appeals opinion, Case No. 289234, 2011 WL 1004174 (2011).

[48] There are instances of elements of the MSC questioning whether some particular area needs to be re-examined under *Daubert* instead of continuing to be accepted as reliable based upon precedent. See, e.g., *People v Mejia*, 505 Mich 963; 937 NW2d 121, 122 (2020) (MCCORMACK, CJ, dissenting) (addressing the court's continued acceptance of the validity and reliability of child sexual abuse accommodation syndrome in light of questions raised in other states).

The lengthy advisory committee note on FRE 702 (proposed 2023 amendments) indicates a dual purpose: both to signal to judges that they should take note of this rule and also to guide those decisions. Even if the Michigan judiciary does not require the same extent of flag-waving, the guiding role of the amendment, through a comment to the revised rule, may nonetheless be useful to judges on which decisions should be addressed by weight and which are an issue of admissibility. Additionally, given the MSC's decision to 'catch up' the MREs based upon the FREs stylistically, it likely makes sense to incorporate the 2023 amendments in to MRE 702.

Another consideration is the opportunity for judicial education presented by the newly implemented Mandatory Continuing Judicial Education Program. While the federal bar does not require judicial officers to undertake continued education, Michigan will begin a mandatory continuing judicial education program, effective 2024.[49] This may present additional opportunities for judicial education that are absent at the federal level.[50]

3. Proposed text

If a change is to be made, what should it be? Of course, one solution is simply adopt FRE 702. Another option would be to keep the format and structure of the existing rule, but add language to reflect the 2023 FRE changes. The Workgroup was relatively agnostic on this issue. While adopting the language of FRE 702 has the potential benefit of directly mirroring the federal rule and thus suggesting the relevance of federal cases applying the rule, the intent to capture the 2023 FRE change can also be conveyed in a comment. The Workgroup also believed there was something to be said for committing the least amount of violence necessary to a long-standing rule of evidence lest unintended consequences follow and to ease digestion amongst bench and bar.

[49] See Michigan Supreme Court, Administrative Order No. 2021-7 (Adopted October 20, 2021).
[50] Nonetheless, both the state and federal judiciary have long had other educational institutes, e.g., Michigan Judicial Institute; Federal Judicial Center.

Attached as Attachment A is a clean and redline proposal for a revised MRE 702 which preserves the existing structure and language as much as possible.

MRE 703

Rule 703 prescribes the facts or data on which experts may base their opinion testimony. Under FRE 703, the bases need not be admissible as long as experts in the particular field would "reasonably rely" on them. Under MRE 703, the bases must be in evidence.

While the Workgroup does not recommend any changes to MRE 703, the following background and commentary is provided so as to share with the Court the bases for the Committee's recommendation.

C. FRE 703

The Federal Rules Committee originally drafted FRE 703 as a liberal standard, prioritizing efficiency and practicality.[51] The Committee reasoned that if other experts rely on particular information in their day-to-day practice, it should be reliable enough for in-court testimony.[52] In its pre-2000 form, FRE 703 did not clarify whether the relied-upon documents were themselves viewable by the jury.[53] This controversy led to a conflict between courts, with some allowing all underlying facts and data to be admitted, in addition to the opinion itself.[54] In 2000, FRE 703 was

[51] 29 Wright & Miller, Federal Practice and Procedure §6267 (2d ed.).
[52] FRE 703 advisory committee's note to 1972 proposed rules; Levine, *Locking the Backdoor: Revised MRE 703 and Its Realized Impact on Bases of Expert Testimony*, 87 U Det Mercy L Rev 505, 522 (2010); McCormick, *Evidence*, p. 38 (6th ed 1992) ("The rationale for this view is that an expert in a science is competent to judge the reliability of statements made to her by other investigators or technicians.").
[53] Benner & Carlson, *Should Michigan Rule of Evidence 703 be Revised?*, 70 Mich B J 572 (June 1991).
[54] See, e.g., Federal Trial Evidence, p. 129 (James Publishing Co., 1992 ed) (urging practitioners to "consider whether by giving [inadmissible evidence] to your expert you will be able to have it presented to the jury".).

amended to exclude inadmissible facts or data used as the basis for expert testimony unless the probative value substantially outweighs its prejudicial effect.[55]

Courts and commentators have addressed two main issues under FRE 703. The first is the perception that FRE 703 is a giant hearsay loophole in derogation of the rest of the rules of evidence and common law. The second is unique to criminal law and involves the Confrontation Clause. A leading law review article after the 2000 revision suggested that the balance struck by the revised FRE 703 largely worked as to the hearsay concerns but that the rule sometimes raised concerns in the criminal context.[56] This debate has also played out in state courts following the federal rule formulation.[57]

D. MRE 703

1. Adoption in 2003

Prior to 2003, MRE 703 (1978) departed from the then-existent Federal Rule, but more in style than substance. Whereas FRE 703 expressly sanctioned the bases of expert testimony not being in evidence, MRE 703 took a different tactic and gave the trial court discretion to require that such bases be in evidence. While this garnered some attention,[58] by the time it was addressed in 2000, at least some members of the Committee felt it was a relatively inconsequential difference (if not an improvement over the federal rule).

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[55] FRE 703 advisory committee's note to 2000 amendment ("Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.").

[56] Volek, *Federal Rule of Evidence 703: The Backdoor and the Confrontation Clause, Ten Years Later*, 80 Fordham L Rev 959, 996-997 (2011).

[57] See, e.g., Hamilton, *The End of Smuggling Hearsay: How People v Sanchez Redefined the Scope of Expert Basis Testimony in California and Beyond*, 21 Chap L Rev 509 (2018).

[58] See Benner & Carlson, *supra* note 52.

The Advisory Committee on the Rules of Evidence generated a report to the MSC in August 2000. In a rare split, the majority of the committee favored a version of the rule requiring the bases of the expert be in evidence, a departure from the then-existing version of the rule.[59] The reason provided for this formulation was a concern that the then-existing Michigan rule, let alone the Federal rule, provided an untrammeled back door for the admission of what would otherwise be inadmissible hearsay.

> The contradictions presented by the federal amendment exist, we submit, because it does not reach the fundamental flaw that inheres in both the federal and Michigan versions of Rule 703, i.e., the grant of authority to decide disputed issues and the substantive rights of parties on the basis of facts that are never proved. We believe that it is time to frankly acknowledge that the well-intentioned innovation of Rule 703 has proved to be unworkable and that we should return to the former practice, which required nothing more than that litigants who make assertions in court be required to prove them.[60]

Two of the eleven members dissented. Judge Tahvonen and Professor John Reed opined in favor of the federal rule (or at least the existing Michigan rule), noting that "if it be thought that Michigan's trial judges are not prepared to exercise their discretion to prevent abuse, there may be a role for the Michigan Judicial Institute."[61]

After submission of the report and an opportunity for public comment, various elements of the bench and bar opposed the proposed amendment. Judge William Giovan, who chaired the Committee and favored the majority opinion,[62] filed lengthy written comments dated January 28, 2003 to the MSC, strongly advocating the adoption of the proposed rule and attempting to rebut

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[59] See August 2000 Report of the Advisory Committee on the Rules of Evidence, p. 7.
[60] *Id.* at 12.
[61] *Id.* at 15.
[62] Judge Giovan had, even prior to the appointment of the Committee, argued for this position to the MSC, as noted in the Committee minutes.

the dissenting opinions expressed at the public hearing and in written comments. The MSC adopted his view.

2. Other States

Like FRE 703, 46 states allow expert opinion testimony even where the bases of the opinion are not admissible.[63] Of these, 9 states have an identical rule to FRE 703. Nineteen have not yet adopted the probative/prejudicial value balancing test reflecting the 2003 FRE amendments. Other states have mildly different wording, but in each of the 46, an expert may base testimony on out-of-court statements as long as there is reasonable reliance.

Only four states, then, diverge significantly from FRE 703. Massachusetts Rule of Evidence 703 requires that facts or data used as the basis of an expert opinion or inference be "independently admissible in evidence and [be] a permissible basis for an expert to consider in formulating an opinion." New York does not have codified rules of evidence, but current law allows reliance on out-of-court material only where it is reasonably relied upon, there is other evidence establishing the material's reliability, and it is not exclusively relied upon for the expert's opinion.[64]

Michigan and Ohio are the other two minority jurisdictions. Both require external bases to be in evidence.[65]

3. MRE 703: pros and cons

[63] See table attached as Attachment B. The exceptions are Massachusetts, Michigan, New York, and Ohio.

[64] However, as of 2022, the courts have created a guide which compiles statutes and case law making up evidentiary practices. See *Guide to New York Evidence*, Chapter 7.01(5)(b) (accessed June 7, 2022) https://nycourts.gov/Judges Opinion (defining when an expert may rely on out-of-court material).

[65] MRE 703; Ohio R Evid 703.

Since the adoption of MRE 703, it has not been subject to study or commentary as to whether the reasons justifying the departure from FRE 703 proved out in practice. The one exception is a 2010 law review comment[66] which summarized the history of the federal and state rules and analyzed a handful of cases citing the rule.

Within the courts, the different formulations have been noted on occasion. In *People v Inge*, unpublished opinion of the Court of Appeals, issued October 23, 2018 (Docket No. 337346), 2018 WL 5276413, the Court of Appeals noted that the trial court incorrectly allowed an expert to opine based upon another report which was not in evidence, noting that a different result might result under FRE 703. And there is not much discussion of the Confrontation Clause issue in Michigan since a strict reading of MRE 703 tends to also support the Confrontation Clause argument.[67] There are, however, examples of the Court of Appeals arguably wrongly relying upon the pre-2003 version of the rule in allowing inadmissible hearsay.[68]

What does not exist is a comprehensive review of the issues. For example, the MRE 703 formulation was thought to increase costs and trial time, especially regarding routine testimony. The classic example is that of a physician testifying to a simple diagnosis: all underlying scans and tests that the physician used for his diagnosis would first need to be admitted, thus necessarily

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[66] Levine, *supra* note 51.

[67] *Id.* See also *People v Fackelman*, 489 Mich 515, 535; 802 NW2d 552, 562 (2011).

[68] In *People v Bundy*, unpublished opinion of the Court of Appeals, issued February 1, 2022 (Docket No. 349072), 2022 WL 303327, p *13, the court allowed an expert to rely upon inadmissible hearsay, stating, "It is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." (quoting *People v Lonsby*, 268 Mich App 375, 382-383; 707 NW2d 610 (2005)). *Lonsby*, however, cited a 1992 opinion for that proposition, which relied upon the pre-2003 version of MRE 703.

increasing costs and court time.[69] Additionally, it was also hoped that the conservative approach would "curtail erroneous use of experts at trial," ultimately offsetting litigation costs.[70]

Nor has there been systematic study of the main issue driving the MRE 703 formulation – the concern that the federal version regularly allowed in hearsay. Given that the federal courts and those of 46 states (to varying degrees) follow the federal formulation, one might think that if an avalanche of offensive hearsay was being permitted it would garner some attention. Yet, the Workgroup found no recent article analyzing the issue nor detailed lament by a federal court. Moreover, the Workgroup can find no record of the issue coming before the Rules Advisory Committee; that body regularly attracts proposed rule changes where issues are perceived to exist.

4. Should a change be made?

The Workgroup was evenly split on this issue but tilted toward no change. Most agreed that existing MRE 703 can cause unnecessary burdening of the trial process and trial evidence with "bases" of the expert's opinion which will never, in trial, be reviewed or discussed. Moreover, the rule is a trap for the unwary, who may be more familiar with the FRE version. On the other hand, some Workgroup members expressed concern about hearsay issues should the FRE version be adopted, and the FRE version would also unsettle the Confrontational Clause jurisprudence in Michigan. Moreover, while the strict wording of MRE 703 provides opportunities to make the trial process more burdensome, there was no overwhelming sense that this is such a pervasive problem without other potential solutions such that a rule change was justified. The Workgroup also considered the pre-2003 version of MRE 703 (which granted discretion to the trial court) but

[69] See, e.g., Levine, *supra* note 51, at 522–523 (discussing concerns that experts will have to consult more closely with attorneys to ensure that the underlying basis of each intended statement is in evidence).
[70] *Id.* at 523.

some Workgroup members were concerned about judges letting in too much hearsay and that appellate review might not be sufficient to address abuses.

FRE 704(b)

The Committee briefly considered whether this rule should be adopted in Michigan. In brief, this rule was added in the wake of the John Hinckley trial by some who thought his insanity defense to be spurious. Since its adoption it has caused some confusion in the courts and has not been adopted in the vast majority of states. The Workgroup saw no good reason to adopt the rule.

ATTACHMENT A

Potential revision of MRE 702

EXISTING MRE 702:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

2023 REVISION TO FRE 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent has demonstrated by a preponderance of the evidence that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

POTENTIAL REVISION TO MRE 702

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify ~~thereto~~ in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the ~~witness~~ expert's opinion reflects a reliable application of ~~has applied~~ the principles and methods ~~reliably~~ to the facts of the case. The proponent bears the burden of demonstrating to the court that it is more likely than not that the expert opinion testimony satisfies this rule.

Attachment B

Cross-jurisdictional Survey on FRE 703 and its Counterparts

Current as of June 1, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Massachusetts	Mass R Evid 703 Mass Guide to Evidence Section 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.
Michigan	MRE 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.
Ohio	Ohio R Evid 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.
New York	NY CPLR 4515 Guide to NY Evid 7.01(5)[2]	Minority	If relying on out-of-court material, must provide evidence of reliability	CPLR 4515 (b) An expert also may rely on out-of-court material if: (i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material; or the out-of-court material comes from a witness in the proceeding who was subject to full cross-examination by the opposing party; and (ii) it is a link in the chain of data and accordingly not exclusively relied upon for the expert's opinion.
Colorado	Colo R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Delaware	Del R Evid 703	Majority	Different in form only	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. Upon objection, if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Florida	Fla Stat Ann § 90.704	Majority	Different in form only	The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Georgia	Ga Code Ann § 24-7-703	Majority	Different in form only	The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Kansas	Kan Stat Ann § 60-458	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of such facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs any prejudicial effect.
Maryland	Md R 5-703	Majority	Different in form only	(a) Admissibility of Opinion. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Vermont	Vt R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Virginia	Va Code Ann § 8.01-401.1	Majority	Different in form only	In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
Wisconsin	Wis Stat Ann § 907.03	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.
North Carolina	NC R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Alaska	Alas R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.
Oklahoma	Okla Stat tit xii, § 2703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Tennessee	Tenn R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Idaho	Idaho R Evid 703	Majority	Different in form only	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Hawaii	Hawaii Rev Stat § 626-1, Rule 703	Majority	Different in form only; adds trustworthiness clause	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Kentucky	Ky R Evid 703	Majority	Different in form only; adds trustworthiness clause	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
Arizona	Ariz R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
New Hampshire	NH R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
South Dakota	SD Codified Laws § 19-19-703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Utah	Utah R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
West Virginia	W Va R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Wyoming	Wy R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
New Mexico	NM R Evid 11-703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
North Dakota	ND R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Missouri	Mo Rev Stat § 490.065.2(2)	Majority	Identical; Only applies in civil rules here	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;
Arkansas	Ark R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
California	Cal Evid Code § 801	Majority	Omits probative value test	If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.
Connecticut	Conn Code of Evid § 7-4(b)	Majority	Omits probative value test	(b) Bases of Opinion Testimony by Experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.
Illinois	Ill R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Indiana	Ind R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.
Iowa	Iowa R Evid 5.703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Louisiana	La Code Evid Ann art. 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Maine	Me R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or has personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, the facts or data need not be admissible for the opinion to be admitted.
Mississippi	Miss R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.
Montana	Mont R Evid 703	Majority	Omits probative value test	The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nebraska	Neb Rev Stat § 27-703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nevada	Nev Rev Stat 50.285	Majority	Omits probative value test	1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
New Jersey	NJ R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Oregon	Or Rev Stat § 40.415 Or R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Pennsylvania	Pa R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
South Carolina	SC R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence
Texas	Tex R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Washington	Wash R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Alabama	Ala R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect
Minnesota	Minn R Evid 703	Majority	Similar rule	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.
Rhode Island	RI R Evid 703	Majority	Underlying facts are admissible if reasonably relied upon	An expert's opinion may be based on a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence. If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source.

[1] Rule categorized as "Majority" if it allows expert testimony where the bases of opinion are not in evidence

[2] New York does not have a comprehensive code of evidence. As of 2022, the *Guide to NY Evidence* compiles statutory and case law on evidentiary

Public Policy Position
MRE 702/703 Workgroup

The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Civil Procedure & Courts Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan did not adopt a position on this item and has authorized this Committee to submit its position.

The Civil Procedure & Courts Committee has a public policy decision-making body with 33 members. On November 5, 2022, the Committee adopted its position after a discussion and vote at a scheduled meeting. 22 members voted in favor of the Committee's position, 3 members voted against this position, 2 members abstained, 6 members did not vote due to absence.

Support Amendment of MRE 702 and MRE 703

Explanation

The Committee voted 22 in favor, 3 opposed, with 2 abstentions to support amending MRE 702 to align with the "2023 Revision to FRE 702," as presented on page 23 of the Final Report of the MRE 702/703 Review Workgroup.

The Committee voted 22 in favor, 3 opposed, with 2 abstentions to recommend that MRE 703 be amended to reinstate the language of MRE 703 that was in use prior to 2003.

Contact Person:

Lori J. Frank lori@markofflaw.com

Public Policy Position
MRE 702/703 Workgroup

The Criminal Jurisprudence & Practice Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Criminal Jurisprudence & Practice Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan did not adopt a position on this item and has authorized this Committee to submit its position.

The Criminal Jurisprudence & Practice Committee has a public policy decision-making body with 27 members. On November 4, 2022, the Committee adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Committee's position, 0 members voted against this position, 3 members abstained, 8 members did not vote due to absence.

Support Workgroup Recommendation

Explanation:
The Committee voted 16 in favor with 3 abstentions to support the proposed amendments to MRE 702, as set forth as "Potential Revision to MRE 702" on page 23 of the Final Report of the MRE 702/703 Review Workgroup.

Contact Persons:
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Order

Michigan Supreme Court
Lansing, Michigan

October 26, 2022

ADM File No. 2021-50

Proposed Addition of Rule 2.421 of the Michigan Court Rules

Bridget M. McCormack,
Chief Justice

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

On order of the Court, this is to advise that the Court is considering an addition of Rule 2.421 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.

[NEW] Rule 2.421 Notice of Bankruptcy Proceedings

(A) Applicability. This rule applies to all pending state court actions in which a party is either:

(1) a named debtor in a bankruptcy proceeding; or

(2) an officer, director, or majority equity holder of a named debtor in a bankruptcy proceeding.

(B) Party Subject to Bankruptcy Proceeding. Any party in a pending state court action who is or becomes subject to a bankruptcy proceeding as provided in subrule (A) must file notice of the bankruptcy proceeding in the pending state court action no later than 7 days after becoming subject to bankruptcy proceedings.

(C) Other Parties. If a party to a pending state court action learns of a bankruptcy proceeding described in subrule (A) and notice of the bankruptcy proceeding has not previously been filed and served, the party that learned of the bankruptcy proceeding may file notice of the bankruptcy proceeding in the pending state court action.

(D) Notice Contents. Notice of a bankruptcy proceeding filed under this rule must, at a minimum, include all of the following:

(1) name(s) of the party described in subrule (A) and his or her designation as the named debtor, officer, director, or major equity holder of a named debtor;

(2) the court name and case number of the bankruptcy proceeding; and, if available,

(3) the name, telephone number, physical address, and email address for the debtor's attorney in the bankruptcy proceeding.

(E) Service of Notice. Notice of a bankruptcy proceeding filed under this rule must be served on all parties to the pending state court action as provided in MCR 2.107.

(F) Effect of Notice. If a notice is filed under this rule, the court may, on the motion of a party or on its own initiative, order the administrative closure of the state court action or set the matter for a status conference to determine if the case is subject to an automatic stay. If the state court action has been administratively closed under this subrule or otherwise, it may be reopened if, on the motion of a party or on the court's own initiative, the court determines that the automatic bankruptcy stay has been lifted, removed, or otherwise no longer impairs adjudication.

Staff Comment (ADM File No. 2021-50): The proposed addition of MCR 2.421 would address notice of a bankruptcy proceeding that affects a pending state court action.

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 February 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-50. 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.

October 26, 2022

Clerk

Public Policy Position
ADM File No. 2021-50: Proposed Addition of Rule 2.421 of the Michigan Court Rules

Support

Explanation
The Committee voted unanimously (24) to support the proposed addition of Rule 2.421.

Position Vote:
Voted For position: 24
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

Contact Person:
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December 26, 2022

Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909
ADMcomment@courts.mi.gov

Re: Proposed Addition of MCR 2.421

Dear Chief Justice and Justices of the Michigan Supreme Court:

I write with respect to the proposed addition of MCR 2.421, offering three changes and the reasoning for these changes.

Paragraph (F)
Insufficiency

The bankruptcy automatic stay statute, 11 USC §362 (b), lists 29 types of cases and circumstances that are ***not*** stayed by the filing of bankruptcy. MCR 2.421 (F) sets forth only two options for how the state court must proceed when a notice of bankruptcy is filed, either:

– order the administrative closure of the case, or
– set the case for a status conference

There is no logical reason that the state court should have to set a case for a status conference which is clearly not subject to automatic stay under a subparagraph of 11 USC §362 (b). The court should be empowered to simply continue such a case without status conference.

Proposed Language

In light of the foregoing discussion, I propose the following change:

> (F) Effect of Notice. If a notice is filed under this rule, the court may, on the motion of a party or on its own initiative:
>
> a. Determine the action is subject to automatic stay and order the administrative closure of the state court action;
> b. Determine the action is not subject to automatic stay, pursuant to 11 USC §362 (b) or otherwise, and order that the state court action shall proceed; or,
> c. Set the action for a status conference to determine if it is subject to the automatic stay.
>
> If the state court action has been administratively closed under this subrule or otherwise, it may be reopened if, on the motion of a party or on the court's own initiative, the court

determines that the automatic stay has been lifted, removed, or otherwise no longer impairs adjudication.

Paragraph (E)
Insufficiency

On a practical level, the debtor – especially if unrepresented in the state court case – rarely serves the other parties/attorneys with a copy of the notice of bankruptcy after filing it with the state court, as required by MCR 2.107(A), and rarely files a proof of service with the state court as required by MCR 2.107(D). The filing of the notice of bankruptcy without serving the other parties leaves those other parties unaware of the bankruptcy and potentially proceeding with the state court case, until another event (in the state court case, the bankruptcy case, or otherwise) makes them aware of the bankruptcy. This will cause needless expense to the other parties, and potentially deleterious actions against the debtor until such awareness of the bankruptcy occurs. It would be best that the court rule require the court clerk to serve all parties with the notice of bankruptcy. This can be done in advance of or in combination with the order or notice issued by the court under paragraph (F).

Alternatively, paragraph (F) could be modified that the court shall not enter an order staying the case or setting a hearing unless and until the debtor files a proof of service. However, I believe this is not in the best interest of the administration of justice, when the above solution is so easily implemented and effective.

Proposed Language

In light of the foregoing discussion, I propose the following change:

> (E) Service of Notice. The court shall serve a copy of the notice of a bankruptcy proceeding filed under this rule upon all parties to the pending state court action, along with any order or notice of hearing under paragraph (F).

Paragraphs (B) and (C)
Insufficiencies

I note with approval the 12/16/22 comment proferred by attorney Trent Collier. I agree with and adopt his excellent analysis in its entirety. In terms of Mr. Collier's proposed solution, I support his second (alternative) proposal (pg 5), *but subject to one additional change*. [In light of the discussion above regarding paragraph (F), Mr. Collier's first proposal (pg 4) would not be sufficient.]

A debtor (or debtor's state court attorney) should not file a notice of bankruptcy in the state court case if a subparagraph of 11 USC §362 (b) is applicable. It is the debtor's responsibility to consult with his/her/its bankruptcy attorney and/or state court attorney to determine whether or not 11 USC §362 (b) is applicable to the state court case such that the notice of bankruptcy should or shouldn't be filed. Where the debtor is unrepresented in both the bankruptcy and state court case, a debtor may file a notice of bankruptcy in error, but with the court being empowered under proposed paragraph (F) as modified above, the proper effect will nevertheless occur despite such improper filing.

Proposed Language

In light of the foregoing discussion, I propose the following changes, simply adding a sentence to paragraph (B) of Mr. Collier's second (alternative) proposal.

