

February 6, 2023

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

RE: ADM 2022-03, MCR 1.109 amendment
Order issued [January 18, 2023](#)

Today's comment is a supplement to my [January 20, 2023](#) comment and is offered in response to the proposal's to-date written objections. This Court can easily dispense with the biology and God/religion objections. And this Court can chart a judicial-operation framework where practices that invite and acknowledge self-identified pronouns do not offend the Constitution. These opinions remain my own.

1. The proposed court rule change cannot be about personal assumptions (bias) about one's biology. If we each take a moment, we can recall personal experiences of knowing people of different genders who have gender-ambiguous first names. Six sitting Michigan judges are included in this example list:

- **Alex** ([Alex Palombo](#), [Alex Trebek](#), or [Alex Leavitt, Ph.D.](#))
- **Avery** ([Avery Earehart](#), [Avery Rose](#), or [Avery Van De Water](#))
- **Blair** ([Blair Warner](#), [Blair Underwood](#), or [Dr. Blair Apgar](#))
- **Casey** ([Casey Wright](#), [Casey Kasem](#), or [Casey Brown](#))
- **Daryl** ([Daryl Hannah](#) or [Daryl Vizina](#))
- **Frankie** ([Frankie Bergstein](#), [Frankie Davis](#), or [Frankie de la Cretaz](#))
- **Jamie** ([Jamie Ziegert](#), [Jamie Thompson](#), or [Jamie Clarke](#))
- **Jessie** ([Jessie Scott Wood](#), [Jessie Windel Eversole](#), or [Jessie Rodger](#))
- **Kelly** ([Kelly Morton](#), [Kelly Hanson](#), or [Dr. Kelly Coburn](#))
- **Leslie** ([Leslie Jones](#), [Leslie Nielsen](#), or [Leslie E. Owen](#))
- **Lynn** ([Lynn Sweet](#), [Lynn Abke](#), or [Lynn Nguyen](#))
- **Morgan** ([Morgan Fairchild](#), [Morgan Freeman](#), or [Morgan Dante](#))
- **Noel** ([Noel Adams](#), [Noel Gonzalez](#), or [Noel Rose](#))
- **Payton** ([Payton Gore, MD](#), [Payton Manning](#), or [Payton Krammerer](#))
- **Perry** ([Perry Buck](#), [Perry Lund](#), or [Perry French](#))
- **Shannon** ([Shannon Schlegel](#), [Shannon Cole](#), or [Shannon Finnegan](#))
- **Stacey** ([Stacey Grunwell](#), [Stacey D. Lawson](#), or [Stacey Gotsulias](#))
- **Terry** ([Terry Gross](#), [Terry Bradsaw](#), or [Terry Wohlgenant](#))
- **Tracey** ([Tracey Ledbetter](#), [Tracey Irving](#), or [Dr. Tracey Jensen](#))

The Social Security Administration posts different baby-name data and trends on its website and they are categorized by female and male births [<https://perma.cc/YER5-48XX>]. I sorted the female and male baby names that increased in popularity from 2020 to 2021. The first names *shared by both genders* were:

Ari	August	Azariah	Baylor	Bellamy
Briar	Denver	Drew	Ellis	Jamie
Kai	Layne	Legacy	Lennon	Oakley
Ocean	Palmer	Quinn	Reign	River
Rory	Rowan	Sage	Salem	Shiloh
Sutton	Tatum			

No good is served by judicial officers and court staff—often managing hundreds or thousands of active case files—having to guess about gender or pronouns. The proposed court rule change simply eliminates confusion and biased assumptions in the judiciary’s day-to-day work and, indeed, can make the work more efficient.

2. The proposed court rule change cannot be about God or any religion. The expectation of treating others with courtesy and respect does not violate any known bona fide religion. And for those who are suggesting religious objectors are in play, we must remember that our “[one court of justice](#)” foundational rule of law and [separation of church and state](#) principles simply forbid an individual judge or court staff member’s personal religious beliefs from influencing how our courts treat people. Const 1963, arts 6 § 1 and 1 § 4.

[A judicial position is not a religious position.](#) Litigants and the public are entitled to neutral jurists. Judge John G. Roberts [explained this](#) during his confirmation hearing for Chief Justice of the United States:

I do know this, that my faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or any other religious source.
[S Hrg 109-158, Serial No. J-109-37 \(September 13, 2005\), p 227.](#)

If, however, there is a matter where a judge cannot overcome a bias because of their personal religious beliefs, then the remedy is for the judge to self-recuse from the case and enter an [MC 264](#) Order of Disqualification.

