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April 14, 2023

Supreme Court Administrative Counsel
P.O. Box 30052
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Re: **ADM File No. 2022-03-Proposed Amendment of MCR 1.109**

Dear Administrative Counsel:

I write to comment upon the proposed amendment of MCR 1.109(D)(1)(b) to permit parties to designate "any personal pronouns" for purposes of reference in court proceedings.

Doubtless the intent of the proposal is to be respectfully inclusive. But the terse comments so far posted by the court fail to grasp the significance of the proposal. Indeed, the initiators of the proposal may not grasp the significance either.

But empowerment of self-selection of pronouns for purposes of legal proceedings easily leads to (at least, demand for) self-definition of *legal status*. The proposal, like the societal trends that spur it, is rooted -- whether knowingly or not -- in "postmodern" epistemology that threatens the ability of the legislature and the courts to draft and interpret the law.

The "Plain Meaning" Problem.

The vagary and variability of self-selected "pronouns" are not the primary issues. But these are the place to begin.

Use of gendered pronouns that deviate from a person's biological sex is one thing -- albeit quite problematic by itself. For decades, the Bar Journal has had a special section devoted to "plain language." Deviation of referential pronouns from biological sex runs somewhat counter to the plain language principle. But this is only the tip of an iceberg.

The comments posted thus far seem to presuppose that the option is simply to designate the ordinary, binary, gendered pronouns, contrary to a party's biological sex. But the proposed rule is not limited to gendered pronouns. It allows "*any* personal pronouns." As written, the rule equally allows a party to designate nongendered plural pronouns ("they"/"them") in the place of he or she for first-person singular references. More importantly, the proposed rule is open to "neopronouns" and "xenopronouns" or "noun-self" references

(ne, ze, xe/zem/xyr) fae/faer/faeself, kitten/kittenself), as advocated by some groups (e.g., the Human Rights Campaign).

Despite resources like the New York Times neopronoun guide (*https://www.nytimes.com/2021/04/08/style/neopronouns-nonbinary-explainer.html*), this variable terminology does not contribute to clarity of meaning. To most readers, this is gibberish. And this is particularly problematic for judicial opinions that are supposed to communicate the meaning of the law to the general public, not merely the legal community or a trendy cultural elite.

The Legal Classification Problem.

Self-selection of pronouns implies a more fundamental concept of self-definition, whereby a person can unilaterally declare membership in a group or classification. Given that the legal system largely functions through define and categorization of people, such self-definition is unworkable.

It is a relatively minor matter for a biological male to identify as female and use female pronouns. But it is quite another thing for a biological male to identify as female and, therefore, demand to be treated as female for broader purposes, e.g., sports participation. By self-definition, Lia Thomas participated in the NCAA women's swimming championships and dominated the event.

This is not just a matter of a private entity sponsoring sporting events. Intercollegiate athletics, and many other activities, are legally regulated. Even as women are now benefitting from legal mandates to provide parity with men in athletic opportunity, they are now at risk of being displaced from those opportunities by biological males self-identifying as women.

And what may become of other categorical programs? Must a specialized transit service providing rides to disabled individuals offer up its limited seating to physically whole persons who self-identify as disabled? (Such people do exist.)

Such concerns can be addressed. But this requires legally limiting the scope of self-definition and/or, ironically, creating more legal categories (which cannot hope to encompass all the host of potential self-definitions).

The limitation of self-definition is quite common in the law. One cannot claim legal treatment as a "married" person, unless they have obtained a marriage license for their relationship. One cannot claim legal treatment as a corporation or an LLC, unless they have filed the appropriate forms and been granted such status. Even the change of one's personal name (for legal purposes) requires a probate court proceeding. MCL 711.1 For the transgendered, Michigan affords a legal option for formal change of one's birth certificate. MCL 333.2831(c).

Certainly, the imposition of legal standards and proceedings for such matters are limitations on personal freedom. But such formalities incorporate a measure of deliberation and permanency to the new legal status. Alteration of legal status -- with its resulting legal

effects upon the person and those interacting in legal and economic spheres with them -- should not be as simple as posting on Tik Tok.

The matter of categories is more complicated. The law is full of categories based on a multitude of factors (e.g., age, disability, residency). And these are unquestionably valid. An epileptic twelve-year-old resident of Detroit should not be able to evade Michigan law and obtain a driver's license by self-identifying as a healthy, adult Ohioan.

Additional classifications can be created for people (e.g., legal mandates requiring specified accommodation for the transgendered). But, given that virtually every type of condition or status is now viewed as a "spectrum" rather than a polarity, not every possible self-identification can be accommodated. A free-for-all of self-identification is unworkable.

We are addressing only pronouns today. But it cannot be expected to end there. Once pronouns are self-selectable in legal proceedings, parties will swiftly demand that their attorneys press the matter beyond form to substance.

The proposed pronoun rule inevitably reaches much farther than pronouns. The rule should not be adopted until its full ramifications are addressed, such that the impact is carefully defined -- and limited.

The More Fundamental Problem.

As stated above, the concept of self-definition exemplified by pronoun choice is a manifestation of postmodern social and cultural analysis.