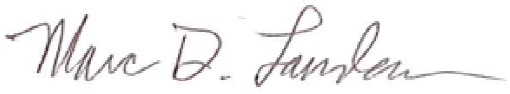
(B) Party Subject to Bankruptcy Proceeding. Any party in a pending state court action who is or becomes a debtor in a bankruptcy proceeding as provided in subrule (A) must file notice of the bankruptcy proceeding in the pending state court action no later than 7 days after becoming subject to bankruptcy proceedings. A debtor whose state court action is not stayed pursuant to 11 USC §362 (b) shall not file a notice hereunder.

(C) Other Parties. If a party to a pending state court action learns of a bankruptcy proceeding described in subrule (A) and notice of the bankruptcy proceeding has not previously been filed and served, the party that learned of the bankruptcy proceeding may file notice of the bankruptcy proceeding in the pending state court action. Federal law may impose additional reporting obligations, and litigants should consult that law to determine whether there is a duty to report.

Consistency of Language

The proposed court rule (as currently proposed) utilizes the terms "automatic stay" and "automatic bankruptcy stay" in paragraph (F). These terms presumably mean the same thing and one term should be utilized in both instances to avoid confusion.

Very truly yours,



Marc D. Landau

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December 16, 2022

Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909
ADMcomment@courts.mi.gov

RE: Administrative File No. 2021-50 and bankruptcy reporting

To the Chief Justice and the Justices of the Michigan Supreme Court:

The Court is presently considering Administrative File No. 2021-50, which proposes a new Rule 2.421. This rule creates a procedure for reporting relevant bankruptcies in Michigan's courts. The proposed rule has two problems. First, it uses vague language, which makes it unclear which parties have a duty to report a bankruptcy. Second (and assuming this duty applies only to debtors), the rule may expose creditors to possible liability and sanctions under bankruptcy law. The Court can fix these problems with minor amendments

The "subject to" problem

First, the rule is ambiguous. It imposes a duty to report bankruptcies on "[a]ny party in a pending state court action who is or becomes subject to a bankruptcy proceeding …" Proposed Rule 2.421(B). It's unclear whether the "subject to" language refers only to a debtor or whether it includes other parties whose claims become subject to a bankruptcy proceeding. After all, both debtors and creditors are "subject to" a bankruptcy proceeding.

This clause's reference to Rule 2.421(A) ("… as provided in subrule (A)") might be read as limiting the "subject to a bankruptcy language." Even so, the rule remains ambiguous. Section (B) refers to reporting requirements for those who are "subject to a *bankruptcy proceeding as provided in subrule (A)*." The italicized language seems to refer to all parties

in a bankruptcy proceeding—debtor and creditor alike. Again, both debtors and creditors may be subject to a bankruptcy proceeding. (Only debtors are subjects *of* bankruptcy proceedings, though.) Consequently, this rule does not clarify which parties have a duty to report bankruptcies.

It would be helpful, therefore, to list the parties who actually have reporting duties. If the Court intends to impose this duty only on debtors, it could state "... who is or becomes *a debtor* in a bankruptcy proceeding …" And if the Court intended to include creditors, it could revise the rule to state, "… who is or becomes *a debtor, creditor, or interested party* in a bankruptcy proceeding." Either way, Michigan attorneys would benefit from language that is more specific.

The optional reporting problem

The second problem arises if the first rule's reporting obligation refers only to debtors. Proposed Rule 2.421(C) states that other parties have the option to report relevant bankruptcy proceedings: "If a party to a pending state court action learns of a bankruptcy proceeding described in subrule (A) and notice of the bankruptcy proceeding has not previously been filed and served, the party that learned of the bankruptcy proceeding *may* file notice of the bankruptcy proceeding in the pending state court action." That language—and especially the italicized *may*—could pose a trap for creditors.

Bankruptcy law often requires creditors to report bankruptcies to state courts. See *In re Webb,* 472 BR 665, *14 (CA 6, BAP 2012) ("…[I]f a creditor has an affirmative duty to halt a pending state court action, failure to do so can result in a willful violation of the stay."). See also *In re Banks,* 253 BR 25, 30 (Bankr ED Mich 2000) ("Under similar circumstances in cases involving garnishments, courts widely agree that a creditor has an affirmative duty to dismiss a prepetition garnishment upon learning of the bankruptcy filing."). In other words, reporting is mandatory in some cases.

Two scenarios demonstrate the kind of facts that may require a creditor to report another party's bankruptcy to a state court.

1. A creditor files a state action against a borrower. The borrower subsequently files for bankruptcy without alerting the state court. The creditor knows about the bankruptcy, too—but it never reports the action to the state court, believing that reporting is optional under MCR 2.421(C). The parties complete discovery and hold a trial, where the creditor obtains a judgment.

In this scenario, a borrower may argue that the creditor violated the automatic stay under 11 U.S.C. § 362 by litigating and obtaining a judgment on its claims against the borrower. That judgment will be void under federal law—which means the state court's time was wasted. Worse, the creditor may face liability in bankruptcy court. See, e.g., *Clayton v King (In re Clayton),* 235 BR 801, 808 (MD NC, 1998) ("To prove a willful violation of the stay, it is not necessary to show that the creditor had the specific intent to violate the stay. … It is sufficient to show that the party knew of the existence of the bankruptcy case and that the creditor's actions were intentional."). To avoid liability, the creditor should have alerted the state court as soon as it knew of the bankruptcy. See, e.g., *In re Webb,* 472 BR 665, *14 (CA 6, BAP 2012) ("In instances in which a foreclosure sale has been put in motion pre-petition, creditors have an affirmative duty to stop the sale from continuing once they receive actual notice of a debtor's bankruptcy.").

The reporting obligation may continue after a case is ostensibly over. For example:

2. An attorney obtains a post-judgment bench warrant against a debtor who refused to show up for creditor's exams. The debtor then obtains a full discharge in bankruptcy. The creditor gives up on collections—but never notifies the state court of the bankruptcy or the debtor's discharge. When the debtor is pulled over for a bad tail light later that year, authorities see

> the outstanding bench warrant and jail the debtor—all based on a debt that was discharged in bankruptcy.

In this scenario, an attorney could find himself or herself facing sanctions and punitive damages for violating the discharge injunction. See 11 USC 524.

These examples show that it is in a creditor's interest to inform a state court whenever they learn of a relevant bankruptcy. That is the only way to ensure that the parties honor the automatic stay—and that they waste no time on state procedures that are ultimately void.

At the very least, the Court should avoid enacting a rule that omits any reference to a creditor's potential duties under federal law.

Proposed Solutions

To address these concerns, the Court might consider two revisions.

First, it could clarify that the mandatory-reporting obligation in MCR 2.421(A) applies to debtors, creditors, and interested parties that are subject to a bankruptcy proceeding. That way, creditors will know that they should report relevant bankruptcies, thereby avoiding liability under federal law:

> (B) Party Subject to Bankruptcy Proceeding. Any party in a pending state court action who is or becomes *a debtor, creditor, or interested party* in a bankruptcy proceeding as provided in subrule (A) must file notice of the bankruptcy proceeding in the pending state court action no later than 7 days after becoming subject to bankruptcy proceedings.

Alternatively, the Court could clarify that subsection (B) applies only to debtors and add a sentence to subsection (C) reminding creditors to review their obligations under federal law. This second option may look like this:

(B) Party Subject to Bankruptcy Proceeding. Any party in a pending state court action who is or becomes *a debtor in a* bankruptcy proceeding as provided in subrule (A) must file notice of the bankruptcy proceeding in the pending state court action no later than 7 days after becoming subject to bankruptcy proceedings.

(C) Other Parties. If a party to a pending state court action learns of a bankruptcy proceeding described in subrule (A) and notice of the bankruptcy proceeding has not previously been filed and served, the party that learned of the bankruptcy proceeding may file notice of the bankruptcy proceeding in the pending state court action. *Federal law may impose additional reporting obligations, and litigants should consult that law to determine whether there is a duty to report.*

Adopting one of these proposals may mitigate the ambiguity and risk in the proposed rule's language. Thank you for the opportunity to submit these proposals.

Very truly yours,

Trent B. Collier

Trent B. Collier

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Order

Michigan Supreme Court
Lansing, Michigan

November 9, 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. 2022-34

Proposed Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Proposed Addition of Rule 3.937 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.913, 3.943, 3.977, and 3.993 and a proposed addition of Rule 3.937 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.913 Referees

(A)-(B) [Unchanged.]

(C) Advice of Rights ~~to Review of Referee's Recommendations~~.

(1) During a hearing held by a referee, the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B).

(2) At the conclusion of a hearing described in MCR 3.937(A), the referee must provide the juvenile with advice of appellate rights in accordance with MCR 3.937. When providing this advice, the referee must state that the appellate rights do not attach until the judge enters an order described in MCR 3.993(A).

[NEW] Rule 3.937 Advice of Appellate Rights

(A) At the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody, the court must advise the juvenile on the record that:

(1) The juvenile has a right to appellate review of the order.

(2) If the juvenile cannot afford an attorney for appeal, the court will appoint an attorney at public expense and provide the attorney with the complete transcripts and record of all proceedings.

(3) A request for the appointment of an appellate attorney must be made within 21 days after notice of the order is given or an order is entered denying a timely-filed postjudgment motion.

(B) An advisement of rights must be made in plain, age-appropriate language designed to ensure the juvenile's understanding of their rights. After advising a juvenile of their rights, the court must inquire whether the juvenile understands each of their rights.

(C) The court must provide the juvenile with a request for appointment of appellate counsel form containing an instruction that the form must be completed and filed as required by MCR 3.993(D) if the juvenile wants the court to appoint an appellate attorney.

Rule 3.943 Dispositional Hearing

(A)-(E) [Unchanged.]

(F) Advice of Appellate Rights. At the conclusion of the dispositional hearing, the court must provide the juvenile with advice of appellate rights in accordance with MCR 3.937.

Rule 3.977 Termination of Parental Rights

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a)-(b) [Unchanged.]

(c) A request for the assistance of an attorney must be made within 21~~14~~ days after notice of the order is given or an order is entered denying timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d)-(e) [Unchanged.]

(2) [Unchanged.]

(K) [Unchanged.]

Rule 3.993 Appeals

(A)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) A request for appointment of appellate counsel must be made within 21~~14~~ days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2)-(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment (ADM File No. 2022-34): The proposed amendments of MCR 3.913 and 3.943 and proposed addition of MCR 3.937 would provide greater due process protections for juveniles in the justice system by ensuring that they are fully advised of their appellate rights at appropriate times and in a manner that is designed to ensure understanding of those rights. The proposed amendments of MCR 3.977 and 3.993 would extend the timeframe for requesting appointment of appellate counsel to 21 days, which mirrors the timeframe for filing a claim of appeal in cases subject to those rules.

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 March 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-34. 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.

November 9, 2022

Clerk

Public Policy Position
ADM File No. 2022-34: Proposed Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Proposed Addition of Rule 3.937 of the Michigan Court Rules

Support with Amendment

Explanation
The Committee voted unanimously to support ADM File No. 2022-34. The proposed amendments and additions would provide greater due process protections for juveniles in the justice system by ensuring that they are fully advised of their appellate rights at appropriate times and in a manner that is designed to ensure understanding of those rights.

The proposed amendments of MCR 3.977 and 3.993 would extend the timeframe for requesting appointment of appellate counsel to 21 days, which mirrors the timeframe for filing a claim of appeal in cases subject to those rules.

Position Vote:
Voted For position: 17
Voted against position: 0
Abstained from vote: 2
Did not vote (absent): 8

The Committee recommended adding the following language to MCR 3.993(F):

> "If a party was denied the right to appellate review or the appointment of appellate counsel due to errors by the party's prior attorney or the court, or other factors outside the party's control, the trial court must issue an order restating the time in which to file an appeal or request counsel, except that the court must not issue any order which would extend the time for appealing an order terminating parental rights beyond 63 days from entry of the order terminating rights."

This mirrors the language of 6.428 while accounting for the limitation on appeals in termination of parental rights matters under 3.993(C)(2).

Position Vote:
Voted For position: 15
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 11

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

Public Policy Position
ADM File No. 2022-34: Proposed Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Proposed Addition of Rule 3.937 of the Michigan Court Rules

Support

Explanation
The Committee voted unanimously to support ADM File No. 2022-34.

Position Vote:
Voted For position: 25
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

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

Public Policy Position
ADM File No. 2022-34: Proposed Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Proposed Addition of Rule 3.937 of the Michigan Court Rules

Support

Explanation:
The Committee voted unanimously (14) to support ADM File No. 2022-34, as the proposed amendments and addition will assist in ensuring that juveniles are fully advised of their appellate rights at appropriate times and in a manner that is designed to ensure understanding of those rights.

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

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

Public Policy Position
ADM File No. 2022-34 -

Support

Explanation
Children's Law Section supported ADM File No. 2022-34. These proposed court rules would provide greater information to youth in the juvenile justice system about their appellate rights. There currently is no obligation to inform youth of their appellate rights, despite such a right existing in other juvenile court proceedings (child welfare cases) and criminal cases and youth having expansive appellate rights. This could lead to better results for youth and greater opportunities for error-correcting appeals.

Position Vote:
Voted for position: 12
Voted against position: 0
Abstained from vote: 0
Did not vote: 7

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

Order

Michigan Supreme Court
Lansing, Michigan

October 26, 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. 2022-05

Proposed Amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.977 Termination of Parental Rights

(A)-(J) [Unchanged.]

(K) Review Standard. The clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights. On application in accordance with Chapter 7 of these rules, the Supreme Court may consider a claim of ineffective assistance of appellate counsel, and the Court will review such a claim using the standards that apply to criminal law.

Rule 3.993 Appeals

(A)-(B) [Unchanged.]

(C) Procedure; Delayed Appeals.

(1) [Unchanged.]

(2) Ineffective Assistance of Appellate Counsel Claims. In accordance with MCR 7.316(D), the Supreme Court may consider a claim of ineffective assistance of appellate counsel in cases involving termination of parental rights.

(2) [Renumbered (3) but otherwise unchanged.]

(D)-(E) [Unchanged.]

Rule 7.311 Motions in Supreme Court

(A)-(G) [Unchanged.]

(H) Motion to Expand Record in Cases Involving Termination of Parental Rights. In a case involving termination of parental rights, a respondent who claims ineffective assistance of appellate counsel under MCR 7.316(D) may file a motion to expand the record to support that claim if appellate counsel's errors are not evident on the record. The motion must be filed no later than the date the application is due.

Rule 7.316 Miscellaneous Relief

(A)-(C) [Unchanged.]

(D) Ineffective Assistance of Appellate Counsel Claims in Appeals Involving Termination of Parental Rights. If a respondent's application for leave to appeal raises the issue of ineffective assistance of appellate counsel, the Court may consider the claim. In making its determination and in addition to any other action allowed by these rules or law, the Court may take the following actions

(1) order the trial court to appoint new appellate counsel under MCR 3.993(D),

(2) allow the respondent time to retain new appellate counsel,

(3) grant a motion to expand the record under MCR 7.311(H), or

(4) remand the case to the Court of Appeals for a new appeal.

Staff Comment (ADM File No. 2022-05): The proposed amendments of MCR 3.977, 3.993, 7.311, and 7.316 would establish a procedure for assessing whether a respondent in a termination of parental rights case was denied the effective assistance of appellate counsel, and if so, provide relief.

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 February 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

October 26, 2022

Clerk

Public Policy Position
ADM File No. 2022-05: Proposed Amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules

Support

Explanation

The Committee voted unanimously (15) to support ADM File No. 2022-05. The proposed amendments would codify a procedure to address claims of ineffective assistance of appellate counsel in cases involving termination of parental rights in juvenile proceedings and before the Supreme Court. The proposal adopts the criminal law standard to review a claim of ineffective assistance in termination cases.

To prevail on a claim of ineffective assistance of counsel in a criminal case, a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). "Whether defense counsel performed ineffectively is a mixed question of law and fact; [the Court of Appeals] reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *Trakhtenberg*, 493 Mich at 47.

A respondent's interest in terminating their parental rights is significant, and the current rules do not provide an avenue to claim ineffective appellate assistance. The proposed amendments permit a respondent to establish a record at the trial court level.

Position Vote:

Voted For position: 17
Voted against position: 0
Abstained from vote: 2
Did not vote (absent): 8

Contact Persons:

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

Public Policy Position
ADM File No. 2022-05: Proposed Amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules

Support

Explanation
The Committee voted unanimously (25) to support ADM File No. 2022-05.

Position Vote:
Voted For position: 25
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 8

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

Public Policy Position
ADM File No. 2022-05 – Proposed Amendments of MCR 3.977, 3.993, 7.311, and 7.316

Support

Explanation
Children's Law Section supports ADM File No. 2022-05 as drafted. Termination of parental rights is the most significant consequence a litigant can sustain the civil court system. It is permanent severance of a one of the most fundamental liberty interests. The failure of counsel to effectively represent a respondent in a termination of parental rights proceeding can have irreversible consequences. This extends to appeals, which is the only error-correcting remedy in termination cases. Children's Law Section supports creating a procedure for respondent-parents to assert ineffective assistance of appellate counsel. It is critical to the constitutional rights of parents and the stability of families that courts get things right the first time, because there are no second chances after termination is finalized. Therefore, the procedure developed in ADM File No. 2022-05 will provide greater due process protections before permanently severing constitutional rights and ensuring that respondent-parents will have a fair chance to correct errors which occurred due to ineffective assistance of appellate counsel.

Position Vote:
Voted for position: 7
Voted against position: 4
Abstained from vote: 1
Did not vote: 7

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

Order

Michigan Supreme Court
Lansing, Michigan

October 26, 2022

ADM File No. 2022-32

Proposed Amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 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 7.201 Organization and Operation of Court of Appeals

(A) Chief Judge and Chief Judge Pro Tempore.

(1) The Supreme Court ~~shall~~ selects a judge of the Court of Appeals to serve as chief judge. No later than October 1 of each odd-numbered year, the Court of Appeals may submit the names of no fewer than two judges whom the judges of that court recommend for selection as chief judge.

(2) The chief judge ~~shall~~ selects a chief judge pro tempore, who ~~shall~~ fulfills such functions as the chief judge assigns.

(3) The chief judge and chief judge pro tempore ~~shall~~ serve a two-year term beginning on January 1 of each even-numbered year, provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore serves at the pleasure of the chief judge.

(B) Court of Appeals Clerk; ~~Place of~~ Filing of Documents; Forms of Documents; Signature~~Papers~~; Fees.

(1) The court ~~shall~~ appoints a chief clerk who is subject to the requirements imposed on the Supreme Court clerk in MCR 7.301(C). The clerk's office must be located in Lansing and be operated under the court's direction. With the court's approval, the clerk may appoint assistant and deputy clerks.

(2) The electronic filing of documents or data with the court is governed by MCR 1.109(G). Documents that are not electronically~~Papers to be~~ filed with the court ~~or the clerk~~ must be filed in the clerk's office~~ in Lansing or with a deputy clerk in Detroit, Troy, or Grand Rapids~~. Fees paid to a deputy clerk must be forwarded to the clerk's office in Lansing. Claims of appeal, applications, motions, and complaints need not be accepted for filing until all required documents have been filed and the requisite fees have been paid.

(3) [Unchanged.]

(C) [Unchanged.]

(D) Panels. The court ~~shall~~ sits to hear cases in panels of three~~3~~ judges. The decision of a majority of the judges of a panel in attendance at the hearing is the decision of the court. Except as modified by the Supreme Court, a decision of the court is final. The judges must be rotated so that each judge sits with every other judge with equal frequency, consistent with the efficient administration of the court's business. The Supreme Court may assign persons to act as temporary judges of the court, under the constitution and statutes. Only one temporary judge may sit on a three~~3~~-judge panel.

(E) Assignments and Presiding Judge. Before the calendar for each session is prepared, the chief judge will~~shall~~ assign the judges to each panel and the cases to be heard by them and designate one of them as presiding judge. A presiding judge presides at a hearing and performs other functions as directed by the court or the Supreme Court by rule or special order~~ directs~~. The chief judge may assign a motion or any other matter to any panel.

(F) Place of Hearing. The court ~~shall~~ sits in Detroit, Lansing, Grand Rapids, ~~and Marquette,~~ or another place the chief judge designates. A calendar case will be assigned for hearing in the city nearest to the court or tribunal from which the appeal was taken~~ or as the parties stipulate~~, except as otherwise required for the efficient administration of the court's business.

(G) Judicial Conferences. At least once a year and at other times the chief judge finds necessary, the judges will~~shall~~ meet to transact any business that properly comes before them and to consider proposals to amend the rules of the court~~,~~ and improve the administration of justice, including the operations of the court~~, and transact any business which properly comes before them~~.

(H) Approval of Expenses. The state court administrator must~~shall~~ approve the expenses for operation of the court and the expense accounts of the judges, including attendance at a judicial conference. The state court administrator must~~shall~~ prepare a budget for the court.

Rule 7.202 Definitions

For purposes of this subchapter:

(1) [Unchanged.]

(2) "date of filing" means the date of receipt of a document by the~~a court~~ clerk or if electronically filed, the date the document is deemed filed under MCR 1.109(G)(5)(b);

(3) [Unchanged.]

(4) "filing" means the delivery of a document to the~~a court~~ clerk and the receipt and acceptance of the document by the clerk with the intent to enter it in the record of the court or the electronic transmission of data and documents through the electronic filing system as provided in MCR 1.109(G);

(5) "custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, a child protective proceeding, or a delinquency case in which a dispositional order removing the minor from the minor's home is an issue;

(6) [Unchanged.]

Rule 7.203 Jurisdiction of the Court of Appeals

(A)-(C) [Unchanged.]

(D) Other Appeals and Proceedings. The court has jurisdiction over any other appeal or action established by law. An order concerning the assignment of a case to the business court under MCL 600.8301 *et seq*. may~~shall~~ not be appealed to the Court of Appeals.

(E) [Unchanged.]

(F) Dismissal.

(1) [Unchanged.]

(2) The appellant or plaintiff may file a motion for reconsideration within 21 days after the date of the order of dismissal. The motion will~~shall~~ be submitted to a panel of three~~3~~ judges. No entry fee is required for a motion filed under this subrule.

(3) The clerk will not accept for filing a motion for reconsideration of an order issued by a three~~3~~-judge panel that denies a motion for reconsideration filed under subrule (2).

Rule 7.204 Filing Appeal of Right; Appearance

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed~~,~~ or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(a)-(c) [Unchanged.]

(d) an order deciding a postjudgment~~post-judgment~~ motion for a new trial, rehearing, reconsideration, or other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period.

(2) [Unchanged.]

(3) When~~Where~~ service of the judgment or order on appellant was delayed beyond the time stated in MCR 2.602, the claim of appeal must be accompanied by an affidavit setting forth facts showing that the service was beyond the time stated in MCR 2.602. Appellee may file an opposing affidavit within 14 days after being served with the claim of appeal and affidavit. If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal

was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely.

(B) Manner of Filing. Except as otherwise provided in MCR 3.993(D)(3) and MCR 6.425(G)(1), t~~T~~o vest the Court of Appeals with jurisdiction in an appeal of right, an appellant must~~shall~~ file with the clerk within the time for taking an appeal

(1)-(2) [Unchanged.]

(C) Other Documents. With the claim of appeal, the appellant must~~shall~~ file the following documents with the clerk:

(1)-(6) [Unchanged.]

(D) Form of Claim of Appeal.

(1)-(2) [Unchanged.]

(3) If the case involves

(a)-(c) [Unchanged.]

that fact must be stated in capital letters on the claim of appeal. In an appeal specified in subrule (D)(3)(c), the Court of Appeals must expedite~~shall give expedited consideration to~~ the appeal, and~~,~~ if the state or an officer or agency of the state is not a party to the appeal, the Court of Appeals must~~shall~~ send copies of the claim of appeal and the judgment or order appealed from to the Attorney General.

(E) Trial Court Filing Requirements. Within the time for taking the appeal, the appellant must~~shall~~ file in the court or the tribunal from which the appeal is taken

(1)-(4) [Unchanged.]

(F) Other Requirements. Within the time for taking the appeal, the appellant must~~shall~~ also

(1)-(2) [Unchanged.]

(G) Appearance. Within 14 days after being served with the claim of appeal, the appellee may~~shall~~ file an appearance (identifying the individual attorneys of record) in the Court of Appeals and in the court or tribunal from which the appeal is taken.

An appellee who does not file a timely appearance is not entitled to notice of further proceedings until an appearance is filed.

(H) Docketing Statement. In all civil appeals, within 28 days after the claim of appeal is filed, the appellant must file ~~two copies of~~ a docketing statement with the court clerk ~~of the Court of Appeals~~ and serve a copy on the opposing parties.

(1)-(2) [Unchanged.]

