



State of Michigan
Court of Appeals

March 1, 2023

Dear Clerk of the Court Larry S. Royster:

On January 18, 2023, our Supreme Court advised the bench and bar that it is considering an amendment to MCR 1.109 with respect to “personal pronouns.” The proposed amendment states in full:

Parties and attorneys may also include *any personal pronouns* in the name section of the caption, and *courts are required* to use those personal pronouns when referring to or identifying the party or attorney, either verbally^[1] or in writing. 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. [ADM File No. 2022-03, Proposed Amendment to MCR 1.109(D)(1)(b) (emphasis added).]

Under its plain language, the proposed amendment would place a mandate on judges and court staff with respect to a person’s selected personal pronoun, absent a clear-record issue.

As the U.S. Court of Appeals for the Sixth Circuit has recognized, “the use of gender-specific titles and pronouns has produced a passionate political and social debate.”² Under Canon 2.B of our Code of Judicial Conduct, a judge must “promote public confidence in the integrity and impartiality of the judiciary.” Therefore, the undersigned judges of the Michigan Court of Appeals will offer no position on the underlying political and social debate about gender markers or preferred pronouns. Instead, the following observations are offered strictly with respect to potential unintended consequences and unanswered questions involving ADM File No. 2022-03:

Ambiguous Need of the Proposed Amendment. The state of Michigan and the federal government provide convenient methods for a person to change a gender marker on a state ID, state driver’s license, birth certificate, or U.S. passport.³ A

¹ Although a relatively minor point, the undersigned note that “verbally” means “by means of words,” which logically includes “in writing,” making the gerund redundant. It is understood that the Supreme Court likely intended to mean “orally” here.

² *Meriwether v Hartop*, 992 F3d 492, 508 (CA 6, 2021); see also *United States v Varner*, 948 F3d 250 (CA 5, 2020) (choosing not to use a preferred pronoun for sake of clarity and judicial impartiality); *Farmer v Perrill*, 275 F3d 958 (CA 10, 2001) (choosing to use a preferred pronoun as a courtesy in deference to the plaintiff’s wishes).

³ *Elizabeth Hertel*, 2021 Mich OAG No 7313; birth certificate: <https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/Folder1/Folder3/DCH-0847-CHGBX.pdf> (visited on Jan. 25, 2023); state ID or driver’s license: https://www.michigan.gov/-/media/Project/Websites/sos/34lawens/MDOS_Sex_designation_form.pdf?rev=0aeb2a2653e74ff8858d7a0e591957

person can select “M” for male, “F” for female, or “X” for nonbinary by submitting a form with a simple declaration, without any showing of medical intervention. Given the convenience of selecting a preferred gender marker, it is unclear whether the proposed amendment to MCR 1.109 is needed, as the undersigned are not aware of a Michigan court refusing a person’s request that a court use a pronoun aligned with that person’s gender marker as identified in an official government record.⁴

Ambiguous Scope of the Proposed Amendment. Unlike the options offered by the federal and state governments, the proposed amendment published by the Supreme Court is not limited under its plain language to pronouns that align with the gender markers of “M”, “F”, or “X”, nor does the proposed amendment identify a concrete class of permissible pronouns from which a person can select. It is unclear, for example, whether a party or lawyer could select (A) a pronoun only from a traditional set (i.e., “he/him/his”, “she/her/hers”, or “they/them/theirs”) or, rather, (B) a pronoun linked to what proponents refer to as a “three-dimensional galaxy” of gender.⁵ The expanding list of personal pronouns includes what are called “neopronouns,” and these in turn can include, for example, pronouns that refer to animals, fantasy characters, “or even just common slang.”⁶ Some examples that proponents give are “bun/bunself”, “kitten/kittenself”, “vamp/vampself”, “prin/cess/princessself”, “fae/faer/faeself”, and “Innit/Innits/Innitself”;⁷ “qui/quem/quis”, “sie/hir/hir”, and “ve/vis/ver”;⁸ and “co/cos/coself”, “xie/hir/hir”, and “ey/em/eir”.⁹

Nor is there anything in the proposed amendment that precludes a person from creating a set of pronouns unique to that person—and this is especially concerning with respect to the next issue.