What is now recognized as "postmodernism" first developed in the field of literary criticism. But it has spread through academia and society as a broader epistemological skepticism. In an apt summary, postmodernism proceeds from "the belief that there is no true objectivity," in literature or science, such that "'all value-orientations are equally well-founded.'" Salberg, Stewart, Wesley and Weiss, *Postmodernism and Its Critics*. (University of Alabama Dept of Anthropology, https://anthropology.ua.edu/theory/postmodernism-and-its-critics/).

The Court should be cautious in opening the door to such concepts. Postmodern analysis implicates a fundamental challenge to effective rule of law. Before adopting a seemingly minor accommodation of self-selected pronouns, the Court should consider the full implications of the postmodern baggage such action invites.

For the sake of brevity, I will (over)simplify by highlighting two such implications: (1) subjective textual interpretation and (2) a resulting personal unilateralism that necessarily becomes anarchic.

It is well established that the "primary goal" of statutory interpretation "is to ascertain and give effect to the Legislature's intent." *Rouch World, LLC v Department of Civil Rights*, 510 Mich 398, 410; __ NW2d __ (20-22). Equally, this Court certainly intends its own opinions to have meaning -- and to be enforced accordingly, until this Court itself says

otherwise. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-2 (2016), *Boyd v W G Wade Shows*, 443 Mich 515, 523 (1993).

But postmodern analysis rejects the fixed meaning -- traditionally accepted as having been imparted to a text by the *author* -- in favor of the individual, subjective interpretation of the *reader*. In postmodern theory, "the reader...should act independently of any supposed intentions of the author" and the author's "delimiting authority." Christopher Butler, *Postmodernism: A Very Short Introduction*, New York, Oxford University Press, 2002), p. 23. "Meanings become the property of the interpreter." *Id.*, at 24.

Obviously, such notions fundamentally contradict the principle that statutes (and judicial opinions) should be read and applied in accordance with the intent of their authors. "The danger, but also the point, for many postmodernists...is that the text is left open to all sorts of interpretations." Butler, *Postmodernism*, at 11. Of particular relevance, "a statute, the holding of a case, or a legal doctrine can be deconstructed" -- thus fundamentally undermining the legally controlling meaning intended by the author(s). Peter C. Schank, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S Cal L Rev 2505, 2505 (1992).

Under postmodern analysis, such deconstruction becomes the right of the reader -- at variance with, or in defiance of, the formerly "privilege[d]" intent of the author. Butler, Postmodernism, at pp. 20-1, 23-4 . As famously stated by Roland Barthes, "we must reverse [the] myth: the birth of the reader must be ransomed by the death of the author." Roland Barthes, *The Death of the Author* (originally 1967). By such reasoning, subjective personal beliefs of the reader (the reader's "narrative") determines the meaning of a text (e.g., a statute or court decision) as applicable to them.

Pronoun choice, by itself, may be a small thing. But epistemological principles from which the notion of such choice has arisen are a much bigger thing.

Postmodern thought is already an active force in the legal community. It is at the heart of the various forms of "critical" legal theory that have become contentious points of debate in the legal (and political) arena. Schank, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, at 2507, 2512-3.

As should be clear, however, postmodern concepts are fundamentally problematic for the effectiveness of a legal system and government in general. Postmodernist analysis has a laudable goal of inclusiveness -- albeit postulated in debatable Marxian terms of power and marginalization. Butler, *Postmodernism*, pp. 44-46, 56. It is the origin of "identity politics." *Id.*, p. 57.

But empowering subjective personal choice of identity (e.g., male, female, neither, etc.) necessarily conflicts with any effort by legislators or the courts to create and enforce classifications of people for legal purposes. Any attempt to make or enforce legal distinction between people can be negated by an individual's unilateral self-declaration to identify as something different. Every person can presume to dictate their legal status. If indulged, they become a law unto themselves.

An extreme example (*rare in Michigan case law, but well known in federal courts*) are the so-called "sovereign citizens" and "Moors," who claim to be outside the reach of state and federal law (particularly tax laws and licensing requirements). See Charles E. Loeser, *From Paper Terrorists to Cop Killers: The Sovereign Citizen Threat*, 93 N C Law Review 1106 (2015) and Michael Crowell, *A Quick Guide to Sovereign Citizens*, UNC School of Government Administration of Justice Bulletin, No. 2015/04, November 2015. In their fanciful historical (and conspiratorical) narrative, statutes and court decisions have no authority over them at all (except to the extent they choose).

Obviously, the declaration that one's pronouns are "xe/xyr," by itself, is of a different nature from the defiance of governmental authority advocated by the "sovereigns." **Again, however, empowerment of self-selection of pronouns for legal proceedings easily leads to self-definition purposes of legal status for broader legal purposes.** It is not a far stretch for an attorney to argue that a client recognized as a "she" for purposes of a legal caption and reference by the court, they should be deemed a "she" for everything else -- from bathrooms to college scholarships -- with no additional criteria or conditions apart from personal declaration.

Conclusion.

The proposed rule allowing parties to designate "any personal pronouns" guarantees confusion. But it implicates much more dubious and pernicious results.

Without rejecting inclusiveness, gender transition or non-binary rejection of gender altogether, it behooves the Court to beware of empowering unbounded self-definition. Until the broader implications are addressed, adoption of the proposed revision to MCR 1.109 is premature.

Very truly yours,

Douglas J. Curlew, J.D., Ph.D.