(3) Cross-~~-~~Appeals. A party who files a cross-~~-~~appeal must~~shall~~ file a docketing statement in accordance with this rule within 28 days after filing the cross-~~-~~appeal.

(4) Dismissal. Failure~~If the appellant fails~~ to file a timely docketing statement~~,~~ ~~the chief judge~~ may result in dismissal of the appeal or cross-appeal under~~pursuant to~~ MCR 7.217.

Rule 7.205 Application for Leave to Appeal

(A) [Unchanged.]

(B) Manner of Filing. To apply for leave to appeal, the appellant must~~shall~~ file with the clerk:

(1) ~~5 copies of~~ an application for leave to appeal ~~(one signed),~~ stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(B) and (C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2) ~~5 copies of~~ the judgment or order appealed from;~~, of~~ the register of actions of the lower court, tribunal, or agency;~~, of~~ the opinion or findings of the lower court, tribunal, or agency;~~,~~ and ~~of~~ any opinion or findings reviewed by the lower court, tribunal, or agency;~~.~~

(3) [Unchanged.]

(4) a~~1~~ copy of certain transcripts, as follows:

(a) in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary

hearing, including the opinion or findings of the court that~~which~~ conducted the hearing;

(b)-(g) [Unchanged.]

If the transcript is not yet available, or if there is no record to be transcribed, the appellant must~~shall~~ file a copy of the certificate of the court reporter or recorder or a statement by the appellant's attorney as provided in MCR 7.204(C)(2). As soon as the transcript is available, t~~T~~he appellant must file it~~the transcript~~ with the Court of Appeals ~~as soon as it is available~~.

(5)-(6) [Unchanged.]

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1) ~~5 copies of~~ an answer to the application ~~(one signed)~~ conforming to MCR 7.212(B) and (D), except that transcript page references are not required unless a transcript has been filed; and

(2) [Unchanged.]

(D) [Unchanged.]

(E) Decision.

(1)-(2) [Unchanged.]

(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross-appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.

(4) [Unchanged.]

(F) [Unchanged.]

Rule 7.206 Extraordinary Writs, Original Actions, and Enforcement Actions

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff mustshall file with the clerk:

(a) 5 copies of a complaint (1 signed), which may have copies of supporting documents or affidavits attached to each copy;

(b) 5 copies of a supporting brief (1 signed) conforming to MCR 7.212(B) and (C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named defendant and, in a superintending control action, on any other party involved in the case thatwhich gave rise to the complaint for superintending control; and

(d) [Unchanged.]

(2) Answer. Athe defendant or any other interested party must file with the clerk within 21 days of service of the complaint and any supporting documents or affidavits:

(a) 5 copies of an answer to the complaint (1 signed), which may have copies of supporting documents or affidavits attached to each copy;

(b) a supporting5 copies of an opposing brief (1 signed) conforming to MCR 7.212(B) and (D) to the extent possible; and

(c) [Unchanged.]

(3) Electronic Filing. The parties may file all pleadings and other papers permitted by this rule electronically with the Court of Appeals. All electronically filed documents must be in PDF digital format, while appendices and other nonoriginal filings may be scanned. All electronic filings must be submitted in accordance with the instructions set forth on the website of the Michigan Court of Appeals. Pro se parties may file pleadings and other papers in paper form.

(43) Preliminary Hearing. There is no oral argument on preliminary hearing of a complaint. The court may deny relief, grant peremptory relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right either with or without referral to a judicial circuit or tribunal or agency for the taking of proofs and report of factual findings. If the case

is ordered to proceed to full hearing, the time for filing a brief by the plaintiff begins to run from the date the order allowing the case to proceed is certified or the date the transcript or report of factual findings on referral is filed, whichever is later. The plaintiff's brief must conform to MCR 7.212(B) and (C). An opposing brief must conform to MCR 7.212(B) and (D). In a habeas corpus proceeding, the prisoner need not be brought before the Court of Appeals.

(E) Actions to Enforce the Headlee Amendment, Under~~Pursuant to~~ Const 1963, art 9, § 32.

(1) Filing of Complaint. To commence an action under~~pursuant to~~ Const 1963, art 9, § 32, the plaintiff must~~shall~~ file with the clerk:

(a) a~~5 copies of the~~ complaint ~~(1 signed)~~, which conforms with the special pleading requirements of MCR 2.112(M) and indicates~~, inter alia,~~ whether there are any factual questions that are anticipated to require resolution by the court and whether the plaintiff~~(s)~~ anticipate~~(s)~~ the need for discovery and the development of a factual record;

(b) ~~5 copies of~~ a supporting brief ~~(1 signed)~~ conforming to MCR 7.212(B) and (C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every ~~named~~ defendant and the office of the attorney general; and

(d) [Unchanged.]

(2) Answer. A~~The named~~ defendant~~(s)~~ must~~shall~~ file with the clerk within 21 days of service of the complaint:

(a) ~~5 copies of~~ an answer to the complaint ~~(1 signed)~~, which conforms with the special pleading requirements of MCR 2.112(M) and indicates~~, inter alia,~~ whether there are any factual questions that are anticipated to require resolution by the court and whether a~~the named~~ defendant~~(s)~~ anticipate~~(s)~~ the need for discovery and the development of a factual record;

(b) ~~5 copies of~~ a supporting brief ~~(1 signed)~~ conforming to MCR 7.212(B) and (C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every ~~named~~ plaintiff.

(3) Subsequent proceedings. Following receipt of the answer:

(a) the ~~chief~~ clerk must~~shall~~ promptly select a panel of the court by random draw and assign that panel to commence proceedings in the suit; and

(b) [Unchanged.]

(c) if the panel of the court determines that the issues framed in the parties' pleadings and supporting briefs solely present jurisprudentially significant questions of law, the panel must~~shall~~ direct that the suit proceed to a full hearing on the merits in the same manner as an appeal ~~as~~ of right and notify the parties of the date for the filing of supplemental briefs, if such briefs are determined to be necessary, and of the date for oral argument, which must~~shall~~ be on an expedited basis; or

(d) if the panel of the court determines that the issues framed in the parties' pleadings and supplemental briefs present factual questions for resolution, the panel must~~shall~~ refer the suit to a judicial circuit for the purposes of holding pretrial proceedings, conducting a hearing to receive evidence and arguments of law, and issuing a written report for the panel setting forth proposed findings of fact, and conclusions of law. The proceedings before the circuit court must~~shall~~ proceed as expeditiously as due consideration of the circuit court's docket, facts and issues of law requires. Following the receipt of the report from the circuit court, the panel must~~shall~~ notify counsel for the parties of the schedule for filing briefs in response to the circuit court's report and of the date for oral argument, which must~~shall~~ be on an expedited basis.

(F) Enforcement of Administrative Tribunal or Agency Orders.

(1) Complaint. To obtain enforcement of a final order of an administrative tribunal or agency, the plaintiff must~~shall~~ file with the clerk within the time limit provided by law:

(a) ~~5 copies of~~ a complaint ~~(one signed)~~ concisely stating the basis for relief and the relief sought;

(b) ~~5 copies of~~ the order sought to be enforced;

(c) ~~5 copies of~~ a supporting brief ~~(one signed) which~~ conform~~ings~~ to MCR 7.212(B) and (C) to the extent possible;

~~(d) a notice of preliminary hearing on the complaint on the first Tuesday at least 21 days after the complaint and supporting documents are served on the defendant, the agency (unless the agency is the plaintiff), and any other interested party;~~

(e)-(g) [Relettered (d)-(f) but otherwise unchanged.]

(2) Answer. A~~The~~ defendant or~~must file, and~~ any other interested party must~~may~~ file~~,~~ with the clerk within 21 days of service of the complaint~~before the date of the preliminary hearing~~:

(a) ~~5 copies of~~ an answer to the complaint ~~(one signed)~~;

(b) a supporting~~5 copies of an opposing~~ brief ~~(one signed)~~ conforming to MCR 7.212(B) and (D) to the extent possible; and

(c) [Unchanged.]

(3) Preliminary Hearing. There is no oral argument on preliminary hearing of a complaint. The court may deny relief, grant peremptory relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right. If the case is ordered to proceed to full hearing, the time for filing of a brief by the plaintiff begins to run from the date the clerk certifies the order allowing the case to proceed. The plaintiff's brief must conform to MCR 7.212(B) and (C). An opposing brief must conform to MCR 7.212(B) and (D). The case is heard on the certified record transmitted by the tribunal or agency. MCR 7.210(A)(2), regarding the content of the record, applies.

Rule 7.207 Cross-Appeals

(A) Right of Cross-Appeal.

(1) When an appeal of right is filed or the court grants leave to appeal, any appellee may file a cross-appeal.

(2) If there is more than one~~1~~ party plaintiff or defendant in a civil action and one~~1~~ party appeals, any other party, whether on the same or opposite side as the party first appealing, may file a cross-appeal against all or any of the other parties to the case as well as against the party who first appealed. If the cross-appeal operates against a party not affected by the first appeal or in a

manner different from the first appeal, that party may file a further cross-appeal as if the cross-appeal affecting that party had been the first appeal.

(B) Manner of Filing. To file a cross-appeal, the cross-appellant mustshall file with the clerk a claim of cross-appeal in the form required by MCR 7.204(D) and the entry fee

(1) within 21 days after the claim of appeal is filed with the Court of Appeals or served on the cross-appellant, whichever is later, if the first appeal was of right; or

(2) [Unchanged.]

The cross-appellant mustshall file proof that a copy of the claim of cross-appeal was served on the cross-appellee and any other party in the case. A copy of the judgment or order from which the cross-appeal is taken must be filed with the claim.

(C) Additional Requirements. The cross-appellant mustshall perform the steps required by MCR 7.204(E) and (F), except that the cross-appellant is not required to order a transcript or file a court reporter's or recorder's certificate unless the initial appeal is abandoned or dismissed. Otherwise the cross-appeal proceeds in the same manner as an ordinary appeal.

(D) Abandonment or Dismissal of Appeal. If the appellant abandons the initial appeal or the court dismisses it, the cross-appeal may nevertheless be prosecuted to its conclusion. Within 21 days after the clerk certifies the order dismissing the initial appeal, if there is a record to be transcribed, the cross-appellant mustshall file a certificate of the court reporter or recorder that a transcript has been ordered and payment for it made or secured and will be filed as soon as possible or has already been filed.

(E) Delayed Cross-Appeal. A party seeking leave to take a delayed cross-appeal mustshall proceed under MCR 7.205.

Rule 7.208 Authority of Court or Tribunal Appealed From

(A) [Unchanged.]

(B) Postjudgment Motions in Criminal Cases.

(1)-(2) [Unchanged.]

(3) The trial court must~~shall~~ hear and decide the motion within 56 days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4) [Unchanged.]

(5) If the motion is granted in whole or in part,

(a) [Unchanged.]

(b) the prosecuting attorney may file a cross-~~-~~appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If the defendant has withdrawn the appeal before the prosecuting attorney has filed a cross-~~-~~appeal, the prosecuting attorney may file a claim of appeal or an application for leave to appeal within the 21-day period.

(6) If the motion is denied, defendant-appellant's brief must be filed within 42 days after the decision by the trial court~~,~~ or the filing of the transcript of any trial court hearing, whichever is later.

(C)-(J) [Unchanged.]

Rule 7.209 Bond; Stay of Proceedings

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1)-(3) [Unchanged.]

(4) When the bond is filed under subsection (E)(2)(a), the judgment or order is~~shall~~ automatically ~~be~~ stayed pending entry of a final order under subsection (G).

(5)-(6) [Unchanged.]

(7) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings are~~shall be~~ stayed during the pendency of the appeal, unless the C~~c~~ourt of Appeals directs otherwise.

(F) Conditions of Stay Bond.

(1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant mustshall promise in writing:

(a)-(e) [Unchanged.]

(2) Criminal Cases. A criminal defendant for whom bond pending appeal is allowed after conviction mustshall promise in writing:

(a)-(f) [Unchanged.]

(G) Sureties and Filing of Bond; Service of Bond; Objections; Stay Orders. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court that entered the order or judgment to be stayed.

(1) Civil Actions and Probate Proceedings.

(a) A copy of a bond and any accompanying power of attorney or affidavit must be promptly served on all parties in the manner prescribed in MCR 2.107. At the same time, the party seeking the stay mustshall file a proposed stay order underpursuant to MCR 2.602(B)(3). Proof of service must be filed promptly with the trial court in which the bond has been filed.

(b) Objections mustshall be filed and served within seven7 days after service of the bond. Objections to the amount of the bond are governed by MCR 2.602(B)(3). Objections to the surety are governed by MCR 3.604(E).

(c) If no timely objections to the bond, surety, or stay order are filed, the trial court mustshall promptly enter the order staying enforcement of the judgment or order pending all appeals. The stay shall continues until otherwise ordered by the trial court or an appellate court.

(d)-(g) [Unchanged.]

(2) Criminal Cases. A criminal defendant filing a bond after conviction mustshall give notice to the county prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in MCR 3.604.

(H) [Unchanged.]

(I) Ex Parte Stay. Whenever an ex parte stay of proceedings is necessary to allow a motion in either the trial court or the Court of Appeals, the court before which the motion will be heard may grant an ex parte stay for that purpose. Service of a copy of the order, with a copy of the motion, any affidavits on which the motion is based, and notice of hearing on the motion, ~~shall~~ operate<u>s</u> as a stay of proceedings until the court rules on the motion unless the court supersedes or sets aside the order in the interim. Proceedings may not be stayed for longer than necessary to enable the party to make the motion according to the practice of the court~~,~~ and<u>,</u> if made, until the decision of the court.

Rule 7.210 Record on Appeal

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original <u>documents</u>~~papers~~ filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court in an estate or trust proceeding, an adult or minor guardianship proceeding under the Estates and Protected Individuals Code, or a proceeding under the Mental Health Code, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.993(E) or MCR 6.425(G), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant <u>must</u>~~shall~~ order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b) [Unchanged.]

(c) On the appellant's motion, with notice to the appellee, the trial court or tribunal may order that some portion less than the full transcript (or no transcript at all) be included in the record on appeal. The motion must be filed within the time required for filing an appeal, and~~,~~ if the motion is granted, the appellee may file any portions of the transcript omitted by the appellant. The filing of the motion extends the time for filing the court reporter's or recorder's certificate until seven~~7~~ days after entry of the trial court's or tribunal's order on the motion.

(d)-(e) [Unchanged.]

(2) Transcript Unavailable. When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant must~~shall~~ take the following steps to settle the record and to cause the filing of a certified settled statement of facts to serve as a substitute for the transcript.

(a) No later than 56 days after the filing of the available transcripts, or 28 days after the filing of the available transcripts in a child custody case or interlocutory criminal appeal, or, if no transcripts are available, within 14 days after filing the claim of appeal, the appellant must~~shall~~ file with the trial court or tribunal clerk~~,~~ and serve on each appellee~~,~~ a motion to settle the record and, where reasonably possible, a proposed statement of facts. A proposed statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review.

(b) Except as otherwise provided, the appellant must~~shall~~ notice the motion to settle the record for hearing before the trial court or tribunal to be held within 21 days of the filing of the motion. If it is not the typical practice of a tribunal to conduct hearings, the motion to settle the record must be filed with the tribunal for consideration by the tribunal within 21 days of the filing of the motion. The motion must~~shall~~ be filed and served at least 14 days before the date noticed for hearing or consideration to settle the record. If appellant filed a proposed statement of facts with the motion, appellee must file and serve on the appellant and other appellees an amendment or objection to the proposed statement of facts in the trial court or tribunal at least seven~~7~~ days before the time set for the settlement hearing or consideration. The trial court may adopt and file the appellant's proposed statement of facts as the certified settled statement of facts.

(c) The trial court or tribunal must~~shall~~ settle any controversy and certify a settled statement of facts as an accurate, fair, and complete statement of the proceedings before it. The certified settled statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review.

(d) The appellant must~~shall~~ file the settled statement of facts and the certifying order with the trial court or tribunal clerk and Court of Appeals.

(3) Duties of Court Reporter or Recorder.

(a) Certificate. Within seven~~7~~ days after a transcript is ordered by a party or the court, the court reporter or recorder must file~~shall furnish~~ a certificate stating:

(i)-(iii) [Unchanged.]

(b) Time for Filing. The court reporter or recorder must~~shall~~ give precedence to transcripts necessary for interlocutory criminal appeals and custody cases. The court reporter or recorder must~~shall~~ file the transcript with the trial court or tribunal clerk within

(i)-(iv) [Unchanged.]

The Court of Appeals may extend or shorten these time limits in an appeal pending in the court on motion filed by the court reporter or recorder or a party.

(c) [Unchanged.]

(d) Form of Transcript. The transcript must be filed in one or more volumes ~~under a hard-surfaced or other suitable cover,~~ stating the title of the action, and prefaced by a table of contents showing the subject matter of the transcript with page references to the significant parts of the trial or proceedings, including the testimony of each witness by name, the arguments of the attorneys, and the jury instructions. The pages of the transcript must be consecutively numbered on the bottom of each page. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page.

(e) Notice. Immediately after the transcript is filed, the court reporter or recorder must~~shall~~ notify the Court of Appeals and all parties that it has been filed and file in the Court of Appeals an affidavit of mailing of notice to the parties.

(f) [Unchanged.]

~~(g) Responsibility When More Than One Reporter or Recorder. In a case in which portions of the transcript must be prepared by more than one reporter or recorder, unless the court has designated another person, the person who recorded the beginning of the proceeding is responsible for ascertaining that the entire transcript has been prepared, filing it, and giving the notice required by subrule (B)(3)(e).~~

(C) Exhibits. Within 21 days after the claim of appeal is filed, a party possessing any exhibits offered in evidence, whether admitted or not, must~~shall~~ file them with the trial court or tribunal clerk, unless by stipulation of the parties or order of the trial court or tribunal they are not to be sent, or copies, summaries, or excerpts are to be sent. ~~Xerographic c~~Copies of exhibits may be filed in lieu of originals unless the trial court or tribunal orders otherwise. When the record is returned to the trial court or tribunal, the trial court or tribunal clerk must~~shall~~ return the exhibits to the parties who filed them.

(D) Reproduction of Records. Where facilities for the copying or reproduction of records are available to the clerk of the court or tribunal whose action is to be reviewed, the clerk, on a party's request and on deposit of the estimated cost or security for the cost, must~~shall~~ procure for the party as promptly as possible and at the cost to the clerk the requested number of copies of documents, transcripts, and exhibits on file.

(E) Record on Motion. If, before the time the complete record on appeal is sent to the Court of Appeals, a party files a motion that requires the Court of Appeals to have the record, the trial court or tribunal clerk must~~shall~~, on request of a party or the Court of Appeals, send the Court of Appeals the documents needed.

(F) Service of Record. Within 21 days after the transcript is filed with the trial court clerk, the appellant must~~shall~~ serve a copy of the entire record on appeal, including the transcript and exhibits, on each appellee. However, copies of documents the appellee already possesses need not be served. Proof that the record was served must be promptly filed with the Court of Appeals and the trial court or tribunal clerk. If the filing of a transcript has been excused as provided in subrule (B), the record is to be served within 21 days after the filing of the transcript substitute.

(G) Transmission of Record. Within 21 days after the briefs have been filed or the time for filing the appellee's brief has expired, or when the court requests, the trial court or tribunal clerk mustshall send to the Court of Appeals the record on appeal in the case pending on appeal, except for those things omitted by written stipulation of the parties. Weapons, drugs, or money are not to be sent unless the Court of Appeals requests. The trial court or tribunal clerk mustshall append a certificate identifying the name of the case and the documentspapers with reasonable definiteness and mustshall include as part of the record:

(1)-(3) [Unchanged.]

Transcripts and all other documents thatwhich are part of the record on appeal must be included in the record and, if filed in print, must be attached in one or more file folders or other suitable hard-surfaced binders showing the name of the trial court or tribunal, the title of the case, and the file number.

(H) Return of Record Filed in Printed Form. If the record was filed in printed form, aAfter the Court of Appeals disposes of thean appeal, the clerkCourt of Appeals mustshall promptly send it tothe original record, together with a certified copy of the opinion, judgment, or order entered by the Court of Appeals,

(1) to the Clerk of the Supreme Court on request if an application for leave to appeal is filed in the Supreme Court, or

(2) to the clerk of the court or tribunal from which it was received when

(a) [Unchanged.]

(b) the period for filing a motion for reconsideration in the Court of Appeals has expired and any timely-filed motion has been resolved, andthere is pending in the Court of Appeals no

(i) timely motion for reconsideration,

(ii) timely petition for a special panel under MCR 7.215 (I), or

(iii) timely request by a judge of the Court of Appeals for a special panel under MCR 7.215 (I),

and the period for such a timely motion, petition, or request has expired.

(c) the period for initiation of a special panel under MCR 7.215(J) has expired and any proceedings under that subrule are concluded.

(I) Disposition of Record Filed in Electronic Form. If the record is filed in electronic form, the Court of Appeals may dispose of the electronic record according to the standards established by the court.

(J~~I~~) Notice by Trial Court or Tribunal Clerk. In order that the parties may take the appropriate action in the trial court or tribunal under the Court of Appeals judgment, t~~T~~he trial court or tribunal clerk must~~shall~~ promptly notify all parties of the return of the record, if filed in printed form, or of the expiration of the time under subrule (H)(2) if the record was filed in electronic form~~in order that they may take the appropriate action in the trial court or tribunal under the Court of Appeals mandate~~.

Rule 7.211 Motions in Court of Appeals

(A) Manner of Making Motion. A motion is made in the Court of Appeals by filing:

(1) ~~5 copies of~~ a motion ~~(one signed)~~ stating briefly but distinctly the facts and the grounds on which it is based and the relief requested;

(2) [Unchanged.]

(3) for a motion to dismiss, to affirm, or for peremptory reversal, ~~5 copies of~~ a supporting brief. A supporting brief may be filed with any other motion. A brief must conform to MCR 7.212(B) and (C) as nearly as possible, except that page references to a transcript are not required unless the transcript is relevant to the issue raised in the motion. A brief ~~in conformance with MCR 7.212(C)~~ is not required in support of a motion to affirm when the appellant argues that:

(a)-(c) [Unchanged.]

(d) a sentence that~~which~~ is within the sentencing guidelines is invalid.

Instead of a brief in support of a motion to affirm in such a circumstance, the movant may append those portions of the transcript that are pertinent to the issues raised in the motion; in that case, the motion must include a summary of the movant's position;

(4) a motion for immediate consideration under subrule (C)(6) if the party wants a decision on the motion~~desires a hearing~~ on a date earlier than the answer~~applicable~~ date set forth in subrules (B)(2)(a)-(e);

(5) proof that ~~a copy of~~ the motion, the motion for immediate consideration if one has been filed, and any ~~other~~ supporting documents~~papers~~ were served on all other parties to the appeal.

(B) Answer.

(1) A party to an appeal may answer a motion by filing:

(a) ~~5 copies of~~ an answer ~~(one signed);~~ and

(b) proof that ~~a copy of~~ the answer and any supporting documents~~other opposing papers~~ were served on all other parties to the appeal.

(2) Subject to subrule (3), the answer must be filed within

(a) 21 days after the motion is served on the other parties~~,~~ for a motion to dismiss, to remand, or to affirm;

(b) 35 days after the motion is served on the appellee~~,~~ if the motion is for peremptory reversal;

(c) 56 days after the motion is served on the defendant~~,~~ for a motion to withdraw as the appointed appellate attorney;

(d) 14 days after the motion is served on the other parties~~,~~ for a motion for reconsideration of an opinion or an order, to stay proceedings in the trial court, to strike a full or partial pleading on appeal, to file an amicus brief, to hold an appeal in abeyance, or to reinstate an appeal after dismissal under MCR 7.217(D);

(e) seven~~7~~ days after the motion is served on the other parties~~,~~ for all other motions.

If a motion for immediate consideration has been filed, ~~all~~ answers to all affected motions must be filed within seven~~7~~ days ~~if the motions for immediate consideration was served by mail,~~ or within such time as the Court of Appeals directs. See subrule (C)(6).

(3) In its discretion, the Court of Appeals may dispose of the following motions before the answer period has expired: a motion to extend time to order or file transcripts, to extend time to file a brief or other appellate pleading, to substitute one attorney for another, for oral argument when the right to oral

argument was not otherwise preserved as described in MCR 7.212, or for an out-of-state attorney to appear and practice in Michigan.

(4) A supporting~~Five copies of an opposing~~ brief may be filed with the answer. A brief must conform to MCR 7.212(B) and (D) as nearly as possible, except that page references to a transcript are not required unless the transcript is relevant to the issue raised in the motion.

(C) Special Motions. ~~If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.~~

(1) Motion to Remand.

(a)-(d) [Unchanged.]