Ambiguous Judicial Discretion with respect to the Proposed Amendment. The proposed amendment does not include language that would provide a court with discretion to deal with bad-faith actors. While the overwhelming majority of parties and lawyers in Michigan’s courts act in good faith even when they strongly disagree with each other, courts do, on occasion, see some parties and lawyers who

⁵¹ (visited on Jan. 25, 2023); U.S. passport: <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> (visited on Jan. 25, 2023).

⁴ The fact that our political branches have seen fit to act in this space also raises the question whether the proposed amendment might violate our Constitution, specifically the distinction between substantive law and policy versus the mere practice and procedure of the courts. See Const 1963, art 4, § 1 (legislative authority); art 5, § 1 (executive authority); and art 6, §§ 1, 5 (judicial authority to promulgate rules governing “the practice and procedure” of courts); see also *People v Watkins*, 491 Mich 450, 472-477; 818 NW2d 296 (2012). If adopted, the proposed amendment could be open to constitutional challenge on this or other grounds. We merely raise the question and go no further so as not to prejudge a potential future lawsuit.

⁵ *Varner*, 948 F3d at 257 (cleaned up).

⁶ Marcus, *A Guide to Neopronouns: Are you a person, place or thing? We have good news.*, New York Times (updated Sept 18, 2022).

⁷ *Id.*

⁸ LGBTQ Nation, <https://www.lgbtqnation.com/2022/08/incomplete-list-gender-pronouns/> (visited on Jan. 25, 2023).

⁹ UC Davis LGBTQIA Resource Center, <https://lgbtqia.ucdavis.edu/educated/pronouns-inclusive-language> (visited on Jan. 25, 2023).

act in bad faith or for strategic reasons unrelated to the merits of a case. As one example, faced with the plain language of the proposed amendment, what is a court supposed to use as a pronoun for someone who subscribes to the “sovereign citizen” movement and demands that the court refer to the person using the person’s unique neopronoun of “:crp/:crpatn/:non-prsn”? Or, what about a party who is an avowed white supremacist and anti-Semitic and demands that the judge and court staff refer to the person as “htlr/nzi/fhr” or some other offensive set of “uniquely personal” neopronouns? These concerns are not overblown, as evidenced by what trial courts across the country have had to deal with in the past.¹⁰

In fact, the only circumstance that the proposed amendment recognizes for using something other than the selected personal pronoun is when doing so will “help ensure a clear record.” Under the canon of construction that the expression of one thing implies the exclusion of others,¹¹ the current form of the proposed amendment implies that a court will be required to use a person’s selected personal pronoun even when the record is clear that the person is acting in bad faith or for strategic reasons separate from the merits of the case. Even if MCR 1.109(E)(5) is interpreted to apply to the selection of a personal pronoun, the remedy listed in MCR 1.109(E)(6) is to sanction the signer, rather than simply not to use the selected personal pronoun.

Ambiguous Consequences of the Proposed Amendment. It is unclear whether the proposed amendment’s required use of a selected personal pronoun is intended to be solely a matter of respect and courtesy consistent with Canon 2.B. As courts have made clear in the past, the judicial use of a selected personal pronoun has always been a matter of respect and courtesy and “bears no legal significance” to the case at hand.¹² This is an evolving area of law, however, and the use of a personal pronoun by dint of a procedural court rule should be carefully distinguished from a substantive factual finding or legal holding with respect to matters of sex, gender, etc. Relatedly, the proposed amendment does not anticipate the circumstance where a pronoun or gender marker might be at the center of the lawsuit (e.g., claim of misgendering, trans-athletes in sports, or violation of free speech) and how the court should, in that circumstance, act to remain scrupulously unbiased.

The proposed amendment is also silent about the repercussions, if any, of a willful, negligent, or innocent/mistaken violation of the court rule. Will a courtroom deputy, law clerk, or bailiff who breaches the rule be subject to discipline or other liability, including termination of employment? Will a judge who breaches the rule be subject to discipline before the Judicial Tenure Commission?

¹⁰ See, e.g., *Interest of CG*, 403 Wis2d 229, 268-269; 976 NW2d 318 (2022) (discussing cases where a party has sought to force courts to use a new name consisting of an obscenity or racial epithet); *Giron v :Chase Home Mortgage Finance, LLC*, Dkt. No. 12-cv-033, 2012 WL 13001851, at nn 1-2 (D NM, June 13, 2012) (discussing the grammatical gymnastics that “sovereign citizens” force courts to play with respect to names).