3. The proposed court rule change does not offend the Constitution. If the staff report expects resistance from some judges (and possibly court staff?) who may (erroneously) feel that proposed language that “courts are required to use those personal pronouns when referring to or identifying the party or attorney” is a form of

compelled speech that somehow violates their personal First Amendment rights, I believe that notion must fail for at least three reasons.

a. Michigan's Constitution: ADM 2022-03 falls within the Supreme Court's exclusive [Article 6, § 5](#) authority under Michigan's Constitution "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. . . ."

b. Michigan's judicial canons: Michigan judicial officers forfeit their personal First Amendment rights when they put on the robe. Consider:

- **Canon 1** of Michigan's [Code of Judicial Conduct](#) establishes that "the judicial system is for the benefit of the litigant and the public, not the judiciary."
- **Canon 2(A)** explains that "A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." **Canon 2(B)** clarifies that "[w]ithout regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect."
- **Canon 3(A)(3)** requires a judge at all times to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in an official capacity. **Canon 3(A)(14)** similarly requires a judge to treat every person fairly, with courtesy and respect. See also, Michigan Judicial Tenure Commission [letter to District Court Judge Alexis G. Krot](#) (July 5, 2022).
- Michigan's [Model Code of Conduct for Trial Court Employees](#) **Canon 3** likewise requires "I will provide impartial treatment to all persons interacting with the court." **Canon 7** expects "I will not discriminate on the basis of race, color, religion, national origin, gender, or other protected group." And **Canon 9** requires courtesy: "I will carry out my responsibilities to litigants, co-workers, and all others interacting with the court in a timely, diligent, and courteous manner."

It should not have to be said that [intentional misgendering is disrespectful, discourteous, and contrary to the judicial canons](#). In this space, in other words, judges do not enjoy a First Amendment right that can be violated. A judge's obligation to promote courtesy, respect, and civility takes priority. In fact, scores of Michigan judicial officers have been privately admonished by the Judicial Tenure Commission over the decades for directing demeaning or discourteous comments to litigants, attorneys, witnesses, jurors, or others.

It is also important to recall how a First Amendment challenge to Michigan's attorney discipline rules already failed.

Seventeen years ago, this Court considered the intersection of the similar [Michigan Rules of Professional Conduct 6.5\(a\)](#)'s courtesy and respect expectations with an attorney's First Amendment rights in *Grievance Administrator v Fieger*, [476 Mich 231](#) (2006). In a [post-opinion order](#), this Court summarized:

This Court previously determined in this case that the First Amendment of the United States Constitution does not bar the application of the Michigan Rules of Professional Conduct to statements made by respondent-attorney Geoffrey Fieger in the course of a pending lawsuit in the Court of Appeals. Specifically, Mr. Fieger stated that he “declared war upon” the judges hearing his lawsuit, that such judges could “kiss his ass,” that his client should “shove [his finger] up their asses,” that they were “three jackass Court of Appeals judges,” that “the only thing that’s in their ‘endo’ should be a large plunger about the size of my fist,” and that the judges had “changed their name from Adolf Hitler and Goebbels, and — what was Hitler’s [mistress] — Eva Braun.” *Grievance Adm’r v Fieger*, order of the Supreme Court, entered December 21, 2006 (Docket No. 127547) (emphasis added).

In other words, notwithstanding the First Amendment, this Court long-ago decided that counsel remains accountable for violating [MRPC 6.5\(a\)](#)'s professional conduct expectations:

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

In his 2006 majority opinion in *Fieger*, Chief Justice Taylor explained why this priority (where an attorney's First Amendment claims take a backseat) is necessary to ensure public confidence in the judiciary's work:

In establishing rules designed to deter and sanction uncivil and discourteous conduct on the part of lawyers, we believe that this Court is doing far more than protecting the sensitivities of judges; rather, we

believe that we are upholding the integrity of that which is being carried out by the judicial branch of government.

The performance of these responsibilities requires a process in which the public can have the highest sense of confidence, one in which the fairness and integrity of the process is not routinely called into question, one in which the ability of judges to mete out evenhanded decisions is not undermined by the fear of vulgar characterizations of their actions, one in which the public is not misled by name-calling and vulgarities from lawyers who are held to have special knowledge of the courts, one in which discourse is grounded in the traditional tools of the law—language, precedents, logic, and rational analysis and debate. To disregard such interests in the pursuit of a conception of the First Amendment that has never been a part of our actual Constitution would in a real and practical sense adversely affect our rule of law, a no less indispensable foundation of our constitutional system than the First Amendment. Grievance Adm'r, 476 Mich at 242 (emphasis added).

The current ADM 2022-03 proposal seems to be in perfect harmony with the Michigan Code of Judicial Conduct's existing expectations, how the Michigan Judicial Tenure Commission has enforced the underlying principles, and how this Court has already considered similar expectations of attorneys.

c. ADM 2022-03 does not “compel” any speech by a judge/court employee. The proposed rule alternatively allows:

Nothing in this subrule prohibits the court from using the individual's name or other respectful means of addressing the individual if doing so will help ensure a clear record.

The alternative means that—even if a judge/court employee doesn't want to use the pronoun listed on a court filing—the proposal allows the court to instead use “the individual's name or other respectful means of addressing the individual.” A court cannot, however, intentionally and disrespectfully misgender a litigant or attorney.

Continued thanks to the Court for considering these comments.

Sincerely,

/s/

Lori Shemka

P.O. Box 15284

Lansing, Michigan 48901

shemka@gmail.com