(e) If the trial court grants the appellant relief in whole or in part,

(i) u~~U~~nless the Court of Appeals orders otherwise, appellant must file the brief on appeal or notice of withdrawal of appeal within 21 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later.

(ii) t~~T~~he appellee may file a cross-appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If the appellant has withdrawn the appeal before the appellee has filed a cross-appeal, the appellee may file a claim of appeal or an application for leave to appeal within the 21-day period.

(f) If the trial court denies the appellant's request for relief, appellant's brief must be filed within 21 days after the decision by the trial court~~,~~ or the filing of the transcript of any trial court hearing, whichever is later.

(2)-(4) [Unchanged.]

(5) Motion to Withdraw. A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) A motion to withdraw is made by filing:

(i) ~~5 copies of~~ a motion to withdraw that~~(one signed) which~~ identifies any points the appellant seeks to assert and any other matters that the attorney has considered as a basis for appeal;

(ii) ~~5 copies of~~ a brief conforming to MCR 7.212(B) and (C)~~,~~ ~~which~~that refers to anything in the record that might arguably support the appeal, contains relevant record references, and discusses~~cites and deals with~~ those authorities that~~which~~ appear to bear on the points in question;

(iii) [Unchanged.]

(iv) proof that a copy of the motion only and not the brief was served on the appellee.

(b) If the appeal is available only by leave of the court, the motion must~~shall~~ be filed within 56 days after the transcript is filed or within the deadline for filing a late application for leave to appeal, whichever comes first. The filing of such a motion, with the accompanying brief required by MCR 7.211(C)(5)(a)(ii), must~~shall~~ be treated as the filing of an application for leave to appeal on behalf of the appellant.

(c) [Unchanged.]

(d) If the court finds that the appeal is wholly frivolous, it may grant the motion and affirm the conviction or trial court judgment in appeals by right or deny leave to appeal in appeals by leave. If the court affirms the conviction or trial court judgment or denies leave to appeal, the appellant's attorney must~~shall~~ mail to the appellant a copy of the transcript within 14 days after the order affirming is certified and file proof of that service. If the court finds any legal point arguable on its merits, it may deny the motion and order the court appointed attorney to proceed in support of the appeal or grant the motion and order the appointment of substitute appellate counsel to proceed in support of the appeal.

(6) Motion for Immediate Consideration. A party may file a motion for immediate consideration to expedite decision~~hearing~~ on another motion. The motion must state facts showing why immediate consideration is required. If ~~a copy of~~ the motion for immediate consideration and ~~a copy of~~ the motion of which immediate consideration is sought are served by electronic service under MCR 1.109(G)(6) or personally served under MCR 2.107(C)(1) or (2),

the motions may be submitted to the court immediately on filing. If mail service is used, motions may not be submitted until the first Tuesday seven~~7~~ days after the date of service, unless the party served acknowledges receipt. ~~The trial court or tribunal record need not be requested unless it is required as to the motion of which immediate consideration is sought.~~

(7) Confession of Error by Prosecutor. In a criminal case, if the prosecutor concurs in the relief requested by the defendant, the prosecutor must~~shall~~ file a confession of error and~~so indicating, which may~~ state reasons why concurrence in the relief requested is appropriate. The confession of error will~~shall~~ be submitted to one judge under~~pursuant to~~ MCR 7.211(E). If the judge approves the confession of error, the judge will~~shall~~ enter an order or opinion granting the relief. If the judge rejects the confession of error, the case will~~shall~~ be submitted for decision through the ordinary processes of the court, and the confession of error will~~shall~~ be submitted to the panel assigned to decide the case.

(8) [Unchanged.]

(9) Motion to Seal Court of Appeals File in Whole or in Part.

(a)-(b) [Unchanged.]

(c) Except as otherwise provided by statute or court rule, the procedure for sealing a Court of Appeals file is governed by MCR 8.119(I). Materials that are subject to a motion to seal a Court of Appeals file in whole or in part must~~shall~~ be held under seal pending the court's disposition of the motion.

(d) Any party or interested person may file an answer in response to a motion to seal a Court of Appeals file within seven~~7~~ days after the motion is served on the other parties, or within seven~~7~~ days after the motion is filed in the Court of Appeals, whichever is later.

(e) An order granting a motion must~~shall~~ include a finding of good cause, as defined by MCR 8.119(I)(2), and a finding that there is no less~~-~~restrictive means to adequately and effectively protect the specific interest asserted.

(f) [Unchanged.]

(D)-(E) [Unchanged.]

Rule 7.212 Briefs

(A)-(C) [Unchanged.]

(D) Appellee's Brief; Contents.

(1)-(2) [Unchanged.]

(3) Unless under the headings "Statement of Questions Involved" and "Statement of Facts" the appellee accepts the appellant's statements, the appellee must~~shall~~ include:

(a)-(b) [Unchanged.]

(E) Briefs in Cross-Appeals. The filing and service of briefs by a cross-appellant and a cross-appellee are governed by subrules (A)-(D).

(F) Supplemental Authority. Without leave of the court, a party may file a one-page communication, titled "supplemental authority," to call the court's attention to new authority released after the party filed its brief. Such a communication,

(1)-(3) [Unchanged.]

(G) [Unchanged.]

(H) Amicus Curiae.

(1)-(2) [Unchanged.]

(3) Except for briefs presented on behalf of amicus curiae listed in MCR 7.312(H)(2), a brief filed under this rule must~~shall~~ indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief~~,~~ and must~~shall~~ identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure must~~shall~~ be made in the first footnote on the first page of text.

(I) Nonconforming Briefs. If, on its own initiative or on a party's motion, the court concludes that a brief does not substantially comply with the requirements in this rule, the court~~it~~ may order the party who filed the brief to file a supplemental brief within a specified time correcting the deficiencies, or it may strike the nonconforming brief.

(J) Appendix.

(1) Requirements. Except as provided in subrules (1)(a)-(f) of this rule, the appellant must file an individual or joint appendix with the appellant's brief. An appellee may file an appendix with the appellee's brief if the appellant's appendix does not contain all the information set forth in subrule (3) of this rule. The appellee's appendix should not contain any of the documents contained in the appellant's appendix except when including additional pages to provide a more complete context, but should only contain additional information described in subrule (3) that is relevant and necessary to the determination of the issues on appeal. To avoid duplication in cases with more than one appellant or appellee, the parties are encouraged to submit a joint appendix underpursuant to subsection (4) rather than separate appendixes. An appendix is not required in appeals from:

(a)-(e) [Unchanged.]

(f) The Michigan Public Service Commission where the record is available on the cCommission's e-docket, or the Michigan Tax Tribunal where the record is available on the tTribunal's tax docket lookup page. In those cases, the parties' briefs mustshall cite to the document number and relevant pages in the electronic record.

(2) [Unchanged.]

(a) For an appendix filed in paper form, one signed copy that is separately bound from the brief mustshall be filed. Each separate document in the appendix must be preceded by a title page that identifies the appendix number or letter and the title of the document. The binding method should allow the easy dismantling of the appendix for scanning.

(b) [Unchanged.]

(3) [Unchanged.]

(4) Joint Appendix.

(a) The parties may stipulate to using a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix mustshall meet the requirements of subrules (J)(2)and (3) and mustshall be included with the initial

appellant's brief or, for a joint appendix of multiple appellees, with the first appellee's brief to be filed.

(b) [Unchanged.]

Rule 7.213 Calendar Cases

(A) Mediation in Calendar Cases.

(1) Selection for Mediation.

(a) [Unchanged.]

(b) To identify cases for mediation, the Court of Appeals will review civil appeals to determine if mediation would be of assistance to the court or the parties. At any time, a party to a pending civil appeal may file a written request that the appeal be submitted to mediation. Such a request may be made without formal motion and is~~shall be~~ confidential.

(c) A party to a case that has been selected for mediation may file a request to have the case removed from mediation. Such a request may be made without formal motion and is~~shall be~~ confidential. If the request to remove is premised on a desire to avoid the cost of mediation, it is not necessary to demonstrate an inability to pay such costs.

(d) [Unchanged.]

(2) Mediation Procedure.

(a) Mediation must~~shall~~ be conducted by a mediator selected by stipulation of the parties or designated by the court. A mediator designated by the court must~~shall~~ be an attorney, licensed in Michigan, who has met the qualifications of mediators provided in MCR 2.411(F).

(b) Mediation must~~shall~~ consider the possibility of settlement, the simplification of the issues, and any other matters that the mediator determines may aid in the handling or disposition of the appeal.

(c) The order referring the case to mediation must~~shall~~ specify the time within which the mediation is to be completed. Within 7 days after

the time stated in the order, the mediator mustshall file a notice with the clerk stating only the date of completion of mediation, who participated in the mediation, whether settlement was reached, and whether any further mediation is warranted.

(d) If mediation results in full or partial settlement of the case, the parties mustshall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) underpursuant to MCR 7.218(B).

(e) The mediator may charge a reasonable fee, which mustshall be divided between and borne equally by the parties unless otherwise agreed and paid by the parties directly to the mediator. If a party does not agree upon the fee requested by the mediator, upon motion of the party, the chief judge or another designated judge mustshall set a reasonable fee. In all other respects, mediator fees areshall be governed by MCR 2.411(D).

(f)-(g) [Unchanged.]

(3) Selection of Mediator.

(a) Except as otherwise provided in this rule, the selection of a mediator isshall be governed by MCR 2.411(B).

(b) Within the time provided in the order referring a case to mediation, the parties may stipulate to the selection of a mediator. Such stipulation mustshall be filed with the clerk of the court. If the parties do not file a stipulation agreeing to a mediator within the time provided, the court willshall appoint a mediator from the roster of approved mediators maintained by the circuit court in which the case originated.

(B) Notice of Calendar Cases. After the briefs of both parties have been filed, or after the expiration of the time for filing the appellee's brief, the clerk mustshall notify the parties that the case will be submitted as a "calendar case" at the next available session of the court.

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence mustshall be given to:

(1)-(2) [Unchanged.]

(3) Interlocutory appeals from the grant of a preliminary injunction;

(4) [Unchanged.]

(5) appeals of decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid; ~~and~~

(6) actions brought under Const 1963, art 9, §§ 29-34 (Headlee actions); and

(7) [Unchanged.]

(D) Arrangement of Calendar. Twenty-one days before the first day of the session, the clerk must send~~shall mail~~ to all parties in each calendar case notice of the designated panel, location, day, and order in which the cases will be called.

(E) [Unchanged.]

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

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name must~~shall~~ be published by the Supreme Court reporter of decisions. A memorandum opinion must~~shall~~ not be published. A per curiam opinion must~~shall~~ not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court. An opinion not designated for publication is~~shall be~~ deemed "unpublished."

(B) Standards for Publication. A court opinion must be published if it:

(1)-(5) [Unchanged.]

(6) criticizes existing law; ~~or~~

(7) [Unchanged.]

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan s~~S~~tatute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party must~~shall~~ explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal in~~to~~ the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

(D) Requesting Publication.

(1) Any party may request publication of an authored or per curiam opinion not designated for publication by

(a) filing with the clerk ~~4 copies of~~ a letter stating why the opinion should be published, and

(b) serving~~mailing~~ a copy on~~to~~ each party to the appeal not joining in the request.

Such a request must be filed within 21 days after release of the unpublished opinion or, if a timely motion for rehearing is filed, within 21 days after the denial of the motion.

(2) [Unchanged.]

(3) Promptly after the expiration of the time provided in subrule (D)(2), the clerk must~~shall~~ submit the request, and any response that has been received, to the panel that filed the opinion. Within 21 days after submission of the request, the panel will~~shall~~ decide whether to direct that the opinion be published. The opinion will~~shall~~ be published only if the panel unanimously so directs.

Failure of the panel to act within 21 days will~~shall~~ be treated as a denial of the request.

(4) The Court of Appeals must~~shall~~ not direct publication if the Supreme Court has denied an application for leave to appeal under MCR 7.305.

(E) Judgment.

(1) [Unchanged.]

(2) The clerk must~~shall~~ send a certified copy of the opinion or order, with the date of filing stamped on it, to each party and, in an appeal, to the court or tribunal from which the appeal was received. In criminal cases, ~~the clerk shall provide an additional copy of any opinion or order disposing of an appeal or of any order denying leave to appeal to~~ the defendant's lawyer~~, which the lawyer~~ must promptly send ~~to~~ the defendant a copy of any opinion or order disposing of an appeal or of any order denying leave to appeal. An opinion or order is notice of the entry of judgment of the Court of Appeals.

(F) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules,

(a) the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal in~~to~~ the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court;

(b) execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210(~~[~~H~~]~~) or by the Supreme Court clerk under MCR 7.310) with a certified copy of the court's judgment or, if a printed record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

(2) [Unchanged.]

(G) Entry, Issuance, Execution O~~o~~n, and Enforcement of All Other Orders. An order other than one described in subrule (E) is entered on the date of filing. The clerk must promptly send a certified copy to each party and to the trial court or tribunal. Unless otherwise stated, an order is effective on the date it is entered.

(H) [Unchanged.]

(I) Reconsideration.

(1) A motion for reconsideration may be filed within 21 days after the date of the order or the date stamped on an opinion. The motion mustshall include all facts, arguments, and citations to authorities in a single document and mustshall not exceed 3,200 words or, for self-represented litigants without access to a word-processing system, 10 double-spaced pages. A copy of the order or opinion of which reconsideration is sought must be included with the motion. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3).

(2) A party may answer a motion for reconsideration within 14 days after the motion is served on the party. An answer to a motion for reconsideration mustshall be a single document and shall not exceed 2,500 words or, for self-represented litigants without access to a word-processing system, seven7 double-spaced pages.

(3)-(4) [Unchanged.]

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1)-(2) [Unchanged.]

(3) Convening of Special Panel.

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome--determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Effect of Pending Supreme Court Appeal. ANo poll must notshall be conducted and a special panel mustshall not be convened if, at the time the judges are required to be polled, the Supreme Court has granted leave to appeal in the controlling case.

(c) [Unchanged.]

(4) Composition of Panel. A special panel convened underpursuant to this rule consists of seven7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) Consideration of Case by Panel. An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). The special panel mustshall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar. The parties are permitted to file supplemental briefs, and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel mustshall return to the original panel for further consideration any remaining, unresolved issues, as the case may require.

(6) [Unchanged.]

(7) Reconsideration; Appeal. There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at bar, the time limits for moving for reconsiderationrehearing or for filing an application for leave to appeal into the Supreme Court run from the date of the order declining to convene a special panel or, if a special panel is convened, from the date of the decision of the special panel, except that, if the case is returned to the original panel for further consideration in accordance with subrule (5), the time limits shall run from the date of the original panel's decision, after return from the special panel. If a motion for reconsideration is filed, it willshall be submitted to the special panel, which, if appropriate, may refer some or all of the issues presented to the original panel.

Rule 7.216 Miscellaneous Relief

(A) Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:

(1) exercise any or all of the powers of amendment of the trial court or tribunal;

(2) [Unchanged.]

(3) permit amendment of or additions to the grounds for appeal;

(4)-(10) [Unchanged.]

(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1)-(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the cCourt may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the cCourt without first obtaining leave, prohibiting the filing of actions in the cCourt without the filing fee or security for costs required by MCR 7.209 or MCR 7.219, or other restriction the cCourt deems just.

Rule 7.217 Involuntary Dismissal of Cases

(A)-(C) [Unchanged.]

(D) Reinstatement.

(1) Within 21 days after the date of the clerk's notice of dismissal underpursuant to this rule, the appellant or plaintiff may seek relief from dismissal by filing a motion for reinstatement that showsing mistake, inadvertence, or excusable neglect.

(2) [Unchanged.]

Rule 7.219 Taxation of Costs; Fees

(A)-(B) [Unchanged.]

(C) Objections. Any other party may file objections to the bill of costs with the clerk within seven7 days after a copy of the bill is served. The objecting party must serve a copy of the objections on the prevailing party and file proof of that service.

(D) [Unchanged.]

(E) Review. The action by the clerk will be reviewed by the Court of Appeals on motion of either party filed within seven~~7~~ days from the date of taxation, but on review only those affidavits or objections that~~which~~ were previously filed with the clerk may be considered by the court.

(F) Costs Taxable. A prevailing party may tax only the reasonable costs incurred in the Court of Appeals, including:

(1) ~~printing of briefs, or if briefs were typewritten,~~ a charge of $1 per original page for the prevailing party's costs associated with preparation of appellant's brief, appellee's brief, a supplemental brief or a reply brief, not including any attachments or appendices;

(2)-(7) [Unchanged.]

(G) Fees Paid to Clerk. The clerk may~~shall~~ collect the following fees, which may be taxed as costs:

(1)-(5) [Unchanged.]

(H) [Unchanged.]

(I) Violation of Rules. The Court of Appeals may impose costs on a party or an attorney ~~when in its discretion they should be assessed~~ for violation of these rules.

Staff Comment (ADM File No. 2022-32): The proposed amendments of subchapter 7.200 would make technical amendments of the COA rules in an effort to modernize them and ensure they reflect the COA's established practices.

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 February 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at

P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-32. 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.

October 26, 2022

Clerk

Public Policy Position
ADM File No. 2022-32: Proposed Amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 of the Michigan Court Rules

Support

Explanation
The Committee voted unanimously (24) to support ADM File No. 2022-32.

Position Vote:
Voted For position: 24
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

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

Public Policy Position
ADM File No. 2022-32: Proposed Amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 of the Michigan Court Rules

Support

Explanation
The Committee voted unanimously (24) to support ADM File No. 2022-32.

Position Vote:
Voted For position: 24
Voted against position: 0
Abstained from vote: 0
Did not vote (absence): 9

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

Public Policy Position
ADM File No. 2022-32: Proposed Amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 of the Michigan Court Rules

Support

Explanation:
The Committee voted to support the technical amendments to the Court of Appeals rules contained in ADM File No. 2022-32, which will result in the Rules better reflecting established practices.

Position Vote:
Voted For position: 16
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 8

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

Name: Gregg Knight

Date: 11/11/2022

ADM File Number: 2022-32

Comment:
Court rule 7.215--- how about amending that rule so that it's actually followed instead of being disregarded as it was in my court of appeals case (346554). I'm only a high school graduate but I found numerous ("published) cases regarding revocation of probation (MCL 771.4) but the panel made a personal and political decision in my case. Poor people like me cannot afford to appeal to the Supreme Court and ordinary people don't know you can appeal when your indigent because that's not known to the public. People also have no idea how to go through the process because the courts purposely make it so complicated that no ordinary citizen can understand the process. Private attorneys will not give you advice or even guidance on the appeal process unless you give them your life savings. Legal aid only help with limited cases. Pro bono attorneys do not exist. I was deprived of my constitutional rights which I had previously won back in Jackson County Circuit Court all because the court of appeals refused to follow court rule 7.215 and made their own personal and political decision. They assumed I would appeal to the Supreme Court but obviously don't realize that some people are poor. Too bad for me because if the court of appeals had followed the law I wouldn't have had to appeal anything. All 11 pages of court of appeals 346554 are wrong and I can prove that but Justice for poor people is nonexistent. An employee of the Attorney General's office told me that the Justice system is only set up for people who have money and he was absolutely correct!!! Make the Justice system so that it truly is (equal protection under the law)!!! Poor people have zero protection under the law!!

Report and Recommendations

MICHIGAN TASK FORCE ON JUVENILE JUSTICE REFORM

July 22, 2022

BACKGROUND ON MICHIGAN'S TASK FORCE ON JUVENILE JUSTICE REFORM

Over the last few years, Michigan has made many improvements to its juvenile justice system including raising the age of juvenile court jurisdiction. Additionally, local courts throughout the state employ research-based practices, such as diverting youth from system involvement, using risk and needs assessment tools, and adopting evidence-based programs and services. At the same time, Michigan has struggled to consistently align system policies and practices across diverse locales with what research shows works to improve community safety, reduce juvenile recidivism, and reduce system disparities.

In recognition of these challenges, Governor Gretchen Whitmer signed Executive Order 2021-6 establishing the Michigan 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." Task Force members include representatives from across branches of government, political parties, locales, and the juvenile justice continuum representing diverse perspectives, including youth and family members with lived experience of the juvenile justice system.

As laid out in the executive order, the Task Force is charged with developing recommendations to improve state law, policy, and appropriations guided by the following objectives:

- Safely reduce placement in detention and residential placement and associated costs.
- Increase the safety and well-being of youth impacted by the juvenile justice system.
- Reduce racial and ethnic disparities among youth impacted by the juvenile justice system.
- Improve the efficiency and effectiveness of the state's and counties' juvenile justice systems.
- Increase accountability and transparency within the juvenile justice system.
- Better align practices with research and constitutional mandates.

Governor Whitmer gave the Task Force a year to conduct the juvenile justice system assessment, develop recommendations, and provide a final report by July 22, 2022. In support of this effort, the Task Force partnered with The Council of State Governments (CSG) Justice Center—selected through a competitive process—to conduct the assessment and facilitate the recommendation development process. The CSG Justice Center is a national, nonprofit organization that combines the power of a membership association, representing state officials in all three branches of government, with policy and research expertise to develop strategies that increase public safety and strengthen communities.

MEMBERS OF THE MICHIGAN TASK FORCE ON JUVENILE JUSTICE REFORM

Lieutenant Governor Garlin Gilchrist (Chair)

Judge Dorene Allen, Midland County

Commissioner Alisha Bell, Wayne County

Judge Karen Braxton, Wayne County

Representative Brenda Carter, 29th District

John Casteel, Western Wayne County Care Management

Supreme Court Justice Elizabeth Clement, Michigan Supreme Court

Cami Fraser, Executive director of a non-profit organization that provides legal services

Stine Grand, Assistant Attorney General

Sheriff Steve Hinkley, Calhoun County

Jeannine Gant, (formerly) President, Big Brothers Big Sisters Detroit and currently Diversity, Inclusion and Belonging Lead, Emerging World

Senator Kim LaSata, 21st District

Thom Lattig, Juvenile Court Director, Ottawa County

Representative Sarah Lightner, 65th District

Derrick McCree, Director, Division of Juvenile Justice, Department of Health and Human Services

Karen McDonald, Prosecutor, Oakland County

Dr. Michael Rice, State Superintendent

Chief Everette Robbins II, Huron Township

Senator Sylvia Santana, 3rd District

Jason Smith, Executive Director, Michigan Center for Youth Justice

Kimberly Thomas, Co-director, Juvenile Justice Clinic, University of Michigan Law School

Commissioner Marlene Webster, Shiawassee County

Colbert Williams, Co-Founder and Co-Executive Director, The Delta Project

TASK FORCE MEETINGS AND ASSESSMENT PROCESS

The Task Force met nine times since its inception and was united in the goal of seeking to better understand the juvenile justice system and opportunities to improve it. Meetings provided members with an overview of Michigan's system at the state and local levels, from diversion through reentry, as well as financing and data collection. Members also received detailed presentations, based on the assessment process, on system strengths and challenges. Finally, Task Force meetings included a focus on uplifting local court and county best practices within Michigan as well as best practices from other states across the country. Meetings included robust discussion and helped build a growing consensus over time on the need to improve key aspects of the system statewide.

Meetings were recorded and made available to the public on the Task Force website hosted by the Michigan Committee on Juvenile Justice.

ASSESSMENT SCOPE AND QUALITATIVE ACTIVITIES

The Task Force, with support from the CSG Justice Center, conducted an unprecedented assessment of Michigan's juvenile justice system. Qualitative assessment activities encompassed a review of local and state policies and practices and extensive efforts to garner the perspectives of stakeholders across the system on strengths and opportunities for improvement. Activities included the following:

- Comprehensive review of juvenile statute, court rules, and administrative policies
- More than 100 focus groups and interviews with stakeholders from across the state to better understand how the juvenile justice system functions. Conversations included, but were not limited to, representatives from the following groups:
    - Law enforcement
    - School resource officers
    - Court administrators
    - Judges and referees
    - Detention staff
    - Line-level probation officers and probation managers
    - Prosecutors
    - Public defenders
    - Community-based and residential service providers (local, private, and state operated)
    - Michigan Department of Health and Human Services (MDHHS) juvenile justice, child welfare, behavioral health, finance, data, and other staff and leadership
    - Education officials
    - Community mental health and other behavioral health professionals
    - Advocates
    - Tribal populations
    - Youth and families with lived experience in the juvenile justice system

- Ongoing conversations with juvenile justice agencies, associations, and other stakeholders to review and reflect on the assessment findings including but not limited to the following:
    - Michigan Association for Family Court Administration
    - Michigan Association of Circuit Court Administrators
    - Michigan Probate Judges Association
    - Michigan Judges Association
    - Referees Association of Michigan
    - The Prosecuting Attorneys Association of Michigan
    - Michigan Juvenile Detention Association
    - Michigan Association of Chiefs of Police
    - Michigan Sheriff's Association
    - Michigan Association of Counties
    - Michigan Federation for Children and Families

The CSG Justice Center tried to ensure that focus group participants represented Michigan's geographic diversity with representation from urban, exurban, and rural communities. Further, efforts were made to ensure that the voices and perspectives across the focus groups included demographic representation of people impacted by the justice system.