¹¹ *Bronner v City of Detroit*, 507 Mich 158, 173 n 11; 968 NW2d 310 (2021).

¹² *Interest of CG*, 403 Wis2d at 239 n 9; see also *Lynch v Lewis*, Dkt. No. 7:14-cv-24, 2014 WL 1813725, at n 2 (MD Ga, May 7, 2014).

And, most critically for the cause of justice, will a breach of the court rule be grounds for reversing a judgment or other legal remedy on reconsideration or appeal? For example, in *United States v Thomason*, 991 F3d 910 (CA 8, 2021), the U.S. Court of Appeals for the Eighth Circuit rejected a criminal defendant’s claim of prosecutorial misconduct based on misgendering—but crucially, the court did so because the defendant “cite[d] no authority for the proposition that litigants and courts *must* refer to defendants by their preferred pronouns.” *Id.* at 915 (emphasis added). If the Michigan Supreme Court adopts the proposed amendment in its current form, then courts in this state *must* use a selected personal pronoun (absent a clear-record issue), and this distinguishing factor in *Thomason* will no longer hold in our courts.

Ambiguities with respect to the intended legal consequences of a court rule, especially with respect to criminal law, are inconsistent with due process of law.

Finally, the undersigned judges observe that only a few states have entered this space, but those that have entered it have done so in narrow, prudent ways. In Utah, for example, a party may complete a nonbinding “Notice of Pronouns” form to inform the court and parties how they should refer to that party;¹³ Massachusetts has a similar procedure.¹⁴ In New York, the Advisory Committee on Judicial Ethics released Op 21-09, which provides: “Where a party or attorney has advised the court that their preferred gender pronoun is ‘they,’ a judge may not require them to instead use ‘he’ or ‘she.’ ” The adoption of something similar to what other states have done could ameliorate several of the unintended consequences and unanswered questions identified with respect to the proposed amendment.

In sum, the Judicial Branch’s sole objective is justice, and in pursuing this justice, a judge must remain “unswayed by partisan interests, public clamor, or fear of criticism.” Canon 3.A(1). It is in the spirit of furthering justice—unswayed by partisanship or clamor—that the undersigned have offered these observations about ambiguities in the proposed amendment published by the Michigan Supreme Court in ADM File No. 2022-03.



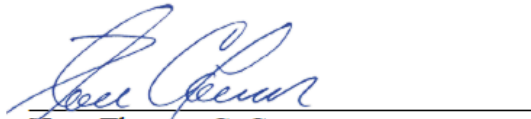
Hon. Brock A. Swartzle
Chair, Rules Committee
Michigan Court of Appeals



Hon. Michael F. Gadola
Chief Judge Pro Tem
Michigan Court of Appeals



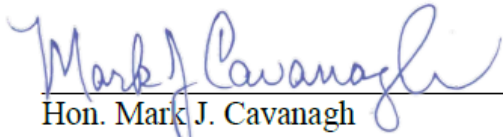
Hon. Mark T. Boonstra
Michigan Court of Appeals



Hon. Thomas C. Cameron
Michigan Court of Appeals

¹³ Utah form: <https://www.utcourts.gov/en/legal-help/legal-help/procedures/pro-se/pronouns.html> (visited on Feb. 8, 2023).

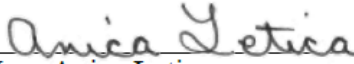
¹⁴ Mass Sup Judicial CR 1:08(H).



Hon. Mark J. Cavanagh
Michigan Court of Appeals



Hon. Michael J. Kelly
Michigan Court of Appeals



Hon. Anica Letica
Michigan Court of Appeals



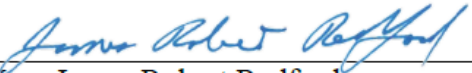
Hon. Jane E. Markey
Michigan Court of Appeals



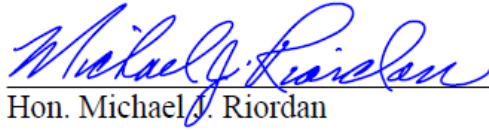
Hon. Christopher M. Murray
Michigan Court of Appeals



Hon. Colleen A. O'Brien
Michigan Court of Appeals



Hon. James Robert Redford
Michigan Court of Appeals



Hon. Michael J. Riordan
Michigan Court of Appeals