QUANTITATIVE ANALYSIS

In addition to the qualitative assessment, the CSG Justice Center examined case-level data on youth in the juvenile justice system. Case-level data were provided to the CSG Justice Center by the MDHHS, the State Court Administrative Office (SCAO), and a sample of 32 individual county courts. The courts that shared data with the CSG Justice Center provided information on juvenile cases from petition filing date through adjudication over a 5-year period (2016–2020) and covered approximately 55 percent of the state juvenile population (ages 10 to 16). Data provided by MDHHS included information on statewide juvenile and dual status (child welfare and juvenile justice involved) cases placed under the supervision of the state from 2015 to 2020.

The CSG Justice Center's efforts to obtain and analyze systemwide data, however, also highlighted a number of data gaps and challenges at the county and state levels that limited a more robust data analysis. These challenges include non-standardized and incomplete race, ethnicity, offense, violation, placement, and risk data across counties and an inability to clearly distinguish state from county wards within local court data for youth placed post-disposition.

ASSESSMENT FINDINGS IN CONTEXT: WHAT WORKS TO IMPROVE COMMUNITY SAFETY AND YOUTH OUTCOMES

The findings of the assessment process were presented to the Task Force and other stakeholders and were grounded in what research shows works to reduce juvenile recidivism, reduce system disparities, and ensure that resources are used efficiently to improve community safety. This research and related

state and local best practices are summarized in Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile Justice System, which emphasizes the following:

1. Base supervision, service, and resource allocation decisions on the results of validated risk and needs assessments.
2. Adopt and effectively implement services demonstrated to reduce recidivism and improve other youth outcomes and use data to evaluate system performance and guide improvements.
3. Employ a coordinated approach across service systems to address youth's needs.
4. Tailor system policies and programs to reflect the developmental needs of adolescents.

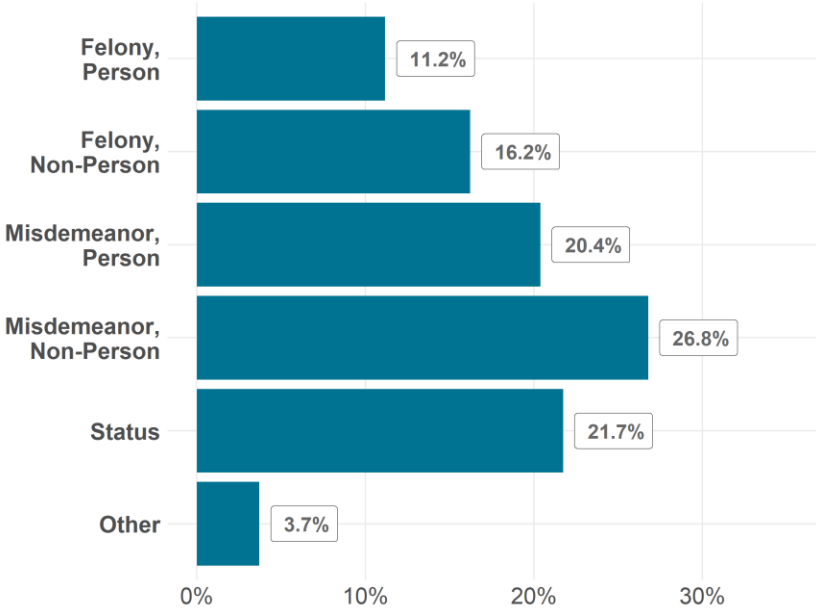
JUVENILE JUSTICE SYSTEM ASSESSMENT: KEY FINDINGS

The assessment of the juvenile justice system identified key strengths, including innovative, research-based approaches that are currently implemented by counties and local courts throughout the state such as pre-court diversion programs, use of risk and needs assessments, and investments in evidence-based, community-based programs. What follows is a summary of the key findings related to system gaps and challenges. Comprehensive assessment findings, including both strengths and challenges, can be found on the Task Force website hosted by the Michigan Committee on Juvenile Justice, particularly the February, March, and April meetings.[1]

KEY FINDINGS

1. **Michigan lacks the policy framework and service infrastructure necessary to ensure that youth who are at a low risk of reoffending are diverted from the juvenile justice system statewide.**
    a. Diversion eligibility, processes, tools, and practices differ significantly across the state.
    b. Nearly half of all petitions between 2016 and 2019 were for status[2] and non-person misdemeanor[3] offenses.[4] (See Figure 1.) Nearly 12 percent were for youth ages 12 and under.[5] (See Figure A1 in Appendix A.)
    c. The Child Care Fund (CCF)—the primary statewide juvenile justice funding structure—requires a court referral and the provision of intensive supervision, which makes it challenging for jurisdictions to use these dollars for pre-court or pre-arrest diversion.

Figure 1. Petitions by Offense Type, 2016–2019



2. **Many elements of the juvenile court process and probation supervision are not aligned with research and developmentally appropriate practices across the state.**
    a. Limited statewide guidelines, standards, or tools exist to guide dispositional decisions, lengths of time on supervision, and supervision practices.
    b. The juvenile justice system imposes numerous fines/costs on youth and their families. In 2019, 41 percent of juvenile court cases had a fine ordered or an associated cost.[6]
    c. Youth and families often must pay attorney fees, in addition to other costs imposed by the system, which can result in youth waiving an attorney or pleading their cases quickly. In 2019, the median amount paid for reimbursement costs (placement, evaluation, treatment) was $850, with 11 percent of cases paying more than $1,000.[7]

3. **Michigan has no centralized structure and minimal standards, supports, or resources for juvenile public defense statewide.**
    a. There is no statewide system nor are there standards or monitoring processes in place to ensure that youth in the juvenile justice system receive adequate defense services.
    b. Lack of statewide funding for juvenile defense has resulted in significant variation in local systems in terms of accessibility to trained, qualified defenders; the types of services that are available; and when in the court process counsel is appointed.

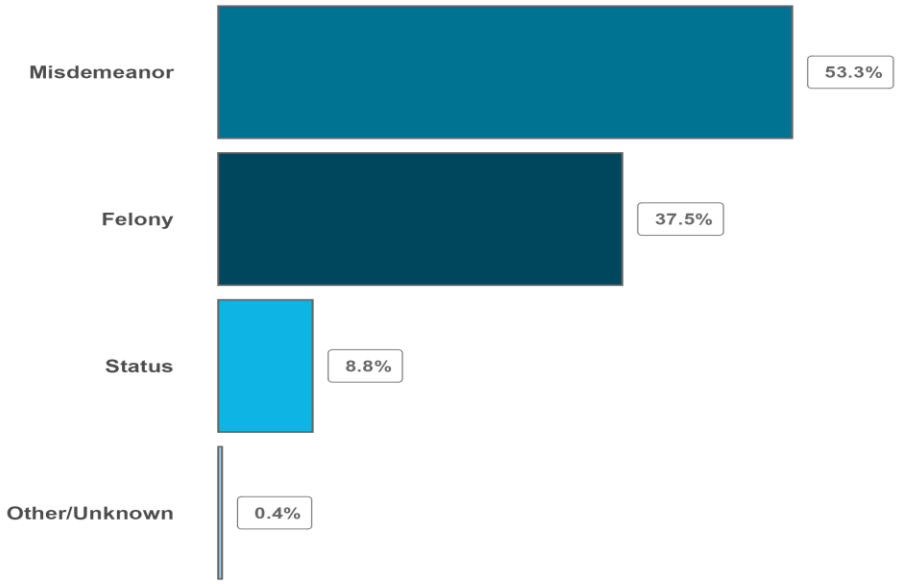
4. **Michigan lacks statewide policies and tools to ensure that predisposition detention is used only for youth who are a public safety or flight risk.**
    a. Local detention decision-making protocols vary considerably with minimal use of validated screening tools to inform these decisions. Over 60 percent of youth placed in

detention have committed a status or misdemeanor offense as their most serious offense (see Figure 2).

b. From 2016 to 2019, 1 in 3 youth stayed in detention longer than 30 days; currently, youth remain in detention facilities for months awaiting placement.[8] (See Figure A2.)

c. Detention licensing standards differ between court- and county-operated facilities, do not reflect trauma-informed practices, and have limited quality assurance.

Figure 2: Predisposition Detentions by Most Serious Offense, 8 Counties, 2016–2020



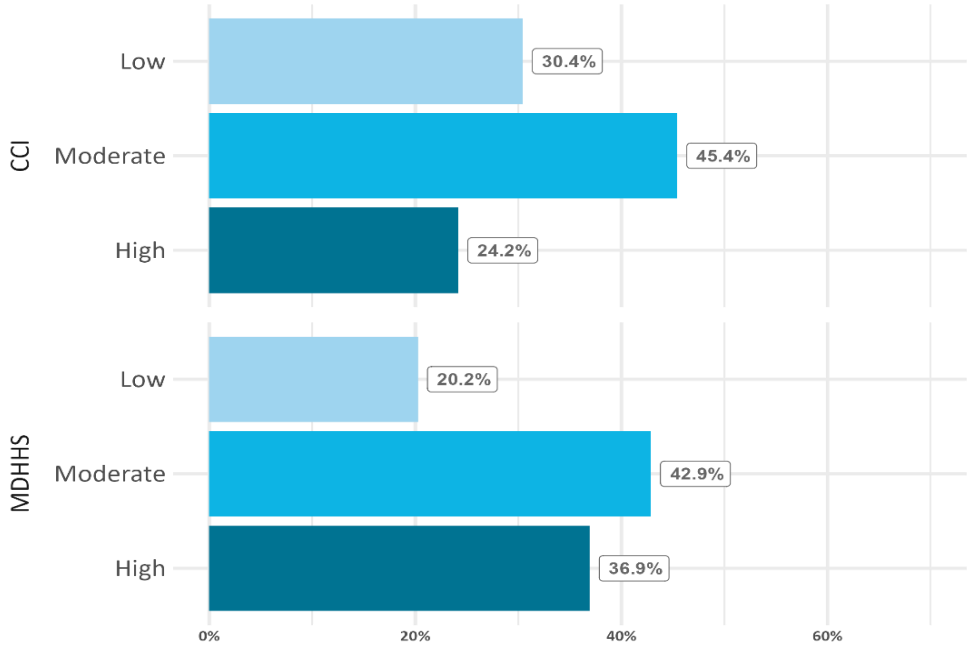
5. **Michigan has minimal state laws, court rules, or funding incentives that guide the use of post-disposition residential placements.**

   a. Michigan does not have statutory age, offense, or risk level limitations on the use of post-disposition residential placements. As a result, more than 60 percent of youth placed in privately operated facilities (CCI) and three-quarters placed in state-operated facilities (MDHHS) as state wards from 2016 to 2020 were assessed as being at a low or moderate risk to reoffend.[9] (See Figure 3.)

   b. Almost 90 percent of state wards who started in a state-operated facility and 70 percent who started in a privately operated facility from 2015 to 2018 spent 9 months or more out of home.[10] (See Figure A3.)

   c. The CCF does not provide financial incentive for local courts to maintain youth in the community given that community-based and residential placements are reimbursed at the same rate (50 percent). There are few dedicated funding mechanisms available to locales to develop community-based alternatives to detention and incarceration.

Figure 3. Disposition Risk Level for State Supervised Youth Placements, 2016–2020



6. **The quality of services and case management received by youth in post-disposition residential placements differs significantly by county, wardship, and facility.**
    a. There is limited statewide strategy or investment in ensuring that state- and privately operated facilities employ specific, evidence-based, culturally competent programs and practices proven to be effective for justice-involved youth.
    b. State and county staff, and young people themselves, cite a dearth of reentry services, especially for older youth, including behavioral health services, housing, independent living programs, and programs for youth who commit sex offenses.
    c. Delays, confusion, and lack of coordination over how to reinstate Medicaid upon reentry hinders a continuity of care, leaving youth without necessary medication and services.

7. **The residential system suffers from inherent structural challenges that undermine bed availability and quality.**
    a. There has been historic and ongoing inattention to the needs of the juvenile justice system, including ensuring that the state has the capacity, staff expertise, systems, and resources needed to support sufficient and effective residential service delivery.
    b. The disjointed nature of the residential system hampers bed planning, matching youth to the most appropriate level of care, and crisis management.
    c. Michigan's approach to funding residential placements—including low per diem rates, no unfilled bed rate, lack of MDHHS control over funding rates, and lack of competitive procurement—hinders provider stability, staffing, and the efficient use of resources.

8. **Black youth are disproportionately represented in all parts of the juvenile justice continuum, and few statewide structures exist to address disparities.**
    a. Black youth are petitioned for court at 2 times the rate of White youth and are more than 1.5 times as likely to be adjudicated[11] as their White peers.[12]
    b. Black youth are detained at six times the rate of White youth, and the average length of stay in detention is seven days longer.[13] (See Figures A4 and A5.)
    c. Black youth are placed as state wards at three times the rate of White youth, and there is limited attention statewide to ensuring that the residential system is equipped to serve youth of color effectively.[14] (See Figure A6.)

9. **There is no statewide quality assurance system to ensure that local courts, the state, or private providers are implementing programs and practices effectively**.
    a. There is no statewide infrastructure to guide or hold local courts accountable for implementing research-based programs and practices.
    b. There is no dedicated quality assurance infrastructure to assess the quality of services provided by state- or privately operated facilities serving justice-involved youth beyond broad health and safety licensing standards and associated reviews.

10. **Data are unavailable or unreliable to answer basic questions about the juvenile justice system's performance across decision points and to guide system decisions and improvement.**
    a. Michigan lacks statewide performance measures, data systems, analytic capacity, and reporting processes to measure community-based and out-of-home placement outputs, outcomes, or performance such as recidivism or other youth outcomes.

TASK FORCE RECOMMENDATIONS FOR JUVENILE JUSTICE SYSTEM IMPROVEMENT

RECOMMENDATION DEVELOPMENT PROCESS

The recommendation development process was a comprehensive, transparent, collaborative effort that involved a range of diverse stakeholders with varying perspectives. This process included synthesizing input from hundreds of interviews and focus groups, including with youth and families directly impacted by the system. Additionally, 8 issue-specific working groups, consisting of Task Force members and other stakeholders, formed in early 2022 and met regularly to identify recommendations for the Task Force. These working groups (see Appendix B) were organized around the following topics:

1. Competency
2. Court Processing
3. Data
4. Diversion
5. Juvenile Defense

6. Financing
7. Out-of-Home Placement
8. Waiver

The working groups included representatives from the Task Force and practitioners who were experts in the identified topic areas, as well as law enforcement, court staff, impacted parents, judges, referees, legislators, and others. The recommendations were also guided and shaped by four constituency advisory groups (see Appendix C). The four advisory groups were as follows:

1. Tribal Advisory Group
2. Advocates
3. Impacted Parents
4. State Court Administrative Office

These groups met tirelessly over months to review the assessment findings and heard from representatives within Michigan and other states about best practices. Through extensive conversations, they achieved consensus on a set of research-based recommendations that they believe will improve community safety, reduce disparities, and improve outcomes for youth and families across the state.

To aid in this process, the majority of the recommendations are intended to be implemented with delayed effective dates to allow time for thoughtful planning and ensure that the proper resources and local and state capacity are in place prior to implementation.

RECOMMENDATIONS APPROVED BY THE TASK FORCE

Every recommendation that follows was reviewed, discussed, and formally voted on by members of the Task Force during the July 18, 2022, Task Force meeting. The details of the recommendations that were approved appear below, including in parentheses whether those recommendations were approved unanimously or by two-thirds consensus.

The Task Force is excited about the comprehensive, research-based blueprint these recommendations provide to transform Michigan's juvenile justice system. Members are committed to continuing to work across branches of government and with an array of stakeholders at the state and local levels to translate these recommendations into concrete legislative, court rule, administration, and funding changes and to support their adoption and effective implementation statewide.

SYSTEM STRUCTURE AND FUNDING PRIORITIES

1. **Enhance the Child Care Fund (CCF) to focus on establishing a minimum framework of juvenile justice best practices statewide. These best practices will be supported by an increase in the community-based services/supervision reimbursement rate for counties and tribes in order to incentivize and support the development, expansion, and strengthening of community-based services and formal alternatives to detention and incarceration. (UNANIMOUS[15])**
    a. Increase the state reimbursement rate from 50 percent to 75 percent for community-based supervision and services (including respite/shelter). Maintain the 50 percent state reimbursement rate for residential services (detention and post-disposition longer term residential placements).
    b. This increased rate would also incorporate costs related to Raise the Age (transitioning in the final year of the current Raise the Age funding model) such that the CCF becomes an integrated source of funding for Raise the Age and CCF funding.
    c. As part of the increased reimbursement rate for community-based services, require local courts to 1) adopt a validated risk screening too to guide diversion decisions 2) adopt a validated risk assessment tool for use prior to disposition 3) adopt a detention screening tool 4) adhere to best practice probation standards, including officers being certified in these standards every two years 5) employ a local quality assurance specialist to support the above practices (excluding counties/tribes that receive the basic grant) and 6) form cross-systems youth service committees at the local/regional level to promote collaboration and resource efficiencies.
    d. Expand use of the CCF so that local courts and tribes can use funding as they see fit for pre-arrest diversion through reentry, eliminate "intensive" requirements so counties can match supervision/services to youth's risk level, and streamline administrative requirements.
    e. Create a statewide CCF advisory committee composed of juvenile justice association members, local court/county representatives, prosecutor and defense attorney representatives, tribal representatives, MDHHS, advocates, and impacted populations, to support evidence-based practice implementation and statewide capacity building.

2. **Establish and fund a new Juvenile Justice Services Division within the State Court Administrative Office (SCAO). (UNANIMOUS)** The Division will do the following**:**
    a. Coordinate statewide implementation of risk/needs and detention screening and assessment tools.
    b. Provide technical assistance and quality assurance for local implementation of research-based policies, programs, and practices.

c. Help coordinate statewide court policies, funding, data collection, and reporting, including CCF performance measures such as the use of structured decision-making tools, overrides, and equity.

d. In fulfilling this capacity, SCAO may partner with a third-party, such as with a Michigan university, to support technical assistance and quality assurance activities.

3. **Expand the Michigan Indigent Defense Commission (MIDC) to include development, oversight, and compliance with youth defense standards in local county defense systems. (UNANIMOUS)**
    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 (PACC)

4. **Establish a statewide residential advisory committee composed of juvenile justice association members, local representatives, tribal representatives, advocates, prosecutors, defense attorneys and other stakeholders including impacted youth and families, and MDHHS. (UNANIMOUS)**
Responsibilities for this committee include the following:
    a. Work with MDHHS to standardize and strengthen local detention and privately-operated residential facility licensing standards, service standards, staff training, length-of-stay guidelines, as well as minimum statewide state/county ward case management standards.
    b. Develop statewide strategies, policies, and/or recommendations to address the crisis in availability of therapeutic residential placements. This must include treatment for mental health needs and the needs of developmentally disabled youth.
    c. Work with DHHS to establish a clearinghouse for all placements in the state.
    d. Recommend criteria to measure progress toward evidence-based outcomes that are set for a youth to assist in documenting the effect of residential interventions.
    e. In partnership with MDHHS, establish juvenile justice specific quality assurance and improvement processes for these facilities and share performance information statewide.
    f. Develop statewide strategies, policies, and/or recommendations on alternatives to detention and incarceration (such as the use of kinship care and respite).

g. Advise and coordinate with MDHHS on the development of a larger, transformational statewide strategic plan for residential bed planning, procurement, and bed management.

5. **Require the establishment of cross-systems, cross-government, county/regional/tribal youth service committees (as part of existing human service committees) to improve service availability, access, and coordination of CCF and other service system's funding for youth at risk of entering or who are in the juvenile justice system. These committees will also be responsible for strengthening reentry services and supports for youth placed out of home regardless of wardship. (UNANIMOUS)**
    a. These committees would be composed of representatives from local courts, tribes, state child welfare and juvenile justice staff, local community mental health centers, service providers, schools, advocates, prosecutors, defense attorneys, and impacted youth and families. Committees shall include representatives of tribes with service areas in the same region.

DIVERSION

6. **Establish 13 as the minimum age for juvenile court jurisdiction. (CONSENSUS[16])**
    a. An exception is made for youth committing a "specified juvenile violation" as defined in 712A.2 of Michigan's Probate Code (i.e. most serious offenses).
    b. Youth under the age of 13 could still be referred to probation through an alternative referral process, in lieu of an arrest or petition, to access services for themselves and their families, if necessary. Courts/tribes will be able to use the CCF to support services, including court-operated service programs, for this population.
    c. Consistent with the federal Indian Child Welfare Act and the Michigan Indian Child Welfare Act, for cases involving a child who is enrolled or eligible for enrollment in a federally recognized tribe and is referred to probation instead of into court, notice shall be sent to the child's tribe, the tribe shall be allowed to participate in the case, and the case can potentially be transferred to the court of the child's tribe.

7. **Require the use of a validated risk screening tool and a validated mental health screening tool to inform diversion and consent calendar decisions. Expand the Diversion Act so that all offenses—except for the most serious ones, which shall be enumerated—are eligible for pre-court diversion based on established local criteria and the use of a risk screening tool. (UNANIMOUS)**
    a. The risk screening tool and mental health screening tool shall be conducted prior to a decision being made to offer diversion or the consent calendar.
    b. Courts can use the risk screening tool that best fits their needs based on statewide guidelines for the tool and its appropriate use. Part of the implementation planning process will include establishing criteria for ensuring the tools used are validated and research based, including for youth of all races/ethnicities to prevent bias. Currently, the Michigan Juvenile Assessment Tools meet these criteria and are freely available to all parties.

c. Tools would inform, not replace, professional discretion; counties would retain full discretion to make whatever decisions they believe are in the best interests of community safety and youth outcomes.
d. A "specified juvenile violation" as defined in 712A.2 of Michigan's Probate Code will not be eligible for diversion under the Diversion Act.

8. **All youth who commit status offenses shall be referred to a court officer, or another party designated by the local court, pre-petition, to conduct a validated risk screening. Youth screened as low risk are diverted to collaborative community programs or other services that are evidence-based or culturally approved by a Tribe if the youth is American Indian. (UNANIMOUS)**
    a. After screening, a formal petition for a youth committing a status offense may be considered, with a requirement for written documentation by the court officer, and ultimately by the court, articulated on the record, if placed under court supervision, for why diversion was not used.
    b. A state funded pilot program to remove status offenses completely from court jurisdiction shall be created in a diverse set of counties. Counties participating in the pilot program will provide services for diverted youth and shall receive technical assistance from the new SCAO Juvenile Justice Services Division.
    c. It is encouraged that local courts create a protocol at the county level between the court, the prosecutor, public defender, schools, tribes, and other community stakeholders to address status offenses based on available resources and services.
    d. Consistent with the federal Indian Child Welfare Act and the Michigan Indian Child Welfare Act, for cases involving a child who is enrolled or eligible for enrollment in a federally recognized tribe and is referred to court officer/probation for status offenses, notice shall be sent to the child's tribe prior to the screening, the tribe shall be allowed to participate in the case, and the cases can potentially be transferred to the court of the child's tribe.

9. **Align pre-court diversion and consent calendar conditions with research and developmental science. (UNANIMOUS)**
    a. Limit the length of time that a youth can be placed on pre-court diversion to no longer than three months, and to no longer than six months for youth on the consent calendar, unless the court determines, and articulates on the record, a longer period is needed for youth to complete a specific treatment program.
    b. Eliminate fees associated with participation in pre-court diversion and the consent calendar.
    c. Eliminate the possibility that restitution can be used to exclude eligibility for pre-court diversion and the consent calendar.

COURT PROCESSING

10. **Require a validated risk and needs assessment to be conducted for all youth prior to disposition, and the results of the validated risk and needs assessment to be used by prosecutors, defense attorneys, the court, and other parties to the case to determine the most appropriate disposition**

commensurate with public safety, victim interests, rehabilitation, and improved youth outcomes including but not limited to educational advancement. (UNANIMOUS)

a. Local courts can select and use whichever tool fits their needs if it is research-based and validated. Part of the implementation planning process will include establishing criteria for appropriate tools and their use, including specific consideration to ensure that the tools are validated and don't perpetuate bias for youth of color. Currently, the Michigan Juvenile Assessment Tools meet these criteria and are freely available to all parties.
b. Support the use of a mental health screening tool pre-disposition, and the referral of a client to a full mental health assessment if warranted.
c. Reassessments shall be conducted at least every six months or when there is a major life event or change in the case.
d. A dispositional review hearing will be conducted at least at the six-month mark—if not before—to consider whether youth still require system supervision, and at least every three months if applicable thereafter.

11. **SCAO, with proper funding and in partnership with local probation departments and other stakeholders, shall establish statewide, research-based, juvenile specific probation standards and guidelines. (UNANIMOUS)**
    a. Areas for standards include the use of risk and needs screening and assessment, detention screening and decision making, case planning, tailoring and individualizing probation conditions, improving youth and family engagement, using graduated responses and incentives, reviewing data, and addressing racial and ethnic disparities.
    b. SCAO shall "certify" local probation officers and court staff in these standards through a required training institute every two years, as per a requirement of the CCF, and provide ongoing training, technical assistance, and quality assurance on these standards.

12. **The age of presumed competence will align with the minimum age of jurisdiction. (UNANIMOUS)**
    a. Expand competency evaluation reports to include an individualized, sustainable mental/behavioral health service referral.
    b. In competency determinations, courts shall not consider just the physical age of the child, but the mental age and ability to comply with and benefit from court ordered services.
    c. Refine the definition of a restoration service provider and update the timeline for evaluation/remediation/treatment by removing the 30- and 60-day extensions unless adequate resources are unavailable.
    d. MDHHS, in collaboration with the newly created SCAO Juvenile Justice Services Division, shall maintain a list of approved providers to evaluate juvenile competency considering these factors.
    e. Expand judges' ability to dismiss felony offenses for youth found incompetent.
    f. Under the revised CCF, competency evaluations and restoration and treatment services conducted after a youth is found incompetent would be eligible for reimbursement.

13. **Establish a statewide study committee on juvenile waivers that will be charged with reviewing available data on the use of juvenile waivers and designations, identifying challenges and barriers with current policies and practices, examining national research and best practices, and developing a final report that includes recommendations for improvement, which shall be submitted to the governor, SCAO, and legislature. (UNANIMOUS)**

14. **Ensure that factors considered by the court for traditional waivers and designations account for youth's developmental maturity and emotional and mental health, and their ability to get more treatment and rehabilitation for these needs in juvenile court. (UNANIMOUS)** Factors to be considered include the following:
    a. The seriousness of the offense and aggravating factors, the youth's culpability, and the youth's risk to public safety
    b. The youth's prior delinquency history including only the youth's prior record of acts that would be crimes if committed by an adult
    c. The emotional and mental health and maturity of the youth
    d. The amenability of the youth to treatment and rehabilitation in the juvenile justice system
    e. Cultural considerations
    f. Prior treatment efforts and out-of-home placements
    g. Impact on the victim

15. **Eliminate most non-restitution fees and costs associated with juvenile justice system involvement. (UNANIMOUS)**
    a. Juvenile court and probation cannot assess fees/costs except for restitution, or a fee/cost related to the Crime Victims Fund.
    b. For fees related to the Crime Victims Fund as well as for restitution, establish a standard procedure for ability to pay, determination of payment schedule, and total to be assessed.

16. **Restrict the ability to extend consent calendar and probation supervision solely for the purpose of collecting restitution. Restitution orders will still be maintained through the show cause process if probation supervision is terminated. (UNANIMOUS)**

OUT-OF-HOME PLACEMENT

17. **Require a validated detention screening tool to be used statewide, prior to detention decisions, as a guide for detention placement decisions and establish clear statutory legal authority for what entities can make detention decisions. (UNANIMOUS)**
    a. Detention is short-term confinement and used to ensure public safety or risk of flight from court processes. Detention is not normal or routine and all options of community-based placement must be explored by the Court prior to the use of detention, and a decision shall be made on the record subject to due process safeguards.

b. The working group recommended statewide adoption of a single detention screening tool, given that most counties do not currently use any tool. SCAO, in coordination with the CCF advisory committee, would help to develop and promulgate standards and protocols for the tool's appropriate use and overrides, provide training, and oversee data collection.
c. An expedited review hearing shall be held monthly on the record to determine the suitability and continuation of the detention by the court.

18. **Restrict the use of pre-adjudication detention for non-public safety reasons. (UNANIMOUS)**
    a. Detention can't be used solely for need-based reasons including the need for behavioral health treatment, family reasons, and self-protection.
    b. Detention can't be used for youth who are solely adjudicated with a status or low-level misdemeanor offense (to be enumerated) as their most serious offense.
    c. Exceptions can be made, articulated on the record, for youth who pose an imminent threat to public safety or flight risk.
    d. Through the residential advisory committee, partner with MDHHS and other state agencies and experts as appropriate to develop a strategy and plan for increasing statewide capacity and use policies for kinship care, respite foster homes, crisis mobilization services, and other resources for use specifically as alternatives to detention.

19. **Restrict the use of detention for violations of a court's orders that is not an independent delinquent (as opposed to status) offense. (UNANIMOUS)**
    a. Exceptions can be made, articulated on the record, for youth who pose an imminent threat to public safety or flight risk.

20. **Establish a single, updated set of licensing/service standards for detention facilities that reflect developmentally appropriate, research-based, trauma-informed principles and practices, regardless of court/county operation. Create a robust annual quality assurance and review process for these facilities. (UNANIMOUS)**

21. **Expand funding for the Regional Detention Support Services Program to focus on programmatic alternatives to detention such as crisis mobilization, respite, short-term shelter foster homes, and home detention monitoring and services, particularly targeted to rural and tribal communities. (UNANIMOUS)**

22. **Require MDHHS—in partnership with the residential advisory committee, SCAO, and relevant juvenile justice associations—to examine the juvenile justice residential financing model, per diem rates, funding levels, bed allocation, bed locations and capital infrastructure, public/private management, and procurement methods of residential placements, and within one year, make legislative and funding recommendations to the governor's office and legislature for a revamped statewide juvenile justice residential structure. (UNANIMOUS)**
    a. Recommendations must provide for improved bed sufficiency and stability, qualified facility staffing and staff retention, keeping youth closer to home in smaller, more treatment-

oriented settings, the efficient use of resources for effective services, and improved public safety and youth outcomes, including but not limited to educational advancement.

23. **Provide MDHHS with statutory authority to adjust juvenile justice residential per diem rates within their appropriated fiscal budget, and make changes to provider service agreements to respond in a more flexible way to bed shortages, staff retention challenges, and service needs. (UNANIMOUS)**

24. **Through the residential advisory committee, establish a short-term, cross-system, case review process for counties/courts for youth remaining in detention for longer than 30-60 days awaiting placement, as well as for counties/courts and MDHHS for youth in private and state-run facilities for longer than 9-12 months, to help identify community-based or residential alternatives with the goals of reducing lengths of stay and freeing up bed capacity. (UNANIMOUS)**

25. **Through the residential advisory committee, establish a set of baseline case management standards for counties and MDHHS that must guide all long-term post disposition state and privately-run residential placements regardless of county or wardship, including ongoing use of risk and needs assessments, service delivery, behavioral health treatment, family/team meetings, dual ward policies, and reentry planning processes. (UNANIMOUS)**

26. **MDHHS shall, in partnership with the residential advisory committee, develop robust, juvenile-justice specific, evidence-based service standards for all state-run and privately-run juvenile justice residential placements regardless of facility or wardship. (UNANIMOUS)**
    a. These standards shall include minimum risk/needs assessment, service, behavioral health, case management, family engagement, and reentry planning expectations.
    b. These standards shall include length-of-stay guidelines informed by the treatment models used by facilities, youth's treatment progress, youth's risk level/most serious offense, and research and best practices from other states.

27. **Establish an independent ombudsman, or strengthen and expand an existing entity, for handling, investigating, and reporting incidents in facilities. (UNANIMOUS)**
    a. Establish policies and confidentiality protocols that support youth/families to make complaints directly to this entity, anonymously, if necessary, rather than having to go through the facility in which a youth is currently placed.

28. **Establish a dedicated administrative process and protocols and MDHHS staff to support the timely reinstatement of Medicaid for youth leaving detention or longer-term residential facilities. (UNANIMOUS)**
    a. Explore opportunities for Michigan Medicaid coverage to continue for youth in detention for medical and prescription care.

DATA

29. **SCAO should develop data standardization protocols and procedures for the collection and sharing of data by local courts that can be used to inform decision making and drive system improvement efforts. (UNANIMOUS)**
    a. Protocols for local courts collecting and sharing data with SCAO should include set data elements, performance measures (including equity measures), uniform definitions, and business rules that allows for statewide juvenile justice data aggregation, analysis, and reporting.
    b. SCAO should develop an annual publicly available statewide data report on key performance measures.

30. **SCAO should establish robust quality assurance procedures to assess and address data quality issues and ensure data integrity, including conducting regular data reviews and developing resources and providing training for local courts. (UNANIMOUS)** Procedures will include the following:
    a. Reviewing local data exported into the JDW regularly to ensure required data elements are accurate, complete, consistent, current, and timely.
    b. Establishing procedures to alert local courts when data quality issues are flagged and provide courts with an opportunity to correct required data elements within an agreed upon period.
    c. Developing data definitions, data standards, and business rule guides that will be maintained online as resources for juvenile courts.
    d. Providing regular training and timely updates to local juvenile court administrators and staff on data standards, business rules, and updates.

EQUITY AND YOUTH VOICE

31. **Establish statewide definitions and protocols for capturing race, ethnicity, and tribal data across data systems, and create a public equity data dashboard to establish a baseline and track progress on key measures of statewide disparities and improvements. (UNANIMOUS)**

32. **Establish a statewide youth and family juvenile justice advisory group to inform resource allocation decisions and ensure that policy adoption and implementation are vetted and supported by authentic youth and family participation, to include but not be limited to educational advancement while youth are in the juvenile justice system. (UNANIMOUS)**
    a. The statewide advisory group shall work with local courts and tribes, SCAO, and MDHHS to develop a statewide family engagement strategy, including family engagement policies and standards across diversion, court, probation, detention, and placement.

EXCEPTIONS TO RECOMMENDATIONS TO ENSURE RESPECT AND COMPLIANCE WITH TRIBAL SOVEREIGNTY

The Tribal Advisory Board to the Michigan Task Force on Juvenile Justice Reform requested carve outs for changes to Michigan law, rule, or policy recommended by the Task Force, including, but not limited to, any changes that may result in loss or modification to Child Care Fund reimbursement for tribes.

- The Tribal Advisory Board requests that provisions be put in place to prevent out-of-home placement and detention facilities in Michigan from rejecting or ejecting tribal wards based upon changes recommended by the Task Force that result in statutory, policy, or rule changes in Michigan that the tribes elect not to adopt within their individual jurisdictions.
- The Tribal Advisory Board will be recommending that status offenses remain unchanged to ensure that the State of Michigan continues to honor the terms and spirit of the Indian Child Welfare Act (25 U.S.C 1901 et seq.) and the Michigan Indian Family Preservation Act (MCL 712B.1 - 41).

The following draft language for these carve outs is presented by the Tribal Advisory Board to be considered:

"In order to respect tribal sovereignty, the eligibility requirements for reimbursement through [the Child Care Fund] under [insert citation for use of validated assessment tools, data collection requirements, detention limitation on length of stay/age/offense, residential placement limitation on length of stay/age/offense, probation oversight/training requirements, and detention review hearings] shall not apply to tribes. Reimbursement through the Child Care Fund for detention of tribal wards shall not be adjusted below 50%."

General language for tribal no reject/eject clause in facility contracts:

"In order to respect tribal sovereignty, the department's master contract for juvenile justice residential foster care services shall prohibit contractors from denying a referral for placement of a youth, or terminating a youth's placement, if the youth's assessed treatment needs are in alignment with the facility's residential program type, as identified by a tribal court or the department when placing a temporary or permanent ward of a tribal court based upon the child's age if the child is over 10-years old, type of offense, or use of a validated assessment tool. In addition, the master contract shall require that a ward of a tribal court placed in juvenile justice residential foster care facility must have regularly scheduled treatment sessions with a licensed psychologist or psychiatrist, or both, and access to the licensed psychologist or psychiatrist as needed."

Note: This language is taken from 2020 PA 166 Sec. 709 and is meant to prevent facilities from being able to deny placement for tribal court wards based on the differences between a tribe's laws and the changes made to Michigan statutes/policies/rules.

Appendix A: Data

Figure A1. Petitions by Age, 2016–2019

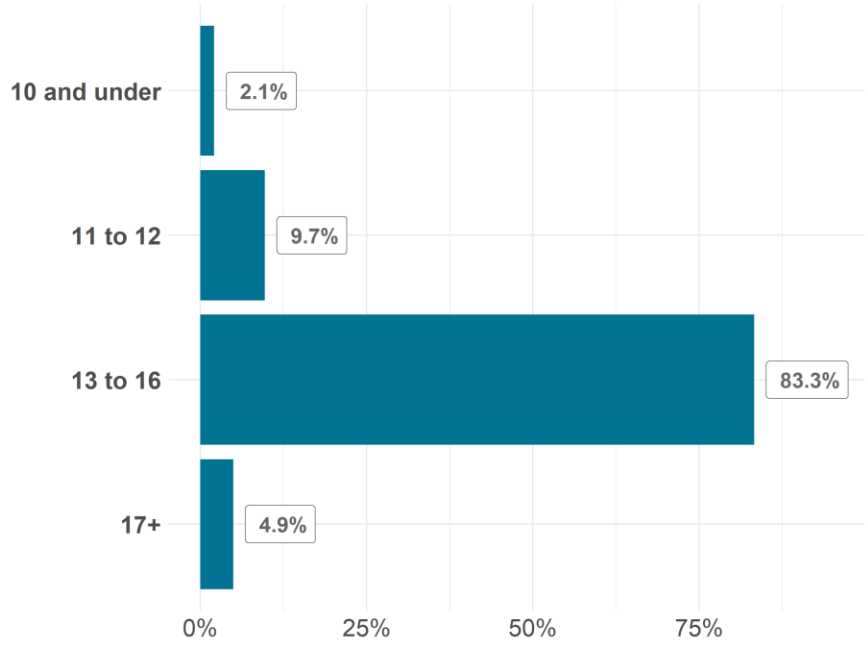


Figure A2. Length of Stay in Detention Distribution, 9 County Courts, 2016–2018

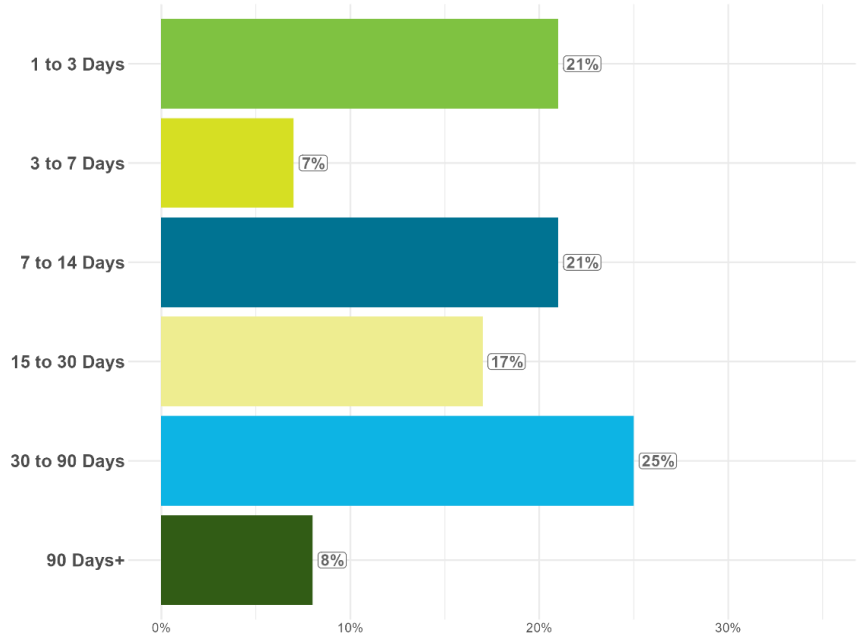


Figure A3. Total Length of Stay Distribution within Placement Episodes by Starting Placement for State Supervised Youth, 2015–2018

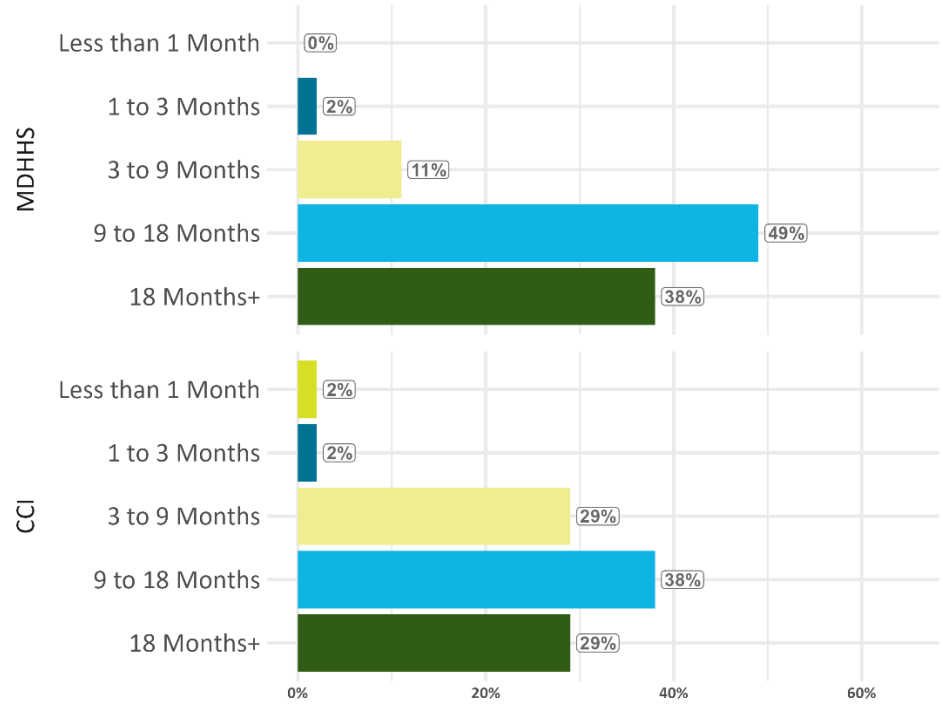


Figure A4. Relative Rate Index Black vs. White for Detention, 8 County Courts, 2016–2020

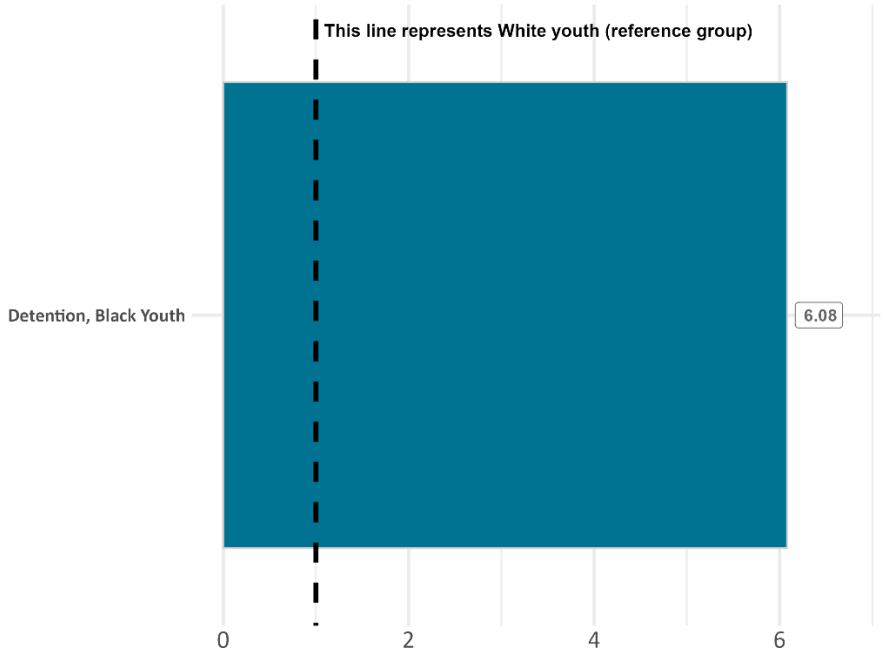


Figure A5. Average Length of Stay in Detention for Black vs. White Youth, 8 County Courts, 2016–2018

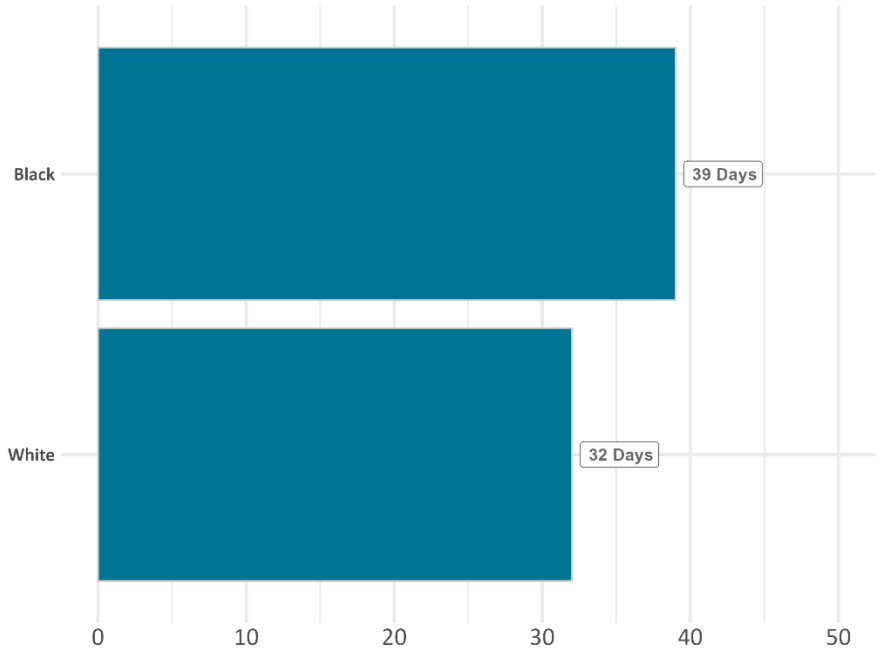
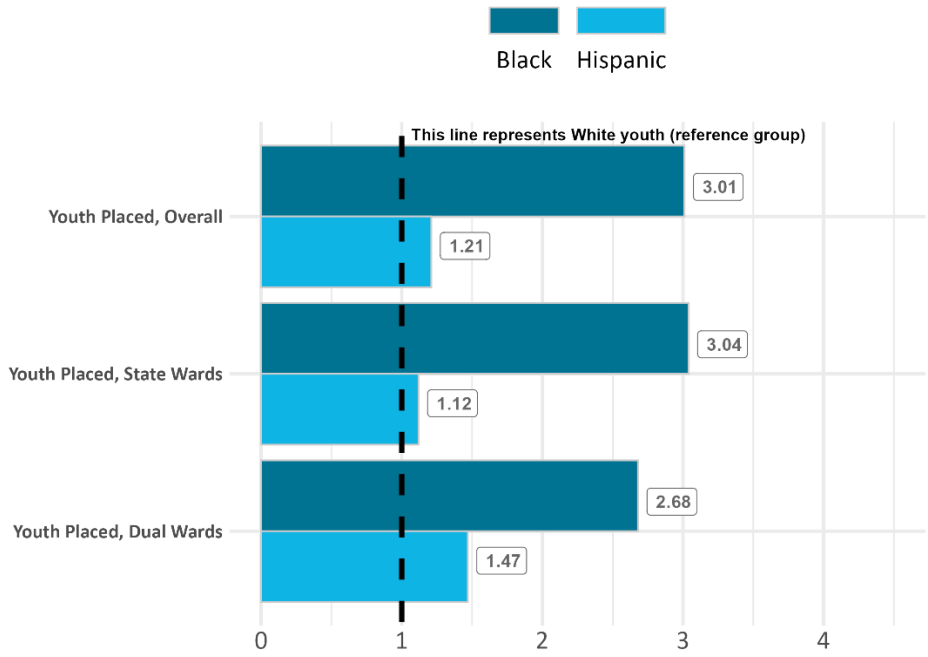


Figure A6. Relative Rate Index Disparities for State Supervised Youth Episodes, 2015–2020



Appendix B: Working Group Members

Finance Working Group

1. Hon. Kenneth Akini, Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court
2. Casey Anbender, State Court Administrative Office
3. Megan Banning, Calhoun County
4. Robert V. Belleman, Saginaw County
5. Wendy Campau, Michigan Department of Health and Human Services
6. Soleil Campbell, Michigan Department of Health and Human Services
7. Hon. Susan Dobrich, Michigan Probate Judges Association
8. Jamie Fitak, Northern Michigan Juvenile Officers Association
9. Shannah Havens, Michigan Department of Health and Human Services
10. Mary Catherine Hannah, Alpena County
11. Teddy Jay, Michigan Department of Health and Human Services
12. Meghann Keit, (formerly) Michigan Association of Counties
13. Kamau Kheperu, Wayne County
14. Thom Lattig, Michigan Association for Family Court Administration
15. Rep. Sarah Lightner, Michigan House of Representatives, District 65
16. Mike McMillan, Michigan Association of Circuit Court Administrators
17. Tanya Morrow, State Court Administrative Office
18. Joe O'Connell, State Budget Office
19. Bob Schneider, Citizens Research Council of Michigan
20. Jodi Valentino, Roscommon County
21. Amy Zimmerman, Michigan Department of Health and Human Services

Diversion Working Group

1. Michele Bell, (Formerly) Midland County Circuit Court
2. Sean Burns, Kent Independent School District
3. Harriet Dean, Eaton County Truancy Intervention Program
4. Leigh Feldman, Cass County Circuit Court
5. Ann Heerde, Ottawa County Community Mental Health
6. Ebony Hemphill, Parent Representative
7. Bob Higgins, Michigan Committee on Juvenile Justice
8. Hon. Cheryl Hill, Marquette County Probate Court
9. Michelle Hill, Michigan Department of Health and Human Services
10. Rhonda Ihm, Genesee County 7th Circuit Court
11. Joe Jackson, Kent County Prosecutor's Office
12. Hon. Cheryl Lohmeyer, Monroe County Probate Court
13. Lynda McGhee, Michigan Children's Law Center
14. Manda Mitteer, Muskegon County Public Defender's Office
15. Erin Nostrandt, Saginaw Community Mental Health
16. Dave Pelon, Van Buren County Juvenile Court
17. Samantha Perry, Black Family Development
18. Melissa Reid, Oakland County Probation
19. Jill Simms, Marquette County Prosecutor's Office
20. Hon. Angela Sherigan, Little River Band of Odawa Indians Tribal Court
21. Jason Smith, Michigan Center for Youth Justice

22. Brandi Taylor, Wayne County Circuit Court

Court Processing Working Group

1. Darcy Brohman, Growth Works
2. Cameron Clark, Leelanau County Circuit Court
3. Clint Cook, Van Buren County Juvenile Probation
4. Melinda Fandel, Michigan Department of Health and Human Services
5. Hon. Richard Garcia, Ingham County Probate Court
6. Sarah Husyer, Clinton/Eaton Counties Defense Attorney
7. Lynn Johnson, Marquette County Circuit Court
8. Kathie Kolean, Ottawa County Juvenile Court
9. Scott LeRoy, Ingham County Circuit Court
10. Alisha Riedl, Muskegon County Circuit Court
11. Hon. Melissa Pope, Nottawaseppi Huron Band of the Potawatomi Tribal Court
12. Jaclyn Sivers, Oakland County Prosecutor's Office
13. Kristen Staley, Michigan Indigent Defense Commission
14. Linda Strasz, Tuscola County Juvenile Office
15. Hon. Matthew Switalski, Macomb County Circuit Court
16. Kimberly Thomas, Juvenile Justice Clinic, University of Michigan
17. Tom Weichel, Alcona County Prosecutor's Office
18. Cole Williams, The Delta Project

Out-of-Home Placement Working Group

1. Hon. Kenneth Akini, Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court
2. Hon. Dorene Allen, Midland County Probate Court
3. Chris Anderson, Eaton County Prosecutor's Office
4. Soleil Campbell, Michigan Department of Health and Human Services
5. Terina Carte, Private Contracted Attorney, Genesee County
6. Marc Crotteau, Calhoun County Circuit Court
7. Mary Joe French, Muskegon County Juvenile Transition Center
8. Dan Gibson, Clinton County Juvenile Court
9. Elvin Gonzalez, Berrien County Trial Court
10. Renee Gonzales, Michigan Department of Health and Human Services
11. Rhonda Ihm, Genesee County 7th Circuit Court
12. Dante Jennings, Detroit Behavioral Institute
13. Derrick McCree, Michigan Department of Health and Human Services
14. Hon. Julia Owdziej, Washtenaw County Probate Court
15. Megan Peña, Hope Network Behavioral Health Services
16. Brian Philson, Highfields, Inc.
17. Mark Reene, Tuscola County Prosecutor's Office
18. Tawana Rogers-Reece, InSight
19. Alex Rossman, Michigan League for Public Policy
20. Mary Scott, Parent
21. Kristin Stone, Macomb County Circuit Court

Data Working Group

1. Heather Blodgett, Ottawa County Circuit Court

2. Robb Burroughs, Public Policy Associates
3. Soleil Campbell, Michigan Department of Health and Human Services
4. Justice Beth Clement, Michigan Supreme Court
5. Dr. Dick Dolinski, The Legacy Center for Student Success
6. Nicole Faulds, Macomb County Circuit Court
7. Terri Gilbert, Wayne State University School of Social Work
8. Sam Haddad, Wayne County
9. Laura Hutzel, State Court Administrative Office
10. Rep. Sarah Lightner, Michigan House of Representatives, District 65
11. Dr. Jodi Petersen, Michigan State University
12. Amanda Pollard, Eaton County Circuit Court
13. Dave Roach, Michigan Department of Technology, Management and Budget
14. Mike Rosenberg, Michigan Department of Health and Human Services
15. Deborah Shaw, Livingston County Probate Court
16. Jason Smith, Michigan Center for Youth Justice
17. Hon. Tyler Thompson, Osceola County Probate Court
18. Amy Wesaw, Nottawaseppi Huron Band of the Potawatomi

Competency Working Group

1. Dr. James Henry, Western Michigan University Children's Trauma Assessment Center
2. Michelle Hill, Michigan Department of Health and Human Services
3. Lynn Johnson, Marquette County Circuit Court
4. Hon. Tina Yost Johnson, Calhoun County Circuit Court
5. Tanya Morrow, State Court Administrative Office
6. Dr. Debra Pinals, Michigan Department of Health and Human Services
7. Ameel Trabilsy, Trabilsy Law

Juvenile Defense Working Group

1. Terina Carte, Private Contracted Attorney, Genesee County
2. Justice Elizabeth Clement, Michigan Supreme Court
3. Rep. Sarah Lightner, Michigan House of Representatives, District 65
4. Joshua Pease, State Appellate Defender Office
5. Amanda Pollard, Eaton County Juvenile Court
6. Hon. Tom Slagle, Dickinson County Probate Court
7. Kristen Staley, Michigan Indigent Defense Commission
8. Kim Tandy, The Gault Center
9. Kim Thomas, Juvenile Justice Clinic, University of Michigan Law School

Waiver Working Group

1. Hon. Karen Braxton, Wayne County 3rd Circuit Court
2. Jeffrey Getting, Kalamazoo Prosecutor's Office
3. Joshua Pease, State Appellate Defender Office
4. Hon. Melissa Pope, Nottawaseppi Huron Band of the Potawatomi Tribal Court

Appendix C: Advisory Group Members

State Court Administrative Office Advisory Board

1. Hon. Dorene Allen, Midland County Probate Court, Probate Court Judge
2. David Bilson, Referees Association of Michigan (RAM), Oakland County Juvenile Court Referee/Deputy Court Administrator
3. Noah Bradow, SCAO - Field Services, Court Analyst Manager
4. Hon. Karen Braxton, Wayne County Circuit Court, Circuit Court Judge
5. Cameron Clark, Leelanau Family Court Administrator
6. Hon. Elizabeth Clement, Michigan Supreme Court Justice
7. Nicole Faulds, Macomb County Circuit Court, Circuit Court Administrator - Family Division
8. Hon. John Gadola, Genesee County Circuit Court, Circuit Court Judge
9. Elivin Gonzales, Berrien County Trial Court, Family Division Administrator
10. Linda Harrison, Referees Association of Michigan (RAM), Macomb County Chief Juvenile Referee
11. Rhonda Ihm, Genesee County Circuit Court, Deputy Circuit Court Administrator
12. Lynn Johnson, Marquette County Family Division, Director of Juvenile Services
13. Meghann Keit-Corrion, Michigan Association of Counties (MAC) Governmental Affairs Associate
14. Thom Lattig, Ottawa County Circuit Court, Juvenile Court Director
15. Tanya Morrow, SCAO - Field Services, Management Analyst
16. Deborah Nelson, Wayne County Circuit Court, Juvenile Mental Health Court Coordinator
17. Josh Pease, SBM Children's Law Section Rep Attorney
18. Amanda Pollard, SBM Family Law Section Recommendation and Eaton County Family Division Attorney Referee
19. Hon. Melissa Pope, Nottawseppi Huron Band of Potawatomi Indians, Tribal Court Chief Judge
20. Hon. Tom Slagle, Dickinson County Probate Court, Probate Court Judge - Chief Judge
21. Veronica Stillson, Michigan Probate and Juvenile Registers Association (MPJRA), Family Division & Probate Court Supervisor
22. Andy Thalhammer, Kent County Circuit Court, Circuit Court Administrator
23. Hon. Daryl Vizina, Cheboygan County Probate Court, Probate Court Judge - Chief Judge
24. Hon. Tina Yost Johnson, Calhoun County Circuit Court, Circuit Court Judge

Advocates Advisory Board

1. Tim Christensen, Training Director, Michigan Liberation
2. Robert Dorigo Jones, Vice President, Michigan's Children
3. Kris Keranen, Director of Education Advocacy, Disability Rights Michigan
4. Diana Rademacher, Community Engagement Director, Americans for Prosperity
5. Alex Rossman, External Affairs Director, Michigan League for Public Policy
6. Jane Shank, Executive Director, Association for Children's Mental Health
7. Jason Smith, Executive Director, Michigan Center for Youth Justice
8. Stephen Wallace, Regional Engagement and Mobilization Associate, Michigan's Children
9. Algeria Wilson, (Formerly) Director of Public Policy, National Association of Social Workers, Michigan

10. Kristin Wunderlin, Interim Behavioral Health Director, Ruth Ellis Center

Tribal Advisory Board

1. Hon. Kenneth Akini, Chief Judge, Grand Traverse Band of Ottawa and Chippewa Indians
2. Hon. Jocelyn Fabry, Chief Judge, Sault Ste. Marie Tribe of Chippewa Indians
3. Hon. William Jondreau Sr., Chief Judge, Keweenaw Bay Indian Community, Michigan
4. Hon. Carol Jackson, Magistrate, Saginaw Chippewa Indian Tribe
5. Matthew Lesky, Court Administrator, Little Traverse Bay Bands of Odawa Indians
6. Hon. Allie Greenleaf Maldonado, Chief Judge, Little Traverse Bay Bands of Odawa Indians
7. Spring Medacco, Court Administrator, Little River Band of Ottawa Indians
8. Hon. Leah Parish, Chief Judge, Bay Mills Indian Community
9. Hon. David Peterson, Associate Judge, Pokagon Band of Potawatomi Indians
10. Hon. Melissa Pope, Chief Judge, Nottawaseppi Huron Band of the Potawatomi
11. Hon. Angela Sherigan, Chief Judge, Little River Band of Ottawa Indians
12. Amy Wesaw, Senior Staff Attorney, Nottawaseppi Huron Band of the Potawatomi

Impacted Parents Advisory Board

1. Ebony Hemphill, Coordinator, Truth, Racial Healing and Transformation, Initiatives and Public Policy, The Kalamazoo Community Foundation
2. Mary Scott, Executive Director of Workforce Development, The Hope Network
3. Cole Williams, Co-founder and Co-executive Director, The Delta Project

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[1] See the detailed Task Force presentations for more information on the data summarized in these key findings and the associated datasets used to arrive at these findings.

[2] Status offenses are acts that would not be crimes if they were committed by adults, such as truancy, curfew violations, and running away.

[3] A non-person misdemeanor is an offense that does not involve another person, such as a property offense.

[4] CSG Justice Center analysis of data from 32 counties provided by State Court Administrative Office (SCAO) and directly from counties.

[5] Ibid.

[6] CSG Justice Center analysis of statewide Judicial Data Warehouse (JDW) financial assessment data provided by SCAO.

[7] Ibid.

[8] CSG Justice Center analysis of data from nine counties provided by SCAO.

[9] CSG Justice Center analysis of statewide data provided by the Michigan Department of Health and Human Services (MDHHS).

[10] Ibid.

[11] Adjudication is the court process that determines whether youth committed the act for which they were charged.

[12] CSG Justice Center analysis of data from 32 counties provided by SCAO and directly from counties.

[13] CSG Justice Center analysis of data from 8 counties provided by SCAO.

[14] CSG Justice Center analysis of statewide data provided by MDHHS.

[15] Vote tallies encompass the 22 Task Force members who were either present, sent proxies, or submitted their votes in advance. These 22 members were Lieutenant Governor Garlin Gilchrist; Judge Dorene Allen, Commissioner Alisha Bell, Judge Karen Braxton, Representative Brenda Carter, John Casteel, Justice Elizabeth Clement, Cami Fraser, Assistant Attorney General Stine Grand, Sheriff Steve Hinkley, Jeannine Gant, Thom Lattig,

Representative Sarah Lightner, Derrick McCree, Prosecutor Karen McDonald, Dr. Michael Rice, Chief Everette Robbins II, Senator Sylvia Santana, Jason Smith, Kimberly Thomas, Commissioner Marlene Webster, and Colbert Williams.

[16] A recommendation is considered to have been approved by consensus when at least two-thirds of voting members voted in support of the recommendation.

Public Policy Position
Report and Recommendations of the Michigan Task Force on Juvenile Justice Reform

Explanation

The committee reviewed and voted on the *Keller*-permissibility of each of the 32 recommendations made by the Michigan Task Force on Juvenile Justice Reform separately.

Recommendation	Keller-Permissibility	Position
1 - Enhance the Child Care Fund (CCF) to focus on establishing a minimum framework of juvenile justice best practices statewide. These best practices will be supported by an increase in the community-based services/supervision reimbursement rate for counties and tribes in order to incentivize and support the development, expansion, and strengthening of community-based services and formal alternatives to detention and incarceration.	The committee voted unanimously that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	The committee voted to support the recommendation as an increase in funding for services, alternatives to detention, and better practices will produce better outcomes for youth in the juvenile court system. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
2 - Establish and fund a new Juvenile Justice Services Division within the State Court Administrative Office (SCAO).	The committee voted unanimously that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	The committee voted to support the recommendation as there is very little state-level oversight of the juvenile justice system, and a dedicated division within SCAO can ensure more uniform practice and availability of resources to trial courts. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
3 - Expand the Michigan Indigent Defense Commission (MIDC) to include development, oversight, and compliance with youth defense standards in local county defense systems.	The committee voted unanimously that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services.	The committee voted to support the recommendation because the implementation of this recommendation could significantly increase the quality and availability of legal services for youth, at both the trial and appellate level. However, the committee recommends

	Position Vote: Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	that training for all the attorneys be required as part of this. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 9
4 - Establish a statewide residential advisory committee composed of juvenile justice association members, local representatives, tribal representatives, advocates, prosecutors, defense attorneys and other stakeholders including impacted youth and families, and MDHHS.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	
5 - Require the establishment of cross-systems, cross-government, county/regional/tribal youth service committees (as part of existing human service committees) to improve service availability, access, and coordination of CCF and other service system's funding for youth at risk of entering or who are in the juvenile justice system. These committees will also be responsible for strengthening reentry services and supports for youth placed out of home regardless of wardship.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	
6 - Establish 13 as the minimum age for juvenile court jurisdiction.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:**	The committee voted to support this recommendation as this will maximize diversion for youth who are less likely to benefit from formal adjudication. **Position Vote:** Voted For position: 14 Voted against position: 3

	Voted For position: 15 Voted against position: 3 Abstained from vote: 0 Did not vote (absent): 9	Abstained from vote: 1 Did not vote (absent): 8
7 - Require the use of a validated risk screening tool and a validated mental health screening tool to inform diversion and consent calendar decisions. Expand the Diversion Act so that all offenses— except for the most serious ones, which shall be enumerated—are eligible for pre-court diversion based on established local criteria and the use of a risk screening tool.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 10
8 - All youth who commit status offenses shall be referred to a court officer, or another party designated by the local court, pre-petition, to conduct a validated risk screening. Youth screened as low risk are diverted to collaborative community programs or other services that are evidence based or culturally approved by a Tribe if the youth is American Indian.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 10	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment.

		Position Vote: Voted For position: 13 Voted against position: 2 Abstained from vote: 1 Did not vote (absent): 11
9 - Align pre-court diversion and consent calendar conditions with research and developmental science.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11	The committee voted to support this recommendation as greater research and application of that research will lead to better outcomes for youth. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11
10 - Require a validated risk and needs assessment to be conducted for all youth prior to disposition, and the results of the validated risk and needs assessment to be used by prosecutors, defense attorneys, the court, and other parties to the case to determine the most appropriate disposition commensurate with public safety, victim interests, rehabilitation, and improved youth outcomes including but not limited to educational advancement.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11

11 - SCAO, with proper funding and in partnership with local probation departments and other stakeholders, shall establish statewide, research-based, juvenile specific probation standards and guidelines.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11	The committee voted to support this recommendation as proper funding and youth-specific standards will assist in decriminalizing youth in the juvenile court system and lead to better outcomes for them. **Position Vote:** Voted For position: 13 Voted against position: 2 Abstained from vote: 1 Did not vote (absent): 11
12 - The age of presumed competence will align with the minimum age of jurisdiction.	The committee voted that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 13 Voted against position: 2 Abstained from vote: 1 Did not vote (absent): 11	The committee to support this recommendation as the current system of competency determination for youth does not provide positive outcomes for youth. **Position Vote:** Voted For position: 14 Voted against position: 1 Abstained from vote: 1 Did not vote (absent): 11
13 - Establish a statewide study committee on juvenile waivers that will be charged with reviewing available data on the use of juvenile waivers and designations, identifying challenges and barriers with current policies and practices, examining national research and best practices, and developing a final report that includes recommendations for improvement, which shall be submitted to the governor, SCAO, and legislature.	The committee voted that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 13 Voted against position: 3	The committee to support this recommendation. The current data on waivers and designations is sparse, and the application is not uniform between counties. With implementation of Raise the Age in late 2021, it appears that there is also an increase in waiver cases. Better data is needed to determine the effectiveness of Michigan's current waiver and designation statutes. **Position Vote:**

	Abstained from vote: 0 Did not vote (absent): 11	Voted For position: 15 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 11
14 - Ensure that factors considered by the court for traditional waivers and designations account for youth's developmental maturity and emotional and mental health, and their ability to get more treatment and rehabilitation for these needs in juvenile court.	The committee voted that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 14 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 12	The committee voted to support this recommendation as the current criteria for deciding whether to waive/designate a case are not reflective of many aspects of who the youth is and what impact their mental/emotional health, upbringing, and culture can have on their decision making and amenability to rehabilitation. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12
15 - Eliminate most non-restitution fees and costs associated with juvenile justice system involvement.	The committee voted that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12	The committee voted to support this recommendation as these fees and costs can be onerous on youth and their families, often leading to extended time on probation while draining financial resources which could be better used to benefit the youth rather than the courts, and because the threat of being assessed attorney fees can result in youth waiving their right to an attorney or pleading their cases quickly. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12

16 - Restrict the ability to extend consent calendar and probation supervision solely for the purpose of collecting restitution. Restitution orders will still be maintained through the show cause process if probation supervision is terminated.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12	The committee voted to support this recommendation. The purpose of the juvenile justice system to help rehabilitate and support youth, and extended terms of probation for no reason other than collecting money are unrelated to that purpose. It is effectively punishing a youth for indigency. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12
17 - Require a validated detention screening tool to be used statewide, prior to detention decisions, as a guide for detention placement decisions and establish clear statutory legal authority for what entities can make detention decisions.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12

18 - Restrict the use of pre-adjudication detention for non-public safety reasons.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12	The committee voted to support this recommendation with an amendment to restrict detention for imminent threat but not a flight risk. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12
19 - Restrict the use of detention for violations of a court's orders that is not an independent delinquent (as opposed to status) offense.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 12	The committee voted to support this recommendation with an amendment to restrict detention for imminent threat but not a flight risk. **Position Vote:** Voted For position: 13 Voted against position: 0 Abstained from vote: 2 Did not vote (absent): 12
20 - Establish a single, updated set of licensing/service standards for detention facilities that reflect developmentally appropriate, research-based, trauma-informed principles and practices, regardless of court/county operation. Create a robust annual quality assurance and review process for these facilities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	
21 - Expand funding for the Regional Detention Support Services Program to focus on programmatic alternatives to detention such as crisis mobilization,	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:**	

respite, short-term shelter foster homes, and home detention monitoring and services, particularly targeted to rural and tribal communities.	Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
22 - Require MDHHS—in partnership with the residential advisory committee, SCAO, and relevant juvenile justice associations—to examine the juvenile justice residential financing model, per diem rates, funding levels, bed allocation, bed locations and capital infrastructure, public/private management, and procurement methods of residential placements, and within one year, make legislative and funding recommendations to the governor's office and legislature for a revamped statewide juvenile justice residential structure.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
23 - Provide MDHHS with statutory authority to adjust juvenile justice residential per diem rates within their appropriated fiscal budget, and make changes to provider service agreements to respond in a more flexible way to bed shortages, staff retention challenges, and service needs.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
24 - Through the residential advisory committee, establish a short-term, cross-system, case review process for counties/courts for youth remaining in detention for longer than 30-60 days awaiting placement, as well as for counties/courts and MDHHS for youth in private and state-run facilities for longer than 9-12 months, to help identify community-based or residential alternatives with the	The committee voted that this recommendation is not *Keller* permissible. **Position Vote (on whether item was *Keller* permissible):** Voted For position: 6 Voted against position: 11 Abstained from vote: 1 Did not vote (absent): 9

goals of reducing lengths of stay and freeing up bed capacity.	
25 - Through the residential advisory committee, establish a set of baseline case management standards for counties and MDHHS that must guide all long-term post disposition state and privately-run residential placements regardless of county or wardship, including ongoing use of risk and needs assessments, service delivery, behavioral health treatment, family/team meetings, dual ward policies, and reentry planning processes.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
26 - MDHHS shall, in partnership with the residential advisory committee, develop robust, juvenile justice specific, evidence-based service standards for all state-run and privately-run juvenile justice residential placements regardless of facility or wardship.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
27 - Establish an independent ombudsman, or strengthen and expand an existing entity, for handling, investigating, and reporting incidents in facilities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9
28 - Establish a dedicated administrative process and protocols and MDHHS staff to support the timely reinstatement of Medicaid for youth leaving detention or longer-term residential facilities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 18

	Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 9	
29 - SCAO should develop data standardization protocols and procedures for the collection and sharing of data by local courts that can be used to inform decision making and drive system improvement efforts.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 2 Did not vote (absent): 10	The committee voted to support this recommendation. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 2 Did not vote (absent): 10
30 - SCAO should establish robust quality assurance procedures to assess and address data quality issues and ensure data integrity, including conducting regular data reviews and developing resources and providing training for local courts.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 3 Did not vote (absent): 10	The committee voted to support this recommendation. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 3 Did not vote (absent): 10
31 - Establish statewide definitions and protocols for capturing race, ethnicity, and tribal data across data systems, and create a public equity data dashboard to establish a baseline and track progress on key measures of statewide disparities and improvements.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 15	The committee voted to support this recommendation. **Position Vote:** Voted For position: 16 Voted against position: 0 Abstained from vote: 3 Did not vote (absent): 10

	Voted against position: 0 Abstained from vote: 4 Did not vote (absent): 10	
32 - Establish a statewide youth and family juvenile justice advisory group to inform resource allocation decisions and ensure that policy adoption and implementation are vetted and supported by authentic youth and family participation, to include but not be limited to educational advancement while youth are in the juvenile justice system.	The committee voted that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 15 Voted against position: 2 Abstained from vote: 2 Did not vote (absent): 10	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 4 Did not vote (absent): 12

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Public Policy Position
Report and Recommendations of the Michigan Task Force on Juvenile Justice Reform

Support in Concept

Explanation

As to recommendations 4, 5, 20, 21, 22, 23, 25, 26, 27, and 28, the Committee concurred with the determination of the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and State Bar staff that the recommendations were not *Keller*-permissible. The Committee concurred with the Access to Justice Policy Committee and State Bar staff that recommendation 24 was not *Keller*-permissible.

As to recommendation 6, the Committee concurred with the determination of the Access to Justice Policy Committee and Criminal Jurisprudence & Practice Committee that the recommendation was *Keller*-permissible. The Committee supported recommendation 6 in concept.

As to recommendations 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, and 32, the Committee concurred with the determination of the Access to Justice Policy Committee, Criminal Jurisprudence & Practice Committee, and State Bar staff that the recommendations were *Keller*-permissible. The Committee supported each of these recommendations in concept.

Position Vote:

Voted For position: 22
Voted against position: 0
Abstained from vote: 1
Did not vote (absence): 10

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Public Policy Position
Report and Recommendations of the Michigan Task Force on Juvenile Justice Reform

Explanation

The committee reviewed and voted on the *Keller*-permissibility of each of the 32 recommendations made by the Michigan Task Force on Juvenile Justice Reform separately.

Recommendation	Keller-Permissibility	Position
1 - Enhance the Child Care Fund (CCF) to focus on establishing a minimum framework of juvenile justice best practices statewide. These best practices will be supported by an increase in the community-based services/supervision reimbursement rate for counties and tribes in order to incentivize and support the development, expansion, and strengthening of community-based services and formal alternatives to detention and incarceration.	The committee voted unanimously that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support the recommendation. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 8
2 - Establish and fund a new Juvenile Justice Services Division within the State Court Administrative Office (SCAO).	The committee voted unanimously that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support the recommendation. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 8
3 - Expand the Michigan Indigent Defense Commission (MIDC) to include development, oversight, and compliance with youth defense standards in local county defense systems.	The committee voted unanimously that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services. **Position Vote:**	The committee voted to support the recommendation and reiterated its previous position on legislation introduced during the last legislative session to effectuate this recommendation, in part, (2022 HB 6344 and 2022 HB 6345) that such legislation should (1) provide a broader definition of the youth defense mandate; and (2) establish appellate attorney fee

	Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	incentives consistent with the MIDC Act and a requirement for the state to reimburse local systems for these fees. **Position Vote:** Voted For position: 18 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 8
4 - Establish a statewide residential advisory committee composed of juvenile justice association members, local representatives, tribal representatives, advocates, prosecutors, defense attorneys and other stakeholders including impacted youth and families, and MDHHS.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
5 - Require the establishment of cross-systems, cross-government, county/regional/tribal youth service committees (as part of existing human service committees) to improve service availability, access, and coordination of CCF and other service system's funding for youth at risk of entering or who are in the juvenile justice system. These committees will also be responsible for strengthening reentry services and supports for youth placed out of home regardless of wardship.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
6 - Establish 13 as the minimum age for juvenile court jurisdiction.	The liaisons believe that this recommendation is *Keller* permissible because impacts the functioning of the courts and the availability of legal services to youth.	The committee voted to support this recommendation. **Position Vote:** Voted For position: 9 Voted against position: 6 Abstained from vote: 2

	Position Vote: Voted For position: 10 Voted against position: 7 Abstained from vote: 1 Did not vote (absent): 8	Did not vote (absent): 8
7 - Require the use of a validated risk screening tool and a validated mental health screening tool to inform diversion and consent calendar decisions. Expand the Diversion Act so that all offenses— except for the most serious ones, which shall be enumerated—are eligible for pre-court diversion based on established local criteria and the use of a risk screening tool.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment. **Position Vote:** Voted For position: 13 Voted against position: 1 Abstained from vote: 3 Did not vote (absent): 9
8 - All youth who commit status offenses shall be referred to a court officer, or another party designated by the local court, pre-petition, to conduct a validated risk screening. Youth screened as low risk are diverted to collaborative community programs or other services that are evidence based or culturally approved by a Tribe if the youth is American Indian.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party

		to review the calculations and data of the pretrial risk assessment. **Position Vote:** Voted For position: 13 Voted against position: 1 Abstained from vote: 3 Did not vote (absent): 9
9 - Align pre-court diversion and consent calendar conditions with research and developmental science.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 14 Voted against position: 2 Abstained from vote: 1 Did not vote (absent): 9
10 - Require a validated risk and needs assessment to be conducted for all youth prior to disposition, and the results of the validated risk and needs assessment to be used by prosecutors, defense attorneys, the court, and other parties to the case to determine the most appropriate disposition commensurate with public safety, victim interests, rehabilitation, and improved youth outcomes including but not limited to educational advancement.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment. **Position Vote:**

		Voted For position: 13 Voted against position: 1 Abstained from vote: 3 Did not vote (absent): 9
11 - SCAO, with proper funding and in partnership with local probation departments and other stakeholders, shall establish statewide, research-based, juvenile specific probation standards and guidelines.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 13 Voted against position: 3 Abstained from vote: 0 Did not vote (absent): 10
12 - The age of presumed competence will align with the minimum age of jurisdiction.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee to support this recommendation. **Position Vote:** Voted For position: 9 Voted against position: 7 Abstained from vote: 0 Did not vote (absent): 10
13 - Establish a statewide study committee on juvenile waivers that will be charged with reviewing available data on the use of juvenile waivers and designations, identifying challenges and barriers with current policies and practices, examining national research and best practices, and developing a final report that	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:**	The committee to support this recommendation. **Position Vote:** Voted For position: 14 Voted against position: 2 Abstained from vote: 0

includes recommendations for improvement, which shall be submitted to the governor, SCAO, and legislature.	Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	Did not vote (absent): 10
14 - Ensure that factors considered by the court for traditional waivers and designations account for youth's developmental maturity and emotional and mental health, and their ability to get more treatment and rehabilitation for these needs in juvenile court.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee to support this recommendation. **Position Vote:** Voted For position: 14 Voted against position: 2 Abstained from vote: 0 Did not vote (absent): 10
15 - Eliminate most non-restitution fees and costs associated with juvenile justice system involvement.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee to support this recommendation. **Position Vote:** Voted For position: 14 Voted against position: 2 Abstained from vote: 0 Did not vote (absent): 10
16 - Restrict the ability to extend consent calendar and probation supervision solely for the purpose of collecting restitution. Restitution orders will still be maintained through the show cause process if probation supervision is terminated.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:**	The committee to support this recommendation. **Position Vote:** Voted For position: 12 Voted against position: 5 Abstained from vote: 2

	Voted For position: 18 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 7	Did not vote (absent): 7
17 - Require a validated detention screening tool to be used statewide, prior to detention decisions, as a guide for detention placement decisions and establish clear statutory legal authority for what entities can make detention decisions.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support the recommendation with an additional amendment that any statements made during an assessment must not be admitted as evidence at an adjudicative hearing. Additionally, risk assessment tools must be peer validated and free from bias. Any information, written policies, data, etc. used to develop or validate such tools must be open to public inspection, auditing, and testing. Any case party to review the calculations and data of the pretrial risk assessment. **Position Vote:** Voted For position: 13 Voted against position: 1 Abstained from vote: 3 Did not vote (absent): 9
18 - Restrict the use of pre-adjudication detention for non-public safety reasons.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 1 Abstained from vote: 0 Did not vote (absent): 10

19 - Restrict the use of detention for violations of a court's orders that is not an independent delinquent (as opposed to status) offense.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 1 Abstained from vote: 0 Did not vote (absent): 10
20 - Establish a single, updated set of licensing/service standards for detention facilities that reflect developmentally appropriate, research-based, trauma-informed principles and practices, regardless of court/county operation. Create a robust annual quality assurance and review process for these facilities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
21 - Expand funding for the Regional Detention Support Services Program to focus on programmatic alternatives to detention such as crisis mobilization, respite, short-term shelter foster homes, and home detention monitoring and services, particularly targeted to rural and tribal communities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
22 - Require MDHHS—in partnership with the residential advisory committee, SCAO, and relevant juvenile justice associations—to examine the juvenile justice residential financing model, per diem rates, funding levels, bed allocation, bed locations and capital infrastructure, public/private management, and	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0	

procurement methods of residential placements, and within one year, make legislative and funding recommendations to the governor's office and legislature for a revamped statewide juvenile justice residential structure.	Did not vote (absent): 7	
23 - Provide MDHHS with statutory authority to adjust juvenile justice residential per diem rates within their appropriated fiscal budget, and make changes to provider service agreements to respond in a more flexible way to bed shortages, staff retention challenges, and service needs.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
24 - Through the residential advisory committee, establish a short-term, cross-system, case review process for counties/courts for youth remaining in detention for longer than 30-60 days awaiting placement, as well as for counties/courts and MDHHS for youth in private and state-run facilities for longer than 9-12 months, to help identify community-based or residential alternatives with the goals of reducing lengths of stay and freeing up bed capacity.	The committee voted that this recommendation is *Keller* permissible because impacts the functioning of the courts, potentially impacting the amount of time that a youth's confinement remains within the purview of the court. **Position Vote:** Voted For position: 10 Voted against position: 7 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 1 Abstained from vote: 0 Did not vote (absent): 10
25 - Through the residential advisory committee, establish a set of baseline case management standards for counties and MDHHS that must guide all long-term post disposition state and privately-run residential placements regardless of county or wardship, including ongoing use of risk and needs assessments, service delivery, behavioral health	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	

treatment, family/team meetings, dual ward policies, and reentry planning processes.		
26 - MDHHS shall, in partnership with the residential advisory committee, develop robust, juvenile justice specific, evidence-based service standards for all state-run and privately-run juvenile justice residential placements regardless of facility or wardship.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
27 - Establish an independent ombudsman, or strengthen and expand an existing entity, for handling, investigating, and reporting incidents in facilities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
28 - Establish a dedicated administrative process and protocols and MDHHS staff to support the timely reinstatement of Medicaid for youth leaving detention or longer-term residential facilities.	The committee voted that this recommendation is not *Keller* permissible. **Position Vote:** Voted For position: 19 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 7	
29 - SCAO should develop data standardization protocols and procedures for the collection and sharing of data by local courts that can be used to inform decision making and drive system improvement efforts.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:**	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0

	Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	Did not vote (absent): 11
30 - SCAO should establish robust quality assurance procedures to assess and address data quality issues and ensure data integrity, including conducting regular data reviews and developing resources and providing training for local courts.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11
31 - Establish statewide definitions and protocols for capturing race, ethnicity, and tribal data across data systems, and create a public equity data dashboard to establish a baseline and track progress on key measures of statewide disparities and improvements.	The committee voted that this recommendation is *Keller* permissible because it impacts the functioning of the courts. **Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0 Did not vote (absent): 11
32 - Establish a statewide youth and family juvenile justice advisory group to inform resource allocation decisions and ensure that policy adoption and implementation are vetted and supported by authentic youth and family participation, to include but not be	The committee voted that the recommendation is *Keller* permissible because it impacts the functioning of the courts and the availability of legal services.	The committee voted to support this recommendation. **Position Vote:** Voted For position: 15 Voted against position: 0 Abstained from vote: 0

limited to educational advancement while youth are in the juvenile justice system.	**Position Vote:** Voted For position: 17 Voted against position: 0 Abstained from vote: 1 Did not vote (absent): 8	Did not vote (absent): 11

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by February 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes amending and combining M Crim JI 7.16 and 7.19, which address conditions for the use of force or deadly force in self-defense or the defense of others in different contexts. The combination and amendments are an effort to reduce confusion in the use of the self-defense instructions involving the duty to retreat. Deletions are in strike-through, and new language is underlined.

[AMENDED and COMBINED] M Crim JI 7.16 ~~Duty to Retreat to Avoid~~ Conditions for Using Force or Deadly Force

~~M Crim JI 7.19 Nondeadly Aggressor Assaulted with Deadly Force~~

[*Select from the following depending on the evidence and circumstances:*]

(1) A person can use [force / deadly force] in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he / she] needed to use [force / deadly force] in self-defense.[1]

[*or*]

(1) A defendant who [assaults someone else with fists or a weapon that is not deadly / insults someone with words / trespasses on someone else's property / tries to take someone else's property in a nonviolent way] does not lose all right to self-defense. If someone else assaults [him / her] with deadly force, the defendant may act in self-defense but only if [he / she] ~~retreats~~ retreated ~~if it is~~ where it would have been safe to do so.[1]

(2) However,[1] a person is never required to retreat under some circumstances. [He / She] does not need to retreat if [attacked in (his / her) own home / (he / she) reasonably believes that an attacker is about to use a deadly weapon / (he / she) is subjected to a sudden, fierce, and violent attack].[2]

(3) Further, a person is not required to retreat if he or she

(a) has not or is not engaged in the commission of a crime at the time the [force / deadly force] is used,

(b) has a legal right to be where he or she is at that time, and

[*Select from the following according to whether the defendant used deadly force or nondeadly force:*]

(c) has an honest and reasonable belief that the use of [~~force /~~ deadly force~~]~~ is necessary to prevent imminent [death / great bodily harm / sexual assault] of [himself / herself] or another person.

[*or*]

(c) has an honest and reasonable belief that the use of force is necessary to prevent the imminent unlawful use of force ~~of~~ against [himself / herself] or another person.

Use Note

Use this instruction when requested where some evidence of self-defense has been introduced or elicited. Where there is evidence that, at the time that the defendant used force or deadly force, he or she was engaged in the commission of some other crime, the Committee on Model Criminal Jury Instructions believes that circumstances of the case may provide the court with a basis to instruct the jury that the defendant does not lose the right to self-defense if the commission of that other offense was not likely to lead to the other person's assaultive behavior. See *People v Townes*, 391 Mich

578, 593; 218 NW2d 136 (1974). The Committee expresses no opinion regarding the availability of self-defense where the other offense may lead to assaultive behavior by another.

1. Paragraph (1) and "However" should be given only if there is a dispute whether the defendant had a duty to retreat. *See People v Richardson*, 490 Mich 115; 803 NW2d 302 (2011).

2. The court may read whatever alternatives may apply or adapt them to other circumstances that may apply to the evidence presented at trial.

Public Policy Position
Model Criminal Jury Instructions 7.16 and 7.19

Support as Drafted

Explanation:
The Committee voted unanimously (21) to support Model Criminal Jury Instructions 7.16 and 7.19 as drafted.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by February 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes two new instructions, M Crim JI 37.1b and M Crim JI 37.2b, for the crimes of offering bribes to employees or agents or the acceptance of bribes by employees or agents in violation of MCL 750.125(1) and (2), respectively. These instructions are entirely new.

[NEW] M Crim JI 37.1b Offering Commission, Gift, or Gratuity to Agent or Employee

(1) The defendant is charged with the crime of offering or promising a commission, gift, or gratuity to an agent or employee to influence how the agent or employee performs the employer's business. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify agent or employee*] was the agent or employee of [*name principal or employer*].

(3) Second, that the defendant
[*Select (a) or (b):*]

(a) [gave / offered or promised] a [commission / gift / gratuity] to [*identify agent or employee*].

(b) offered to or promised that [he / she] would perform some act that would benefit [*identify agent or employee*] or another person.

(4) Third, that when the defendant [(gave / offered or promised) a (commission / gift / gratuity) to (*identify agent or employee*) / offered to or promised that (he / she) would perform some act or offer to perform some act that would benefit (*identify proposed donor*) or another person], the defendant did so with the intent to influence [*identify agent or employee*]'s actions regarding [*name principal or employer*]'s business.

[NEW] M Crim JI 37.2b Accepting Commission, Gift, or Gratuity by Agent or Employee

(1) The defendant is charged with the crime of requesting or accepting a commission, gift, or gratuity as an agent or employee to perform [his / her] employer's business according to an agreement with some other person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was the agent or employee of [*name principal or employer*].

(3) Second, that the defendant
[*Select (a), (b), or (c):*]

(a) [requested / accepted] a [commission / gift / gratuity] from [*identify proposed donor*] for [himself / herself] or another person.

(b) [requested / accepted] a promise of a [commission / gift / gratuity] from [*identify proposed donor*] for [himself / herself] or another person.

(c) [requested / accepted] that [*identify proposed donor*] would perform some act or offer to perform some act that would benefit [himself / herself] or another person.

(4) Third, that when the defendant [requested / accepted] [(the commission / the gift / the gratuity) from (*identify proposed donor*) / the promise of a (commission / gift / gratuity) from (*identify proposed donor*) / that (*identify proposed donor*) would perform some act or offer to perform some act that would benefit the defendant or another person], the defendant did so agreeing or understanding with [*identify proposed donor*] that [he / she] would [*describe conduct agreed on between defendant and donor*] regarding [*name principal or employer*]'s business.

Public Policy Position
Model Criminal Jury Instructions 37.1b and 37.2b

Support as Drafted

Explanation:
The Committee voted unanimously (21) to support Model Criminal Jury Instructions 37.1b and 37.2b as drafted.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

Contact Persons:
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FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==========

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by February 1, 2022. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes amending M Crim JI 37.3b, 37.4, 37.4a, 37.4b, 37.5b, 37.6, 37.8b and 37. 9a, which address bribery and intimidation of witnesses under MCL 750.122. The published Court of Appeals case of *People v Arthur Johnson, Jr.* (MCOA # 353825) held that "true threat" instructional language was required to avoid infringement of the First Amendment right to free speech where the crime is carried out by the use of threats. The amendments add that language to the current jury instructions for these offenses. Deletions are in strike-through, and new language is underlined.

[AMENDED] M Crim JI 37.3b Bribing Witnesses - Crime/Threat to Kill

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

(2) First, that [*name complainant*] was an individual who was testifying, going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [gave / offered to give / promised to give] anything of value to [*name complainant*].[2]

(4) Third, that when the defendant [gave / offered to give / promised to give] something of value to [*name complainant*], [he / she] intended to [discourage

(*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding / influence (*name complainant*)'s testimony at the proceeding / encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime / a threat to kill or injure a person / a threat to cause property damage].

[*Read the following bracketed material where the charge involves a threat:*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[AMENDED] M Crim JI 37.4 Intimidating Witnesses

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

(2) First, that [*name complainant*] was an individual who was testifying, going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [threatened / tried to intimidate] [*name complainant*].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant:*]

[A threat is a written or spoken statement that shows an intent to injure or harm another person or that person's property or family in some way. ~~No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat.~~ A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [threatened / tried to intimidate] [*name complainant*], [he / she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding / influence (*name complainant*)'s testimony at the proceeding / encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

[AMENDED] M Crim JI 37.4a Intimidating Witnesses - Criminal Case, Penalty More Than Ten Years

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

(2) First, that [*name complainant*] was an individual who was testifying, going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [threatened / tried to intimidate] [*name complainant*].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant:*]

[A threat is a written or spoken statement that shows an intent to injure or harm another person or that person's property or family in some way. ~~No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat~~. A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [threatened / tried to intimidate] [*name complainant*], [he / she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding / influence (*name complainant*)'s testimony at the proceeding / encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the official proceeding was a criminal case charging a crime with a maximum punishment of more than ten years or life in prison.

[AMENDED] M Crim JI 37.4b Intimidating Witnesses - Crime/Threat to Kill

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

(2) First, that [*name complainant*] was an individual who was testifying, going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative,

judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [threatened / tried to intimidate] [*name complainant*].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant:*]

[A threat is a written or spoken statement ~~of~~ that shows an intent to injure or harm another person or that person's property or family in some way. ~~No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat~~ A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [threatened / tried to intimidate] [*name complainant*], [he / she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding / influence (*name complainant*)'s testimony at the proceeding / encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime / a threat to kill or injure a person / a threat to cause property damage].

[AMENDED] M Crim JI 37.5b Interfering with Witnesses - Crime/Threat to Kill

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

(2) First, that [*name complainant*] was an individual who was testifying, going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant impeded, interfered with, prevented, or obstructed [*name complainant*] from attending, testifying, or providing information or tried to impede, interfere with, prevent, or obstruct [*name complainant*]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness at the proceeding.

(4) Third, that the defendant intended to impede, interfere with, prevent, or obstruct [*name complainant*] from attending, testifying at, or providing information at the official proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime / a threat to kill or injure a person / a threat to cause property damage].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant:*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[AMENDED] M Crim JI 37.6 Retaliating Against Witnesses

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

(2) First, that [*name complainant*] was a witness at an official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official that is authorized to hear evidence under oath.[1]

(3) Second, that the defendant retaliated, attempted to retaliate, or threatened to retaliate against [*name complainant*] for having been a witness. Retaliate means to commit or attempt to commit a crime against the witness, to threaten to kill or injure any person, or to threaten to cause property damage.

[*Read the following bracketed material where the charge is that the defendant threatened the complainant:*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[AMENDED] M Crim JI 37.8b Retaliating for Crime Report

(1) The defendant is charged with retaliating or attempting to retaliate against a person for reporting criminal conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] reported or attempted to report that [the defendant / (*identify other person*)] [*describe conduct to be reported*].[1]

(3) Second, that the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant is alleged to have committed*) as I have previously described to you[2] against (*name complainant*) / threatened to kill or injure any person / threatened to cause property damage].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant:*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) against (*name complainant*) / threatened to kill or injure any person / threatened to cause property damage], [he / she] did so as retaliation for [*name complainant*]'s having reported or attempting to report the crime of [*identify crime*].

[AMENDED] M Crim JI 37.9a Influencing Statements to Investigators by Threat or Intimidation

(1) [The defendant is charged with / You may also consider the less serious offense of] threatening or intimidating a person to influence that person's statement or presentation of evidence to a police investigator not involving [the commission or attempted commission of another crime / a threat to kill or injure any person / a threat to cause property damage]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made a threat or said or did something to intimidate [*name witness*].

[*Read the following bracketed material where the charge is that the defendant threatened the witness:*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable

person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(3) Second, that when the defendant made the threat or used intimidating words or conduct, [he / she] was attempting to influence what [*name witness*] would tell [a police investigator / Officer (*name complainant*)] or whether [*name witness*] would give some evidence to [a police investigator / Officer (*name complainant*)] who [may be / was] conducting a lawful investigation of the crime of [*identify crime*].

[(4) Third, that when threatening or intimidating [*name witness*], the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) as I have previously described to you / threatened to kill or injure any person / threatened to cause property damage.]

Public Policy Position
Model Criminal Jury Instructions 37.3b, 37.4, 37.4a, 37.4b, 37.5b, 37.6, 37.8b, and 37. 9a

Support as Drafted

Explanation:
The Committee voted 19 to 2 to support Model Criminal Jury Instructions 37.3b, 37.4, 37.4a, 37.4b, 37.5b, 37.6, 37.8b, and 37. 9a as drafted, but recommended that the alignment of these proposed instructions with relevant statutory provisions be reviewed again prior to adopting the instructions.

Position Vote:
Voted For position: 19
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 6

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

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by February 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes a new jury instruction, M Crim JI 40.5, for the offense of public intoxication found at MCL 750.167(e). The instruction is entirely new.

[NEW] M Crim JI 40.5 Public Intoxication

(1) The defendant is charged with the crime of being intoxicated in public and causing a disturbance or endangering persons or property. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was in a place open to the public, [*state location*].

(3) Second, that the defendant was intoxicated. A person is intoxicated when he or she is mentally or physically impaired as a result of consuming an intoxicating substance, such as an alcoholic beverage.

(4) Third, that the defendant [directly endangered the safety of another person or property / disrupted the peace and quiet of other persons present / interfered with the ability of other persons to perform actions or duties permitted by law].[1]

Use Note

See *People v Mash*, 45 Mich App 459; 206 NW2d 767 (1973), and *People v Weinberg*, 6 Mich App 345; 149 NW2d 248 (1967), for *public disturbance* language.

1. The court may read any of the alternatives that apply to the prosecutor's theory of the case that are supported by the evidence.

Public Policy Position
Model Criminal Jury Instructions 40.5

Support with Amendment

Explanation:
The Committee voted unanimously (21) to support Model Criminal Jury Instruction 40.5, with the addition of "or other substances" to (3). Further, the Court may wish to add other examples where appropriate.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

Contact Persons:
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Sofia V. Nelson snelson@sado.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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PROPOSED

The Committee proposes a new jury instruction, M Crim JI 41.2, for the crime of eavesdropping on a private conversation found at MCL 750.539c. The instruction is entirely new.

[NEW] M Crim JI 41.2 Using a Device to Eavesdrop on a Private Conversation

(1) The defendant is charged with the crime of using a device to eavesdrop on a private conversation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify complainants*] were having a private conversation where the defendant was not a participant.

(3) Second, that the defendant [used a device / knowingly aided another person in using a device / knowingly employed or procured another person to use a device] to overhear, record, amplify, or transmit the private conversation between [*identify complainants*].

(4) Third, that defendant did not have the consent of all persons who were part of the private conversation to overhear, record, amplify, or transmit the conversation.

Public Policy Position
Model Criminal Jury Instructions 41.2

Support as Drafted

Explanation:
The committee voted unanimously (21) to support Model Criminal Jury Instructions 41.2 as drafted.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 6

Contact Persons:
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Sofia V. Nelson snelson@sado.org